



NYSBACLE

CLE Course Materials

Note: Complete course materials are also distributed in electronic pdf format online in advance of the program.

Bridging the Gap Albany March 2019

NYSBA Co-Sponsors:

Young Lawyers Section

Committee on Continuing
Legal Education





Bridging the Gap

March 2019

Thursday- Friday, March 21-22, 2019
New York State Bar Association | Albany

16.0 MCLE Credits
7.0 in Areas of Professional Practice; 6.0 Skills; 3.0 Ethics

www.nysba.org/BridgingtheGap

*Sponsored by LawPay and by the Committee on Continuing Legal Education
and the Young Lawyers Section of the New York State Bar Association*

This program is offered for educational purposes.

The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.



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New York State Bar Association

Program Description

The New York State Bar Association is pleased to offer newly admitted attorneys a two-day Bridging the Gap CLE program. Transitional courses are designed to help newly admitted attorneys develop a foundation in the practical skills, techniques and procedures that are essential to the practice of law.

The Bridging the Gap continuing legal education program offers 16.0 total credits. Newly admitted attorneys can satisfy all of their annual MCLE requirements by attending this two-day program which is ideal for “bridging the gap” between law school and the realities of practicing law in New York State. Experienced attorneys who have an interest in other areas of practice can also attend and benefit from this program by learning practical information from skilled and experienced practitioners.

Newly admitted attorneys must complete at least 16 transitional CLE credit hours in **each** of the first two years of admission to the Bar. The first set of 16 transitional CLE credit hours must be completed by the first anniversary of admission to the Bar, in the designated categories of credit. The second set of 16 transitional CLE credit hours must be completed between the first and second anniversaries. To receive skills credit, newly admitted attorneys must take accredited transitional CLE courses in traditional live classroom settings, or through attendance at fully interactive video conference locations that have been approved by the CLE Board for use by newly admitted attorneys.

For more information about the CLE Rules: www.nycourts.gov/Attorneys/CLE.

The New York State Bar Association Bridging the Gap program is offered three times a year and offers special member and newly admitted attorney pricing. The program is also approved for MCLE credit by the **State Bar of California**, the **Pennsylvania Continuing Legal Education Board** and the **Board on Continuing Legal Education of the Supreme Court of New Jersey**. Uniform certificates of attendance can also be issued for other states.

Program Agenda

Day One | Thursday, March 21, 2019

5.0 Areas of Professional Practice, 2.0 Skills, 1.0 Ethics

- 8:30 a.m. **Registration & Continental Breakfast**
- 8:45 a.m. **Welcome and Introductions**
NYSBA Young Lawyers Section Representative
- 9:00 - 10:15 a.m. **Labor and Employment Law for New Attorneys**
- Robert T. Schofield, IV, Esq.**
Whiteman Osterman & Hanna LLP
Albany, NY
- (1.5 Areas of Professional Practice)*
- 10:15 – 10:25 a.m. **Break**
- 10:25 – 11:40 a.m. **Intellectual Property Law Basics for the Non-IP Lawyer**
- David P. Miranda, Esq.**
Heslin Rothenberg Farley & Mesiti, PC
Albany, NY
- (1.5 Areas of Professional Practice)*
- 11:40 – 12:30 p.m. **Attorney Wellness & Wellbeing | Alcohol and Substance Abuse and the Legal Profession | Lawyer Assistance Program**
- Thomas E. Schimmerling, Esq.**
Delhi, NY
- Kelleena Richards, Esq.**
NYS Office of Children & Family Services
Rensselaer, NY
- (1.0 Ethics)*
- 12:30 – 1:15 p.m. **Lunch** (provided)

1:15 – 2:55 p.m.

Health Law 101

Hermes Fernandez, Esq.

Bond, Schoeneck & King, PLLC
Albany, NY

Jeffrey J. Sherrin, Esq.

O'Connell & Aronowitz PC
Albany, NY

Danielle E. Holley, Esq.

O'Connell & Aronowitz PC
Albany, NY

(2.0 Areas of Professional Practice)

2:55 – 3:00 p.m.

Break

3:00 – 5:00 p.m.

Handling a Real Estate Closing in Upstate New York

Michelle H. Wildgrube, Esq.

Cioffi Slezak Wildgrube P.C.
Schenectady, NY

(2.0 Skills)

5:00 p.m.

Adjournment

Day Two | Friday, March 22, 2019

4.0 Skills, 2.0 Areas of Professional Practice, 2.0 Ethics

- 8:30 a.m. **Registration & Continental Breakfast**
- 9:00 – 10:45 a.m. **Basics of Will Drafting (including review of Powers of Attorney)**
- Patricia J. Shevy, Esq.**
The Shevy Law Firm, LLC
Albany, NY
- (2.0 Skills)*
- 10:45 – 10:50 a.m. **Break**
- 10:50 – 12:30 p.m. **Advising Clients Charged with DWI | Local Criminal Court Practice**
- Joseph Gerstenzang, Esq.**
Gerstenzang, Sills, Cohn & Gerstenzang
Albany, NY
- (2.0 Skills)*
- 12:30 – 1:30 p.m. **Lunch** (on your own)
- 1:30 – 3:10 p.m. **Risk Management 101 – Ethical Considerations for New Lawyers**
- Scott W. Bush, Esq.**
Corrigan, McCoy & Bush, PLLC
Rensselaer, NY
- (2.0 Ethics)*
- 3:10 – 3:15 p.m. **Break**
- 3:15 – 5:00 p.m. **Immigration 2019 – Basics for New Attorneys**
- Mary E. Armistead, Esq.**
The Legal Project
Albany, NY
- (2.0 Areas of Professional Practice)*
- 5:00 p.m. **Adjournment**

Accessing the Online Course Materials

Below is the link to the online course materials. These program materials are up-to-date and include supplemental materials that were not included in your course book.



www.nysba.org/MarchBTG2019MaterialsAlbany

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi access is available at this location however, we cannot guarantee connection speeds. This CLE Coursebook contains materials submitted prior to the program. Supplemental materials will be added to the online course materials link.

**Follow Continuing Legal Education
on Twitter for Quick and Relevant
Program Information!**

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New York Rules of Professional Conduct

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

**[http://nycourts.gov/rules/jointappellate/
NY-Rules-Prof-Conduct-1200.pdf](http://nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf)**

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1.800.255.0569 | nysba.org/LAP

All LAP services are confidential and protected under Section 499 of the Judiciary Law as amended by Chapter 327 of the Laws of 1993.





Bringing you the best and most relevant continuing education to help you be a better lawyer. Last year over 2,000 lawyers and judges volunteered for a NYSBA CLE. For decades, CLE volunteers have been developing and presenting seminars, preparing rich collections of written materials and raising the bar for legal practice in New York.

View a Complete Listing of Upcoming CLE Programs at
www.nysba.org/CLE

CLE Board

Program Rules
(22 NYCRR1500)

<http://www.nycourts.gov/attorneys/cle/>

What's New? (excerpt www.nycourts.gov/attorney/cle)

EFFECTIVE JANUARY 1, 2016

CHANGES TO CLE FORMATS FOR NEWLY ADMITTED ATTORNEYS

Changes to Newly Admitted Attorney Requirement

RECENTLY ADOPTED CHANGES TO FORMATS ALLOWED FOR COMPLETION OF THE NEWLY ADMITTED ATTORNEY CLE REQUIREMENT, TO BECOME **EFFECTIVE JANUARY 1, 2016**

The New York State CLE Board adopted the following changes, **effective January 1, 2016**, to the requirement that newly admitted attorneys complete all of their CLE credits in the traditional live classroom setting or by fully interactive videoconference (there is **no change** to the number or categories of credit required, nor to the requirement that they be fulfilled by attending accredited transitional courses):

- **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format, including nonparticipatory formats such as on-demand audio or video, or live broadcast.
- **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as webconference, or teleconference, where questions are allowed during the program.
- There is no change in the requirement for **Skills** credit, which still must be completed in the traditional live classroom setting or by fully interactive videoconference.

Newly admitted attorneys **based in law offices outside of the United States** may fulfill up to 16 credit hours in any approved format. The remaining credit hours must be completed in a format permissible for the category of credit.

Newly admitted attorneys eligible for a **prorated CLE requirement** must complete the credit in a format permissible for the category of credit, except that no more than 14 credits may be earned through nonparticipatory formats, such as on-demand audio or video, or live broadcast.

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- [What if I stop practicing law during my first two years of admission to the New York Bar?](#)
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The CLE Requirement for Newly-Admitted Attorneys

Q] What is a "newly admitted attorney"?

A] Attorneys admitted to the New York State Bar two years or less are considered newly admitted attorneys.

Q] What if I was practicing law in another jurisdiction before I was admitted to the New York Bar?

A] If you were practicing law in another state, the District of Columbia, any territory of the United States or any foreign jurisdiction, for at least five of the seven years immediately preceding admission to the New York Bar, you will not be deemed newly admitted for the purposes of CLE, and you must comply with the [CLE requirement for experienced attorneys](#).

Q] As a newly admitted attorney, what is my CLE requirement?

[A] Newly admitted attorneys must complete at least 16 transitional CLE credit hours in **each** of the first two years of admission to the Bar, as follows:

Category of Credit	Before first anniversary of admission	During second year of admission
Ethics and Professionalism	3	3
Skills	6	6
Law Practice Management and/or Areas of Professional Practice	7	7
TOTAL	16 transitional CLE credit hours	16 transitional CLE credit hours

The first set of 16 transitional CLE credit hours must be completed by the first anniversary of admission to the Bar, in the designated categories of credit. The second set of 16 transitional CLE credit hours must be completed between the first and second anniversaries.

Q] How do I satisfy my CLE requirement?

A] To receive credit, newly admitted attorneys must take accredited transitional CLE courses in a format permissible for the category of credit.

Q] What are "transitional" CLE courses?

A] Transitional courses are designed to help newly admitted attorneys develop a foundation in the practical skills, techniques and procedures that are essential to the practice of law. The sponsoring organization will be able to tell you which of its courses are transitional.

Q. What formats are permissible for Skills credit?

A. Skills credit must be earned in the traditional live classroom setting or by attendance at a fully interactive videoconference that has been approved by the CLE Board for use by newly admitted attorneys.

Q. What formats are permissible for Ethics and Professionalism credit?

A. Ethics and Professionalism credit may be completed in the traditional live classroom setting, by attendance at a fully interactive videoconference that has been approved by the CLE Board for use by newly admitted attorneys, or by participation in the live simultaneous transmission of a live program, such as a webinar or teleconference, where audience questions are allowed during the program (synchronous interactivity). If there is no opportunity for questions during the program, then a newly admitted attorney may not earn Ethics and Professionalism credit for the program.

Q. What formats are permissible for Areas of Professional Practice and Law Practice Management credit?

A. Areas of Professional Practice and/or Law Practice Management credit may be completed in any approved format, including nonparticipatory formats such as on-demand video, live broadcast, DVD, audio recording, etc.

Q. If I complete an online recorded CLE program for which I am awarded 3 credits in Areas of Professional Practice and 1 credit in Ethics and Professionalism, may I count all 4 credits towards my CLE requirement?

A. No. You may count only the 3 credits in Areas of Professional Practice, as an online recorded program is not a permissible format for Ethics and Professionalism credit.

Fulfilling The Requirement

Q] How do I find CLE courses close to home?

A] The CLE Board does not maintain a list of individually accredited CLE courses. You may check with local bar associations or other organizations in your area that may be presenting CLE courses, or you may check the New York [Accredited Provider List](#) for approved CLE providers.

Q] Do out-of-state courses count towards my CLE requirement?

A] Some out-of-state courses are accredited by the New York State CLE Board. Other out-of-state courses may be accredited by another jurisdiction, and you may be eligible for New York CLE credit under New York's Approved Jurisdiction policy. (If your course is not accredited by the New York State CLE Board or if your course does not fall under New York's Approved Jurisdiction policy, you may submit an [Application for Accreditation of an Individual Course Activity](#) to the New York State CLE Board.)

Q] What is New York's "Approved Jurisdiction" policy?

A] A New York attorney may earn credit for attendance at an out-of-state course provided that the course is accredited by the CLE agency of another state or foreign jurisdiction that has been approved by the New York State CLE Board as meeting New York's accreditation standards. An out-of-state course accredited by a [New York Approved Jurisdiction](#) is eligible for New York CLE credit based on a 50-minute credit hour, and in accordance with the Program Rules and the Regulations and Guidelines. The attorney must obtain from the provider documentation of course accreditation by a New York Approved Jurisdiction, a proper certificate of attendance and for nontraditional formats, proof of the provider's independent [verification](#) of the attorney's completion of the course. Please see [section 6 of the Regulations and Guidelines](#) for details.

Q] I attended a CLE course where the sponsor did not apply for CLE accreditation. Is there any way to get credit?

A] Yes. You may submit an [Application for Accreditation of an Individual Course Activity](#) to the CLE Board. If the application is postmarked more than 30 days after the conclusion of the course, you must include a detailed explanation of the circumstances that prevented you from submitting the application within 30 days of the conclusion of the course. If the Board accepts your application and if the course is approved, you will be awarded the appropriate CLE credit.

Q] What if I practice in a foreign country?

A] Newly admitted attorneys based in law offices outside the United States may earn a maximum of 16 of the required 32 credit hours through any approved format. The remaining credits must be completed in a format permissible for the category of credit.

Q] May I earn credit for writing a legal article, or for teaching at a CLE program?

A] No, only experienced attorneys may receive CLE credit for these activities.

Q] May I earn CLE credit for providing pro bono legal services?

A] Newly admitted attorneys may earn pro bono CLE credit solely for the purpose of carrying over the pro bono credit to the following biennial reporting cycle. A maximum of 6 CLE credit hours, including pro bono CLE credit, may be carried over to the following reporting cycle.

Q] May I earn credit for courses I attended before I was admitted to the New York Bar?

A] Yes. A newly admitted attorney may earn a maximum of 16 CLE credits for attendance at accredited transitional CLE courses from the date of law school graduation, up through the date of admission to the New York Bar. These credits must be completed in a format permissible for the category of credit, and may be applied towards your first-year requirement. Credit hours in excess of 16 may not be carried over and applied to your second-year requirement. No credit may be awarded for attendance at courses occurring more than two years before the date of admission to the New York Bar.

Q] May I earn CLE credit for attending a CLE course if I arrive late? What about if I leave early?

A] It is up to the sponsor of the program to determine whether you may earn credit if you do not attend the entire program. The sponsor may award partial credit, full credit or no credit at all, depending upon the circumstances.

Q] May I earn credit for repeating a course?

A] No. You may not get credit for repeating the same course, even if the course is in a different format and even if the course is repeated in a different reporting cycle. So, if you had earned CLE credit for attending the live presentation of a program on cross examination, for example, you would not be able to earn credit for watching the video of that course, even if you watched it three years later. If, on the other hand, the program you "repeat" has significant new content, such as revised or updated materials reflecting recent changes in the law, you may be eligible for CLE credit, even if the title of the course has not changed.

Exceptions To The Requirement

Q] Are there any exemptions from the CLE requirement?

A] Yes. The following persons are exempt from New York's CLE requirement:

1. Attorneys who do not practice law in New York at all during the relevant reporting cycle,
 2. Full time active members of the U.S. Armed Forces,
 3. Attorneys with offices outside of New York who are temporarily admitted to practice in a court within New York for a case or proceeding, but who do not otherwise practice law in New York during the relevant reporting cycle, and
 4. Attorneys who certify that they are retired from the practice of law pursuant to § 468-a of the Judiciary Law.
-

Q] How do I determine whether I am "practicing law in New York"?

A] You must determine for yourself whether your specific activities are considered practicing law in New York. All members of the New York Bar are presumed to be practicing law in New York unless otherwise shown. The burden of proof is on the individual attorney. You should be guided by case law and the Restatement of Law, Third, The Law Governing Lawyers, Chapter 1, § 3. Attorneys "practice law in New York" if they give legal advice or counsel to, or provide legal representation for, a particular body or individual in a particular situation in either the public or private sector. The practice of law does not include the performance of judicial or quasi-judicial (e.g., administrative law judge, hearing officer) functions. Neither the CLE Board nor its staff may advise attorneys on the issue of whether their specific activities constitute the practice of law in New York.

Q] What are my CLE obligations if I practice law outside of New York?

- A] 1. If you do not practice law in New York but practice in another jurisdiction (including a foreign country) that requires you to fulfill a CLE requirement, you must certify compliance with that other jurisdiction's requirement on your New York biennial attorney registration form.
2. If you do not practice law in New York but practice in another jurisdiction (including a foreign country) that does not require you to fulfill a CLE requirement, you must certify to this on your New York biennial attorney registration form.
3. If you practice law both in New York and in another jurisdiction (including a foreign country), you will be required to fulfill New York's CLE requirement. Keep in mind that you may obtain credit for out-of-state transitional courses accredited by [New York Approved Jurisdictions](#).
-

Q] I started practicing law a few months after my admission to the Bar. Do I need to complete all 16 credits for the first year?

A] No. Newly admitted attorneys who are [not practicing law in New York](#) when they are admitted and begin to practice law in New York during their first two years of admission to the New York Bar are subject to a pro rata CLE requirement. They must complete, by their second anniversary of admission to the New York Bar, 1.5 transitional CLE credit hours, in any combination of categories, for each month of the two-year period during any part of which they practice law in New York. These credits must be completed in a format permissible for the category of credit.

Q] What if I stop practicing law during my first two years of admission to the New York Bar?

A] If you are not practicing law in New York at the end of the two-year period, you are subject to a pro rata CLE requirement. You must complete, by the second anniversary of your admission to the New York Bar, 1.5 transitional CLE credit hours, in any combination of categories, for each month of the two-year period during any part of which you practice law in New York. These credits must be completed in a format permissible for the category of credit.

However, if you take a break from the practice of law in New York in the middle of your two-year period, you are not eligible for a prorated CLE requirement, and must complete the entire first- and second-year CLE requirements for newly admitted attorneys.

Q. If I practiced law in New York for only the first 12 months of my admission to the Bar, and have an 18-credit prorated CLE requirement, may I complete all 18 credits through on-demand programs in the Areas of Professional Practice and Law Practice Management categories?

A. No. Although you may complete all of the pro rata requirement in Areas of Professional Practice and/or Law Practice Management, you are limited to 14 credits in nonparticipatory formats, such as on-demand programs or DVDs.

Q] Are there any conditions under which I may obtain a waiver or modification of my CLE requirement?

A] Yes. The New York State CLE Board may, in individual cases involving undue hardship or other extenuating circumstances, grant waivers or modifications of the CLE requirement to attorneys. You should submit an [Application for a Waiver or Modification](#) to the CLE Board.

Compliance & Reporting

Q] How and when do I report compliance with my CLE requirement?

A] An attorney registration form will be mailed to you. Your registration form must be filed within 30 days after your birthday in the second calendar year following your admission to the New York Bar. That is, if you were admitted to the New York Bar in 2015, you will file your registration form within 30 days of your birthday in 2017. Newly admitted attorneys must certify on their attorney registration form that they have satisfactorily completed New York's CLE requirement and that they have retained the proper documentation. Newly admitted attorneys must complete their CLE requirement within two years of their date of *admission* to the New York Bar, no matter when they register.

Q] What should I do if I have not received an attorney registration form by my birthday?

A] If you have not received an attorney registration form by your birthday in the second calendar year following your admission to the Bar, contact the Attorney Registration unit by e-mail at attyreg@nycourts.gov or by telephone at (212) 428-2800.

Q] What if my birthday comes before the second anniversary of my admission? (My birthday is in March; I was admitted in June.)

A] You will certify the number of CLE credits you have actually completed when you file your registration form. You will be considered in compliance even if you have not completed the full second-year requirement, so long as you have completed the first-year requirement. However, you remain responsible for completing your second-year credit hours by your second anniversary of admission to the Bar. Additionally, 12 of the 16 required CLE credit hours for the second year may be applied towards fulfilling your [CLE requirement for experienced attorneys](#) in your next reporting cycle. Ethics and professionalism credit hours may not be applied to the next reporting cycle.

Q] What if my birthday comes after the second anniversary of my admission? (I was admitted in March, and my birthday is in June.)

A] You must complete your newly admitted CLE requirement by the second anniversary of your admission to the Bar even though you will not register until your birthday. If you have completed the required 32 CLE credit hours during your first two years of admission, credits that you complete between your second anniversary of admission and your birthday may be applied towards your next reporting cycle.

Q] What should I do if I cannot complete my CLE requirement on time?

A] You should complete an [Extension of Time Application](#) and submit it to the New York State CLE Board by email to cleoffice@nycourts.gov, or by mail to 25 Beaver Street, Room 888, New York, NY 10004.

Q] What do I do if I completed fewer than 16 credits before my first anniversary, even though I completed all 32 before my second anniversary?

A] The [Program Rules](#) require that you complete 16 credits in *each* of your first two years. You should complete an [Extension of Time Application](#) requesting a retroactive extension for the purpose of adjusting your credits.

Q] If I earn more credits than I need, may I carry them over?

A] Newly admitted attorneys who have earned more than 16 transitional CLE credit hours before the first anniversary of admission to the Bar may apply up to 8 of their additional credits earned during the first year of admission towards their second-year requirement. Once the second-year requirement is complete, up to 6 additional credits may be applied towards the next reporting cycle. Ethics and Professionalism credits may not be carried over. For more information, see [Carryover Credit FAQs](#).

Q] Who keeps track of my certificates of attendance?

A] The New York State CLE program is a self-reporting system. Certificates of attendance, and/or other documentation of compliance with, or exemption from, the CLE requirement, must be retained by the attorney, for a period of at least four years from the date of the course or program, in case of audit.

Q] What happens if I do not fulfill my CLE requirement?

A] The names of attorneys who fail to comply with the CLE requirement may be submitted to the Appellate Division for appropriate action.

Q] What if I have more questions?

A] You may find answers in the [Program Rules](#) or in the [CLE Board Regulations & Guidelines](#), or you may e-mail your questions or comments to CLE@nycourts.gov. You may also contact us at (212) 428-2105, or toll free from outside of New York City at 1 (877) NYS-4CLE (697-4253).

For more information about the CLE Rules visit
www.nycourts.gov/attorneys/CLE

NYSBA Sections

Ranging in size from approximately 500 members to more than 5,000, each section draws its membership from lawyers or judges with common professional interests. Addressing professional development, improvement of laws and continuing legal education in a variety of substantive law fields, sections keep members informed of developments in that area of concentration through programs, publications, communities, listserves and other resources. Sections offer you opportunities to make a mark within your areas of practice. Within NYSBA sections, you can

- Network with influential colleagues who share your interests
- Write for section newsletters and publications
- Join online section-wide Communities - private, professional networks offering practical tips and guidance from other NYSBA members
- Participate on substantive section committees that address timely developments
- Help shape legislation that affects your practice area

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[Intellectual Property Law](#)

[International](#)

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(open to law students and attorneys admitted 10 years or less)

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Intellectual Property Law Basics for the Non-IP Lawyer

INTELLECTUAL PROPERTY LAW

Presented by:
David P. Miranda, Esq.

5 Columbia Circle
Albany, New York 12203
518-452-5600
www.hrfmlaw.com



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1

Intellectual Property

- Copyrights
- Trademarks
- Trade Secrets
- Patents



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2

Copyright

What are the Requirements?

- Original work of Authorship
- Fixed in a tangible medium of expression (paper or recorded)
- Expression is protected, not an idea or fact

Copyright

How Long is it Protected?

- Life of author + 70 years
- 95 years from publication (work for hire)

Who owns it and When?

- Right from the time the work is created
- Immediately becomes property of the author who created the work
- Works "Made for Hire"
Employer is considered author

Copyright

What are the Owner's Rights?

- Reproduce the work
- Prepare derivative works
- Distribute copies
- Perform, display

Best Practice

- Add copyright Notice to all works that are created
- (Date of creation) (Author's name)



PRE-LITIGATION

Cease and Desist Letter and Declaratory Judgment Action

- Sending a cease and desist letter to accused infringer
 - Demands to stop, compensation, offer license, etc
 - Response may be to settle
- Caveat: accused infringer files a declaratory judgment action against copyright owner in local jurisdiction

LITIGATION

Federal Courts have exclusive jurisdiction. See 28 U.S.C. § 1338(a)

Copyright Infringement

- Unauthorized exercise of one of exclusive rights of copyright holder under Section 106
 - Reproduce copyrighted works
 - Prepare derivative works
 - Perform the work publicly
 - Display the work publicly

COPYRIGHT REGISTRATION

- Valid copyright registration as a precondition.
See 17 U.S.C. § 411
- Application approach vs. registration approach
- Second Circuit Rule: valid registration or refused registration

LITIGATION

- An action for a copyright infringement must be brought within three (3) years after the claim has accrued. 17 U.S.C. § 507 (b)
- The elements of a copyright infringement claim are:
 - 1) Ownership of a valid copyright; and
 - 2) Copying of constituent elements of the work that are original
- A certificate of registration obtained within five (5) years after first publication of the work is *prima facie* evidence of the valid ownership of a copyright

- Copying can be proven as either:
 - 1) Direct proof, which is rare; or
 - 2) Indirect or circumstantial proof, which is more likely. This requires proving (1) access and (2) similarities between the two works that provide sufficient proof to support an inference of copying

- Access
 - Proof of access requires an opportunity to view or to copy plaintiff's work.
 - To prove access, a plaintiff must show a reasonable possibility, that an alleged infringer had the chance to view the protected work
- Substantial Similarity
 - Application of the "ordinary observer test."
 - Involves asking whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work

VICARIOUS LIABILITY

- To impose vicarious liability on a defendant for copyright infringement, a plaintiff must establish:
 - (1) requisite control over direct infringer, and
 - (2) derivation of direct financial benefit from direct infringement

Range Rd. Music, Inc. v. E. Coast Foods, Inc., 668 F.3d 1148 (9th Cir.2012)

Range Rd. Music, Inc. v. East Coast Foods, Inc.
(9th Cir. 2012)

- Upheld infringement liability against restaurant that allowed live renditions of jazz songs and played jazz records in attached lounge without appropriate license
- Defendants' exercise of control over direct infringement:
 - Shared liquor license
 - Managerial authority
 - Power to hire and fire employees
 - Power over musical acts
- Defendant derived financial benefits from musical performances

REMEDIES

- Copyright owner may seek:
 - Injunctive relief, seek impoundment and disposition of infringing articles, damages and profits of the infringer, and/or costs and attorneys' fees - See 17 U.S.C. §§ 502-505
- Infringer is liable for either:
 - (1) actual damages and any additional profits, or
 - (2) statutory damages

STATUTORY DAMAGES

- Pursuant to Section 504 of the Copyright Act, award of statutory damages ranges from \$750 to \$30,000
 - Willful infringement increases the amount up to \$150,000
 - Innocent infringement may result in a reduction of statutory damages to \$200

Capitol Records, Inc. v. Thomas-Rasset (8th Cir. Sept. 11, 2012)

- Defendant sought the court to consider the “guideposts” announced by Supreme Court for review of punitive damages award under the Due Process Clause
 - Eight Circuit explained that “[t]he Supreme Court never has held that the punitive damages guideposts are applicable in the context of statutory damages”
 - Due Process Clause prohibits excessive punitive damages based on notions of fairness
 - This concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute
 - Such a broad range of damages “allows courts and juries to calibrate the award based on the nature of the violation”

FAIR USE

- In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:
 - 1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - 2) The nature of the copyrighted work;
 - 3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
 - 4) The effect of the use upon the potential market for or value of the copyrighted work

17 U.S.C. §107.

- Examples of fair use: for purposes of criticism, comment, news reporting, teaching, scholarship, or research
- Presumption that unauthorized copying has occurred, but the focus is on whether or not the use was fair

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FIRST SALE DOCTRINE

•First Sale Doctrine: permits owners of a lawfully purchased copy of copyrighted work to resell it without limitations imposed by copyright holder

See 17 U.S.C. §109

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Kirtsaeng v. John Wiley & Sons, Inc.

- Question of first impression: whether the first sale doctrine applies to a work that was produced outside of the US, legally acquired abroad, and then later imported and resold within US
- Kirtsaeng, a Thai national, lawfully purchased copies of textbooks in Thailand, imported to US and sold them on eBay
- Kirtsaeng found liable for willful copyright infringement and imposed damages of \$600,000 (\$75K for 8 works)

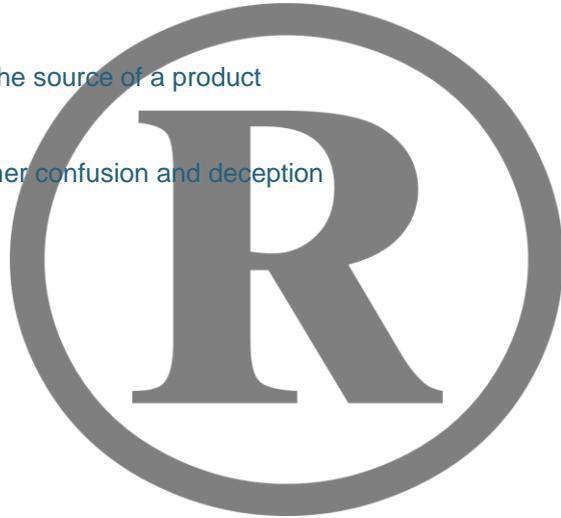
Kirtsaeng v. John Wiley & Sons, Inc.



U.S. Supreme Court reverses, holding that the phrase “lawfully made under this Title” in Act refers to copies of a copyrighted work lawfully made abroad, not just copies that are made in territories in which the Copyright Act is law (as held by the Second Circuit).

Trademarks

- Differentiates the source of a product or service; and
- Avoids consumer confusion and deception as to quality



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Evaluating the Strength of Trademarks

- **Strongest**.....**Weakest**
- Coined/Arbitrary Suggestive Descriptive Generic
- The more distinctive, the stronger the mark.
- Common, descriptive, surnames and geographic names offer less exclusivity.

Arbitrary/Coined



Apple Computer

Suggestive



Apple-a-Day
Vitamins

Descriptive



Cran-apple
Juice

Generic



Apple

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Generic = Unprotectible

- Convenient Food Mart
- Aspirin
- Supermarket

- Some famous marks risk becoming generic
 - Scotch Tape
 - Xerox
 - Advil
 - Nutrasweet
 - Google?

Proper Usage of a Mark

- Marking as a trademark ®™ sm
- Exclusivity
- Do not use as a noun
 - Windsurf® Brand Sailboards
 - Band-Aid® Brand adhesive strips
 - Kleenex® Brand Tissues
 - Visa® Credit Card

Trademark Registration Considerations

- Clearance search
- Federal Registration
 - Intent-to-Use
 - Actual use
- State Registration
- Proper marking and correct usage
 - TM
 - SM
 - ®
 - Labeling the product or the service

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Proper Maintenance of a Mark

- Use it on labels or ads for service
- Federal filing of a declaration between 5th and 6th anniversary date
- Renewal every 10 years
- If license use by others, reserve and maintain quality control provisions
- Police your mark against others likely to cause confusion
- Advertise to build secondary meaning

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Slogan Marks

- A slogan or any other combination of words is capable of trademark significance, if used in such a way as to identify and distinguish the seller's goods and services from others. Allstate Ins. Co. v. Allstate Inc., 307 F.Supp. 1161 (N.D.Tex. 1969)

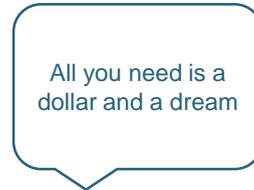
Examples of Slogan Marks



GEICO
U.S. Reg. 3,193,689



Nike, Inc.
U.S. Reg. 1,875,307



New York State
Division of the Lottery
U.S. Reg. 3,751,899



McDonald's Corp.
U.S. Reg. 2,978,887



Mars, Inc. U.S. Reg. 1,596,711

Sound Marks

- A sound mark identifies and distinguishes a product or service through audio rather than visual means. TMEP §1202.15
- Sounds are protectable when they are arbitrary, unique or distinctive and create in the hearer's mind an association of the sound with a good or service. In re Vertex Grp. LLC, 89 USPQ2d 1694, 1700 (TTAB 2009); In re Gen. Electric Broad. Co., 199 USPQ 560, 563 (TTAB 1978)
- The fact that sounds and musical compositions are protected by the copyright laws is not incompatible with their also qualifying for protection as trademarks. Oliveira v. Frito-Lay, Inc., 251 F.3d 56, 61 (2d Cir. 2001)
- As with any designation alleged to be a mark, a sound cannot qualify as a mark if it is "functional"

Examples of Sound Marks

- U.S. Registration No. 916,522 (July 13, 1971) 🔊
- U.S. Registration No. 1,395,550 (June 3, 1986) 🔊
- U.S. Registration No. 2,692,077 (March 4, 2003) 🔊
- U.S. Registration No. 3,411,881 (April 15, 2008) 🔊
- U.S. Registration No. 2,821,863 (March 16, 2004) 🔊
- U.S. Registration No. 2,442,140 (April 10, 2001) 🔊
- U.S. Registration No. 2450525 (May 15, 2001) 🔊
- U.S. Registration No. 2519203 (December 18, 2001) 🔊

Color Marks

•In 1995, the Supreme Court held that a single color of a product is capable of being registered and protected as a trademark. Qualitex Co. v. Jacobson Prods. Co., 513 U.S. 159 (1995)

•Single color requires proof of secondary meaning. Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 529 U.S. 205 (2000)

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Examples of Color Marks



Brown



Canary Yellow



Robin Egg Blue

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Trade Dress

➤ “...the total image and overall appearance” of a product, package, style of doing business etc. “as defined by its overall composition and design, including size, shape, color, texture, and graphics”

➤ The ability of the look of the product, package, service, smell, sound etc. to differentiate itself from others, thereby associating it with a single source



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Trade Dress in a Package



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Trademark Infringement

Likelihood of confusion is one of the elements a plaintiff must plead and prove to establish trademark infringement

Although no one factor is necessarily controlling, two key factors are the similarity between the marks and the proximity of the goods and/or services

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The Second Circuit, in *Polaroid Corp. v. Polaroid Elecs. Corp.*, set forth the following factors:

The strength of this mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.

However, while a trial court considering the likelihood of confusion must evaluate the *Polaroid* factors, the Second Circuit has cautioned that the *Polaroid* factors are not always dispositive.

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Tiffany (NJ) Inc. v. eBay, Inc.
2008 WL 2755787 (S.D.N.Y. 2008)

The luxury goods retailer Tiffany sued eBay for contributory trademark infringement on the grounds that eBay facilitated and allowed counterfeit items to be sold on its website.

The court found there was no contributory infringement because the standard was not whether eBay could anticipate possible infringement or had generalized knowledge of infringement but eBay's actions once it had notice of possible infringement. The burden is with the trademark owner and does not depend on a standard of who could most efficiently bear the burden of policing. Since eBay took action once notified of possible infringement that was sufficient to avoid contributory infringement.

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***Christian Louboutin S.A. v. Yves
Saint Laurent Am. Holdings, Inc.***
2012 WL 3832285 (2d Cir. Sept 5, 2012)

Distinctive red-soled shoe trademark is upheld for shoes with contrasting uppers.

Regarding the mark-at-issue, the court concluded that it had acquired secondary meaning "when used as a red outsole *contrasting* with the remainder of the shoe":



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PATENTS

Must be:

- Useful
- Novel/New
- Non-obvious (To one “Skilled in the Art” to try or combine)

PATENTS

What can be Patented?

- Processes
- Articles of Manufacture
- Machines
- Compositions of Matter
- And Improvements to all

What are your Patent Rights?

- The right to EXCLUDE others from *making, using or selling* an invention
- Limited Monopoly Granted by the Federal Government
- In exchange for *full* disclosure of the invention to the public
 - How Long Does a Patent Last?
- Utility Patent: 20 years from the Date of Filing
- Design Patent: 15 years from the Date of Issue

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What is an Invention?

CONCEPTION

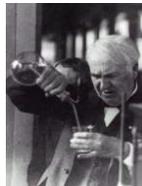
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REDUCTION TO PRACTICE

INVENTION



+



=



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Who is the Inventor?

Who IS? •“Conceives” the claimed invention

Who is NOT?

- Carries out experiments
- Assists inventor in reducing invention to practice
- Contributes obvious elements and improvements
- Suggests a desired result without corresponding idea/solution
- Evaluates invention
- One who identifies the problem but gives no solution

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What to Do When You Invent

- 1) Keep all materials/concepts confidential
- 2) Keep a contemporaneous notebook of ideas/sketches
- 3) Date & Sign all notes/sketches
- 4) If possible, have a witness countersign (learned witness)

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Two Types: Provisional vs. Non-Provisional Application

Provisional Application Process

- Quick & cheap
- Only a place holder (1 year) and establishes a priority date
- If you do NOTHING- Application Ceases to Exist

Non-Provisional Application Process

- Must disclose and describe the best mode contemplated by the inventor of carrying out the invention
 - How? – Specification (Technical): Background, Summary, Description of Drawings, and Detailed Description of Invention
- What defines the invention?
 - Claims: “Define the metes and bounds of the parcel of IP the inventor seeks to own”

The Patent Application Process

What type of Non-Provisional to file?

Utility vs. Design

- **Utility** – Protects how the invention works or is made
 - Multiple Claims
 - Functionality
 - Cost- \$8,000-\$15,000 to file
 - Damages – Reasonable Royalties/Lost Profits
 - 20 years from date of filing
- **Design** – Protects how it looks
 - Single claim (for “ornamental design”) with many figures
 - Cost = \$1,500-\$2,000
 - Cannot be Functional
 - Damages – Reasonable Royalty or Infringer’s Profits
 - 15 years from date of issue

Anatomy of a Patent

Parts of a Patent

- A. Abstract – A brief technical disclosure of the invention
- B. Specification – A written description that references drawings that explain the invention to enable a person skilled in the art to make or use the invention

This part includes several sections including: Drawing, Field of Invention, Background of Invention, Summary of Invention, Brief Description of Drawings and Detailed Description of the Invention (or Best Mode)
- C. Claims – The legal part (i.e. property right) of the patent that specifically points out the idea that is the invention. The claims are what the invention that is protected by the patent

Association for Molecular Pathology v. Myriad Genetics, Inc. U.S. Supreme Court June 13, 2013 (No. 12-398)

Claims to sequences of DNA “isolated” from cells are not eligible for patent because they are “products of nature.” However, claims to synthetic sequences of DNA that are chemically distinct from sequences that exist naturally in cells are patent eligible. Specifically, cDNA—synthetic molecules of DNA whose sequence of nucleotides has portions missing when compared to endogenous genes—were held to be patent-eligible because no such molecules naturally exist.

America Invents Act

Major Provisions

- Changed from “first to invent” to “first inventor to file” system
- Eliminated requirement for Inventor to execute application and provide a mechanism for substitute statement by assignee when inventor is unavailable or non-cooperative
- Removed failure to disclose Best Mode as basis for invalidation of a patent
- Created of “micro-entity” with 75 percent reduction in fees

First Inventor to File System

- Brings U.S. law into conformity with the rest of the world – *Race to the Patent Office*
- First to file based on “effective filing date”
- Absolute novelty standard but still allows a one year grace period for certain publications made by or derived from inventors
- Eliminates interference procedures; introduces derivation proceeding

Heslin Rothenberg Farley & Mesiti P.C.

David P. Miranda, Esq.

Intellectual Property Law
5 Columbia Circle
Albany, New York 12203

518-452-5600
dpm@hrfmlaw.com
www.hrfmlaw.com

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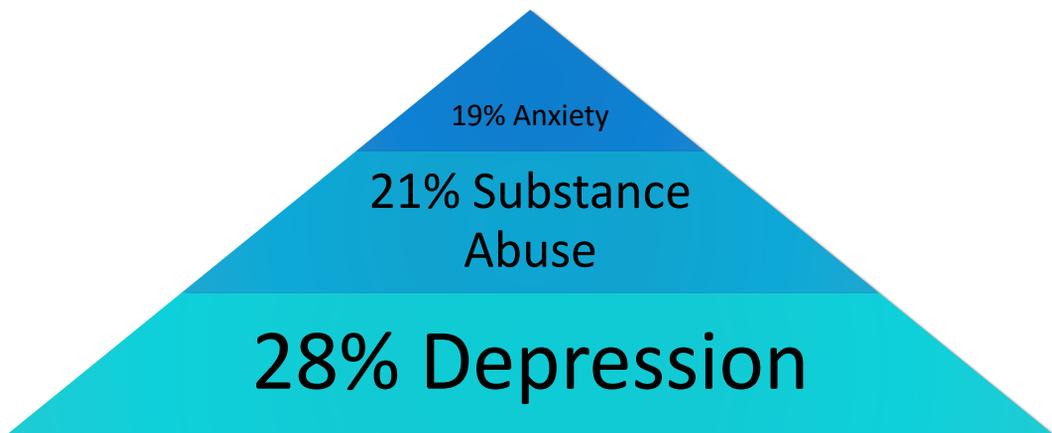
**Attorney Wellness & Wellbeing |
Alcohol and Substance Abuse
and the Legal Profession |
Lawyer Assistance Program**

Substance Abuse Ethics: What All Attorneys Must Know

Meredith S. Heller, Esq.
Law Office of Meredith S. Heller PLLC

1

Attorneys disproportionately suffer from substance abuse disorders and mental health problems:



The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, Krill, Patrick R. JD, LLM; Johnson, Ryan MA; Albert, Linda MSSW.

2

Definitions of Relevant Terms:

This program relies on the definitions provided by the 5th edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*¹:

- Alcohol Use Disorder (“AUD”)
- Substance Use Disorder (“SUD”)
- Gambling Addiction
- Food Addiction
- Depression
- Anxiety Disorders
- Obsessive-Compulsive Disorder
- Bipolar Disorder
- Suicidal Ideation

3

Common Addiction Disorders Facing Attorneys



4

Alcoholism



5

DSM-5 Criteria for Alcohol Use Disorder: In the past year have you ...

1. Had times when you ended up drinking more, or longer, than you intended?
2. More than once wanted to cut down or stop drinking, or tried to, but couldn't?
3. Spent a lot of time drinking? Or being sick or getting over the effects of drinking?
4. Wanted a drink so badly that you couldn't think of anything else?
5. Found that drinking—or being sick from drinking—often interfered with taking care of your home or family? Or caused job troubles? Or school problems?
6. Continued to drink even though it was causing trouble with your family or friends?
7. Given up or cut back on activities that were important or interesting to you, or gave you pleasure, in order to drink?

6

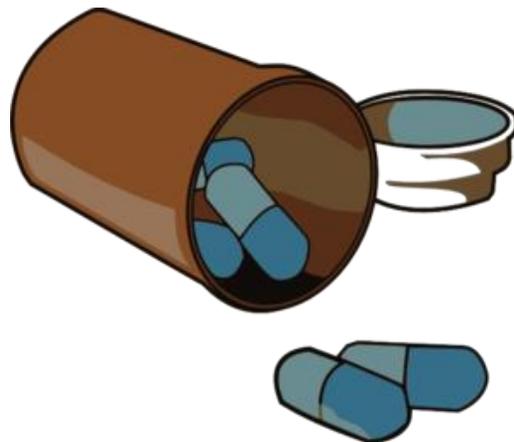
DSM-5 Criteria for Alcohol Use Disorder:

In the past year have you ...

8. More than once gotten into situations while or after drinking that increased your chances of getting hurt (such as driving, swimming, using machinery, walking in a dangerous area, or having unsafe sex)?
9. Continued to drink even though it was making you feel depressed or anxious or adding to another health problem? Or after having had a memory blackout?
10. Had to drink much more than you once did to get the effect you want? Or found that your usual number of drinks had much less effect than before?
11. Found that when the effects of alcohol were wearing off, you had withdrawal symptoms, such as trouble sleeping, shakiness, restlessness, nausea, sweating, a racing heart, or a seizure? Or sensed things that were not there?

7

Substance Use Disorder



8

Substance Use Disorder:

The DSM-5 categorizes drug abuse and addiction under the new single category “Substance Use Disorder” (“SUD”).

Addiction is defined as a chronic, relapsing brain disease that is characterized by compulsive drug seeking and use, despite harmful consequences.

It is considered a brain disease because drugs change the brain; they change its structure and how it works.

These brain changes can be long lasting and can lead to many harmful, often self-destructive, behaviors.

The DSM-5 describes a problematic pattern of use of an intoxicating substance leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period:

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DSM-5 Criteria for Substance Use Disorder (“SUD”):

1. The substance is often taken in larger amounts or over a longer period than was intended.
2. There is a desire or unsuccessful effort to cut down or control use of the substance.
3. A great deal of time is spent in activities necessary to obtain the substance, use the substance, or recover from its effects.
4. Craving, or a strong desire or urge to use the substance.
5. Recurrent use of the substance resulting in a failure to fulfill major role obligations at work, school, or home.
6. Continued use of the substance despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of its use.
7. Important social, occupational, or recreational activities are given up or reduced because of use of the substance.

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DSM-5 Criteria for Substance Use Disorder (“SUD”):

8. Recurrent use of the substance in situations in which it is physically hazardous.
9. Use of the substance is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance.
10. Tolerance, as defined by either of the following:
 - A need for markedly increased amounts of the substance to achieve intoxication or desired effect.
 - A markedly diminished effect with continued use of the same amount of the substance.
11. Withdrawal, as manifested by either of the following:
 - The characteristic withdrawal syndrome for that substance (as specified in the DSM- 5 for each substance).
 - The substance (or a closely related substance) is taken to relieve or avoid withdrawal symptoms.

11

Gambling Disorder



12

DSM-5 Diagnostic Criteria for Gambling Disorder:

Persistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress, as indicated by the individual exhibiting four (or more) of the following in a 12-month period:

1. Needs to gamble with increasing amounts of money in order to achieve the desired excitement.
2. Is restless or irritable when attempting to cut down or stop gambling.
3. Has made repeated unsuccessful efforts to control, cut back, or stop gambling.
4. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble).

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DSM-5 Diagnostic Criteria for Gambling Disorder:

5. Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed).
6. After losing gambling, often returns another day to get even (“chasing” one’s losses).
7. Lies to conceal the extent of involvement with gambling.
8. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling.
9. Relies on others to provide money to relieve desperate financial situations caused by gambling.

The gambling behavior is not better explained by a manic episode.

14

Feeding and Eating Disorders that Commonly Affect Lawyers:

Anorexia
Nervosa

Bulimia
Nervosa

Binge
Eating
Disorder

15

DSM-5 Criteria for Anorexia Nervosa

1. Restriction of energy intake relative to requirements leading to a significantly low body weight in the context of age, sex, developmental trajectory, and physical health. Significantly low weight is defined as a weight that is less than minimally normal or, for children and adolescents, less than that minimally expected.
2. Intense fear of gaining weight or becoming fat, or persistent behavior that interferes with weight gain, even though at a significantly low weight.
3. Disturbance in the way in which one's body weight or shape is experienced, undue influence of body weight or shape on self-evaluation, or persistent lack of recognition of the seriousness of the current low body weight.

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DSM-5 Criteria for Bulimia Nervosa

1. Recurrent episodes of binge eating:
 - a. Eating, in a discrete period of time, an amount of food that is definitely larger than most people would eat during a similar period of time and under similar circumstances.
 - b. A sense of lack of control over eating during the episode.
2. Recurrent inappropriate compensatory behavior in order to prevent weight gain, such as self-induced vomiting; misuse of laxatives, diuretics, or other medications; fasting; or excessive exercise.
3. At least once a week for 3 months.
4. Self-evaluation is unduly influenced by body shape and weight.
5. The disturbance does not occur exclusively during episodes of anorexia nervosa.

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DSM-5 Criteria for Binge Eating Disorder:

1. Recurrent episodes of binge eating.
2. The binge-eating episodes are associated with three (or more) of the following:
 - a. eating much more rapidly than normal.
 - b. eating until feeling uncomfortably full.
 - c. eating large amounts of food when not feeling physically hungry.
 - d. eating alone because of feeling embarrassed by how much one is eating.
 - e. feeling disgusted with oneself, depressed, or very guilty afterwards.
3. Marked distress regarding binge eating present.
4. The binge eating occurs, on average, at least once a week for three months.
5. The binge eating is not associated with the recurrent use of inappropriate compensatory behavior (for example, purging) and does not occur exclusively during the course Anorexia Nervosa, Bulimia Nervosa, or Avoidant/Restrictive Food Intake Disorder.

18

Common Mental Health Issues That Frequently Affect Attorneys



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DSM-5 Criteria for Major Depressive Disorder:

- A. Five or more of the following symptoms have been present and documented during the same two-week period and represent a change from previous functioning; at least one of the symptoms is either (1) depressed mood or (2) loss of interest or pleasure.
 1. Depressed mood most of the day, nearly every day, as indicated by either subjective report (e.g., feels sad, empty, hopeless) or observation made by others (e.g., appears tearful)
 2. Markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation)
 3. Significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day
 4. Insomnia or hypersomnia nearly every day
 5. Psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down)

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DSM-5 Criteria for Major Depressive Disorder, cont.:

6. Fatigue or loss of energy nearly every day.
 7. Feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick).
 8. Diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others).
 9. Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide.
- B. The symptoms do not meet criteria for a mixed episode.
- C. The episode is not attributable to the physiological effects of a substance or to another medical condition.
- Note:** Criteria A-C represent a major depressive episode.
- D. The occurrence of the major depressive episode is not better explained by schizoaffective disorder, schizophrenia, schizophreniform disorder, delusional disorder, or other specified and unspecified schizophrenia spectrum and other psychotic disorders.
- E. There has never been a manic episode or a hypomanic episode.

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DSM-5 Criteria for Generalized Anxiety Disorder:

- A. Excessive anxiety and worry (apprehensive expectation), occurring more days than not for at least 6 months, about a number of events or activities (such as work or school performance).
- B. The individual finds it difficult to control the worry.
- C. The anxiety and worry are associated with three (or more) of the following six symptoms:
 1. Restlessness, feeling keyed up or on edge.
 2. Being easily fatigued.
 3. Difficulty concentrating or mind going blank.
 4. Irritability.
 5. Muscle tension.
 6. Sleep disturbance (difficulty falling or staying asleep, or restless, unsatisfying sleep).

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DSM-5 Criteria for Generalized Anxiety Disorder, cont.:

- D. The anxiety, worry, or physical symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
- E. The disturbance is not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication) or another medical condition (e.g., hyperthyroidism).
- F. The disturbance is not better explained by another medical disorder (e.g., anxiety or worry about having panic attacks in panic disorder, negative evaluation in social anxiety disorder [social phobia], contamination or other obsessions in obsessive-compulsive disorder, separation from attachment in separation anxiety disorder, reminders of traumatic events in posttraumatic stress disorder, gaining weight in anorexia nervosa, physical complaints in somatic symptom disorder, perceived appearance flaws in body dysmorphic disorder, having a serious illness in illness anxiety disorder, or the content of delusional beliefs in schizophrenia or delusional disorder).

23

DSM-5 Definitions of Obsessions and Compulsions:

Obsessions:

1. Recurrent and persistent thoughts, urges, or images that are experienced, at some time during the disturbance, as intrusive and unwanted, and that in most individuals cause marked anxiety or distress.
2. The individual attempts to ignore or suppress such thoughts, urges, or images, or to neutralize them with some other thought or action (i.e. by performing a compulsion).

Compulsions:

1. Repetitive behavior (e.g. hand washing, ordering, checking) or mental acts (e.g. praying, counting, repeating words silently) that the individual feels driven to perform in response to an obsession or according to rules that must be applied rigidly.
2. The behaviors or mental acts are aimed at preventing or reducing anxiety or distress, or preventing some dreaded event or situation; however, these behaviors are not connected in a realistic way with what they are designed to neutralize or prevent, or are clearly excessive.

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Examples of Obsessive-Compulsive Disorders:

- ❖ Body Dysmorphic Disorder
 - ❖ Hoarding Disorder
 - ❖ Trichotillomania (Hair-Pulling Disorder)
 - ❖ Excoriation (Skin-Picking) Disorder
- OCD can be caused by substance abuse or another medical condition.

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Bipolar Disorder:

Bipolar I Disorder:

- ❖ Bipolar I Disorder involves one or more manic episodes or mixed (mania and depression) episodes and at least one major depressive episode. The episodes are not due to a medical condition or substance use.

Bipolar II Disorder:

- ❖ Bipolar II Disorder has one or more severe major depressive episodes with at least one hypomanic episode. There are no manic or mixed episodes. Hypomania is a lesser form of mania.

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Mania:

- A. A distinct period of abnormally and persistently elevated, expansive, or irritable mood, lasting at least one week (or any duration if hospitalization is necessary).
- B. During the period mood disturbance, three (or more) of the following symptoms have persisted (four if the mood is only irritable) and have been present to a significant degree:
 - 1. Inflated self-esteem or grandiosity.
 - 2. Decreased need for sleep (e.g. feels rested after only three hours of sleep).
 - 3. More talkative than usual or pressure to keep talking.
 - 4. Flight of ideas or subjective experience that thoughts are racing.
 - 5. Distractibility (i.e., attention too easily drawn to unimportant or irrelevant external stimuli).
 - 6. Increase in goal-directed activity (either socially, at work or school, or sexually) or psychomotor agitation.
 - 7. Excessive involvement in pleasurable activities that have a high potential for painful consequences (e.g. engaging in unrestrained buying sprees, sexual indiscretions, or foolish business investments).

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Mania, cont.:

- C. The symptoms do not meet criteria for a Mixed Episode.
- D. The mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or other, or there are psychotic features.
- E. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication, or other treatment) or a general medical condition (e.g. hyperthyroidism).

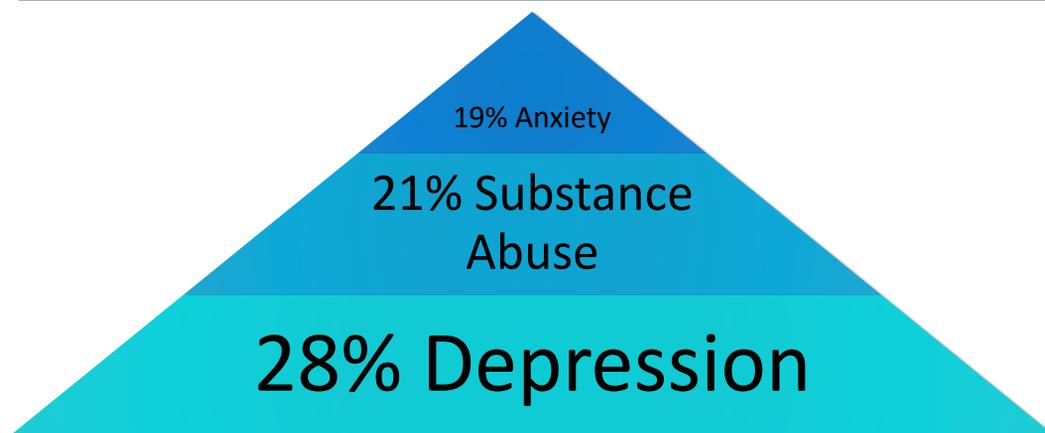
28

Why Lawyers?

Are lawyers more likely to be depressed or are depressed people more likely to become lawyers?

29

Attorneys disproportionately suffer from substance abuse disorders and mental health problems:



The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, Krill, Patrick R. JD, LLM; Johnson, Ryan MA; Albert, Linda MSSW.

30

Some Possible Causes:

- Adversarial Nature of Practice
- Perfectionism
- Pessimism
- Long Hours
- Difficult Clients, Adversaries, Judges
- Deadlines
- Serious Nature of Work
- For Younger Attorneys, a Lack of Control Over Case Load and Tasks
- Culture of Drinking – With Firm, Clients, Prospective Clients
- Isolation as a Solo Practitioner

31

Young Lawyers Are At Particular Risk:

The Krill Study found that, contrary to previous studies, attorneys in the first 10 years of their practice are now suffering from the highest rates of problematic use (28.9%), followed by attorneys practicing for 11 to 20 years (20.6%), and continuing to decrease slightly from 21 years or more. Correspondingly, junior associates have the highest rates of problematic use, and the rates decrease as seniority increases.

32

Common Misconduct Resulting From Impairment



33

Neglect:

- ❖ Incompetent effort
- ❖ Failure to respond to client inquiries
- ❖ Failure to appear
- ❖ Failure to prosecute case
- ❖ Miss statute of limitations
- ❖ Providing false information to client
- ❖ Poor office/file management

34

Rule 1.1, Competence¹:

- (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
- (c) A lawyer shall not intentionally:
 - (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
 - (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

¹ New York Rules of Professional Conduct.

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Rule 1.3, Diligence:

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not neglect a legal matter entrusted to the lawyer.
- (c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

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Rule 1.4, Communications:

- (a) A lawyer shall:
 - (1) promptly inform the client of:
 - (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;
 - (ii) any information required by court rule or other law to be communicated to a client; and
 - (iii) material developments in the matter including settlement or plea offers.
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with a client's reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Financial Misconduct:

- ❖ Conversion of client funds
- ❖ Comingling client funds
- ❖ Failure to promptly refund fees
- ❖ Over-billing/bill padding
- ❖ Deliberate destruction of financial records
- ❖ Failure to get contingency fee in writing

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Rule 1.5: Fees

Rule 1.5 states, in relevant part:

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite firm conviction that the fee is excessive....

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule....

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Rule 1.15: Preserving the Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping Examination of Records

(a) *Prohibition Against Commingling and Misappropriation of Client Funds or Property.*

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

* * * *

(i) *Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.*

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

* * * *

(j) *Disciplinary Action.*

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

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Criminal and Sexual Misconduct:

- ❖ Drunk Driving
- ❖ Possession/Sale of Narcotics
- ❖ Assault
- ❖ Domestic violence
- ❖ Vehicular homicide
- ❖ Forged drug prescription
- ❖ Sexual Assault
- ❖ Harassment
- ❖ Stalking/Cyber-stalking
- ❖ Perjury

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Rule 8.3: Reporting Professional Misconduct

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
- (b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority
- (c) This Rule does not require disclosure of:
 - (1) information otherwise protected by Rule 1.6; or
 - (2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

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Rule 8.4, Misconduct, in relevant part:

A lawyer or law firm shall not:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- * * * *
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

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Bar Violations:

- ❖ Failure to pay dues
- ❖ Failure to: respond to Grievance Committee, cooperate with the Grievance Committee, be truthful in response to Grievance Committee
- ❖ Failure to meet CLE requirements
- ❖ False statements to bar disciplinary authorities
- ❖ Failure to cooperate with the bar
- ❖ False statements on reinstatement questionnaire

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Additional Relevant Rules of Professional Conduct:

Client-Lawyer Relationship

Rule 1.1: Competence

Rule 1.3: Diligence

Rule 1.4: Communications

Rule 1.6: Confidentiality of Information

Advocate

Rule 3.1: Meritorious Claims and Contentions

Rule 3.2: Expediting Litigation

Rule 3.3: Candor toward the Tribunal

Rule 3.4: Fairness to Opposing Party and Counsel

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Additional Relevant Rules of Professional Conduct, cont.:

Transactions with Persons Other Than Clients

Rule 4.1: Truthfulness in Statements to Others

Law Firms and Associations

Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

Rule 5.2: Responsibilities of a Subordinate Lawyer

Maintaining the Integrity of the Profession

Rule 8.1: Bar Admission and Disciplinary Matters

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Some Examples of Impaired Attorneys:

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In re Disability of Caramagno, 47914 (NEV. 9-22-2006)

- A Las Vegas lawyer who arrived in court “90 minutes late in the company of a young woman wearing a black halter top and tight pants.”
- The Court orders that he take a breathalyzer and his BAC level is .075.
- Google “drunk lawyer” and the YouTube video of Mr. Caramagno’s appearance on behalf of client facing life imprisonment is the first item.

Discipline: Went on disability status and has since ceased practicing law.

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Board of Professional Responsibility, Wyoming State Bar v. Anderson, 261 P.3d 695 (2011)

Initial proceeding in 2006 due to a report that Respondent had appeared in court under the influence of alcohol. Respondent acknowledged that he had an alcohol problem and entered into a diversion contract. In event of breach, the Respondent agreed to an immediate six-month suspension.

During 2010, Respondent was twice convicted of driving under the influence of alcohol. Also during 2010, court staff reported that Respondent was not adequately representing his clients in court proceedings. Similar concerns were received by Bar Counsel from clients of Respondent.

Discipline: Respondent retired from the practice of law, and did not contest the formal charge. Respondent agreed to a one-year license suspension.

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Some other examples of impaired attorneys:

- A DWI lawyer in New Mexico who stumbled into the wrong courtroom: Alcohol level .11.
- An Indiana attorney accused of inappropriately touching a court employee three different times: Alcohol level .154.
- Drunken judge proclaims 'I f---ing kill people' before he punches out Legal Aid lawyer and leaves him on sidewalk.

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Hypothetical #1

Lucy Litigator has been battling with a particularly contentious adversary for several months. The trial date has finally arrived. After arriving in the courthouse parking lot, Lucy sees her adversary, Dick Coker, pull into the lot. They have had a hostile relationship throughout the preliminaries so Lucy ducks behind some cars, hoping that Dick won't see her and will go into the courthouse first.

Instead, Dick remains in his car and Lucy sees him appear to snort cocaine off a handheld mirror. Lucy is so shocked, she is not sure if she actually saw what she thinks she saw. Dick proceeds to get out of his car and enter the courthouse. Lucy follows a few minutes after him.

What is Lucy's duty? Would it make a difference if she saw the same thing in a restaurant parking lot the night before the trial?

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Hypothetical #2:

David Drinker has built a successful personal injury firm from the ground up, Drinker & Associates, PC. He has had several of the largest jury verdicts ever in his state and he served as lead attorney in one of the nation's most prominent trials. Because David bringing in tremendous business and press attention, the other members of the firm do not want to address his drinking or his erratic behavior. David is also the sole signatory on the firm's escrow account, but he is often absent from the office so his paralegal has started to sign checks in his name.

Members of the firm begin to panic when they start to receive complaints from clients who have not received their settlement checks. Finally, at that point, one of the senior attorneys, Nota Enabler, tries to get David to seek treatment. She also calls the state's Lawyers Assistance Program to report David's drinking and potential misconduct.

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What Obligations Do Other Members of Drinker & Associates Have?

See:

- ❖ Rule 5.1: Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers
- ❖ Rule 5.2: Responsibilities of a Subordinate Lawyer
- ❖ Rule 8.3: Reporting Professional Misconduct
- ABA Formal Opinion 03-429 (June 11, 2003) – Obligations with Respect to Mentally Impaired Lawyer in the Firm
- *Matter of Dean*, 541 N.Y.S.2d 555 (2d Dept. 1989)

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Hypothetical #3:

Debbie Downer has been a solo practitioner ever since she graduated from law school, five years ago. She can barely make ends meet and is now months behind on her office rent. She is afraid to go to the office because she doesn't want to see her mail. She has stopped answering emails and her voicemail box has been full for weeks. The last time she was at the office, two months ago, she received a check for a small settlement. She deposited the funds into her escrow account but has procrastinated notifying the client. She doesn't think the client really cares about the case because they were indifferent regarding settlement amount.

The settlement check would cover her outstanding rent and some food. Debbie is expecting a tax refund in the next couple weeks which would cover any amount she took out of escrow.

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Hypothetical #4:

Debbie has also failed to keep her other clients informed about the status of cases. She is afraid to contact one of her clients on an immigration matter because she missed a deadline, causing that client's visa application to be denied.

She has also missed two court appearances on a third case. The first time she failed to appear, she called the court claiming that her father had died. She did not consider that statement false because her father had died – seven years ago. She didn't even bother to notify the court the second time.

Finally, she is certain that there are several letters from the Grievance Committee at her office. Two weeks ago, the Committee personally served her at her home with three disciplinary complaints – including one *sua sponte* complaint due to her failure to respond to the Committee's requests.

Debbie has spent much of the past two months sleeping. When she is awake, she is constantly tempted to jump out of her high-rise apartment window.

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Discipline:

Private discipline can range from a letter of caution to a private censure.

Public discipline can range from a brief suspension to disbarment.

Many states now have diversion programs for impaired attorneys. Diversion usually consists of the respondent attorney agreeing to a set of requirements, such as drug treatment, mental health treatment, law practice management education, monitoring – for substance abuse, mental health, practice management.

Diversion often requires that the respondent attorney make an application for diversion. The attorney must also demonstrate some causal connection between the mental health or substance abuse issue and the misconduct.

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Law Students



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How To Get Help



58

Lawyers Assistance Programs:

Lawyer assistance programs (LAPs) are here to support lawyers, judges, students and other legal professionals who suffer from alcohol dependence and abuse. They are in every state.

The ABA Commission on Lawyer Assistance Programs (“CoLAP”) has the mandate to educate the legal profession concerning alcoholism, chemical dependencies, stress, depression and other emotional health issues, and assist and support all bar associations and lawyer assistance programs in developing and maintaining methods of providing effective solutions for recovery.

CoLAP: http://www.americanbar.org/groups/lawyer_assistance.html

List of LAPs by State:

http://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state.html

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Rule 8.3 and LAPs:

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

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Depression and suicide resources:

- ❖ US Suicide Hotline: 1-800-784-2433
- ❖ National Suicide Prevention Lifeline: 1-800-273-8255
- ❖ David Nee Foundation: www.daveneefoundation.org
- ❖ Depression and Bipolar Support Alliance: www.dbsalliance.org
- ❖ Substance Abuse and Mental Health Services Administration: www.samhsa.gov

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Addiction Recovery Resources:

- ❖ Alcoholics Anonymous (AA): www.aa-intergroup.org
- ❖ National Eating Disorders Association: www.nationaleatingdisorders.org
- ❖ National Center for Problem Gambling: www.ncpgambling.org
- ❖ International Lawyers in A.A.: www.ilaa.org
- ❖ Substance Abuse and Mental Health Services Administration: www.samhsa.gov

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Americans with Disabilities Act (“ADA”):

The ADA protects “qualified individuals with disabilities,” which means anyone with a physical or mental impairment that substantially limits one or more major life activities, or who has a record of such an impairment, or is generally regarded as having such an impairment. 42 U.S.C. § 12102(1). The ADA covers people suffering from both mental illness and substance abuse.

LAWYER ASSISTANCE PROGRAM

THE NEW YORK CITY BAR ASSOCIATION

1

**WHY ARE WE TALKING ABOUT
ALCOHOL, DRUG ABUSE AND
MENTAL HEALTH?**

2

RAISE AWARENESS

- **IMPORTANT TO KNOW ABOUT THE HIGH INCIDENCE OF THESE PROBLEMS IN THE PROFESSION YOU HAVE CHOSEN**
- **ENCOURAGE YOU TO GET HELP IF YOU NEED TO**
- **THE LAWYER ASSISTANCE PROGRAM IS A RESOURCE JUST FOR YOU**

3

TEAM EFFORT

- **GARY'S PERSONAL STORY OF RECOVERY**
- **MEREDITH'S DISCUSSION OF THE RULES AND IMPAIRMENT**
- **FORMER CHAIR'S OF THE LAWYER ASSISTANCE COMMITTEE**
- **EILEEN TRAVIS, DIRECTOR OF LAWYER ASSISTANCE**
- **WORK TOGETHER TO HELP LEGAL PROFESSIONALS**

4

HOW DID WE GET HERE?

- **WE ARE 3 OUT OF THOUSANDS OF LAWYERS, JUDGES AND LAWYER ASSISTANCE PROGRAMS AVAILABLE TO HELP YOU.**
- **LAWYER ASSISTANCE COMMITTEES-1970'S**
- **LAWYER ASSISTANCE PROGRAMS-1980'S**
- **ABA COMMISSION ON LAWYER ASSISTANCE PROGRAMS-1980'S**

5

ABA HAZELDEN BETTY FORD STUDY 2016

- **13,000 EMPLOYED ATTORNEYS**
- **EVERY AREA OF LAW**
- **FIRMS, SOLOS, IN-HOUSE, NON-PROFIT**
- **LEGAL EMPLOYERS, ASSOCIATES, PARTNERS, OWNERS**

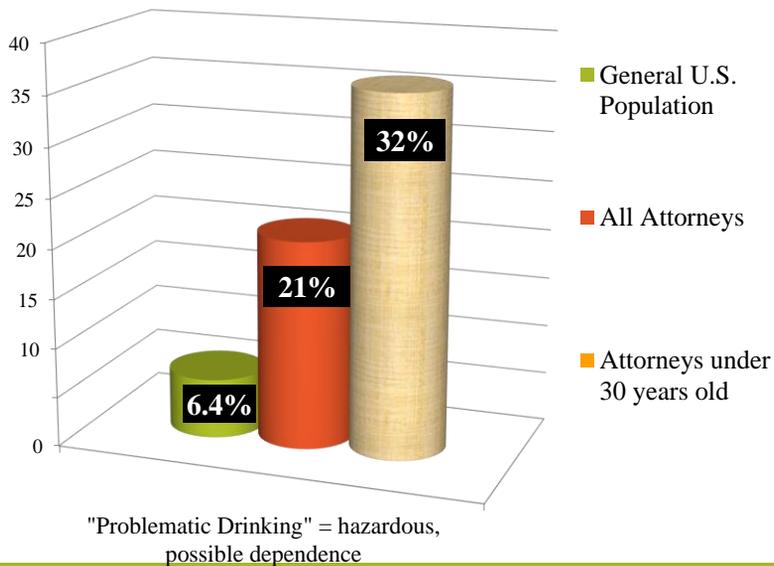
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LEGAL PROFESSION

- 21% SERIOUS/HAZARDESS DRINKING
- 28% SYMPTOMS OF DEPRESSION
- 19% SYMPTOMS OF ANXIETY
- 23% SYMPTOMS OF CHRONIC STRESS
- 11.5% SUICIDAL THOUGHTS DURING CAREER

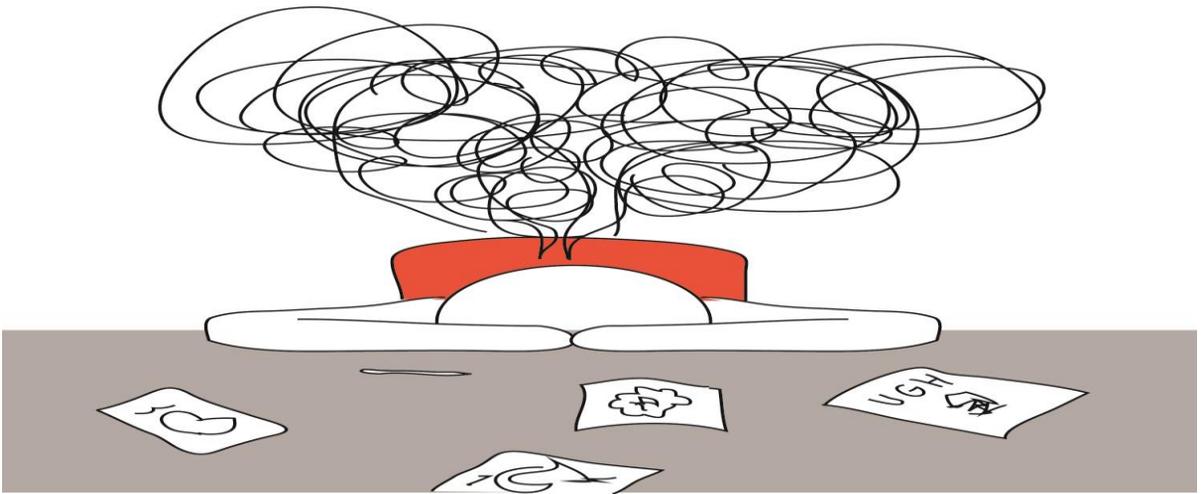
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ALCOHOL ABUSE



8

CHRONIC STRESS-23%



11

IMPACT

- **WORK**

PROCRASTINATION
CONCENTRATION
PRODUCTIVITY
RELATIONSHIPS
COMPETENCY

- **LIFE**

POOR SELF-CARE
RELATIONSHIPS
HEALTH
PHYSICAL
MENTAL

12

WHY?

- **PERFECTIONISM**
- **COMPETITION**
- **ADVERSARIAL NATURE/INCIVILITY**
- **HIGH CASELOADS**
- **LONG HOURS**
- **DIFFICULT DEMANDING CLIENTS**
- **UNSUPPORTIVE WORK ENVIRONMENT**
- **LACK OF MENTORING**
- **ISOLATION**

13

EMOTIONAL SIGNS AND SYMPTOMS

- **WORRY** **LACK OF MOTIVATION** **APATHY**
- **ANGER** **IRRITABILITY**
- **SADNESS** **DEPRESSED MOOD** **LONELY/ISOLATED**
- **SELF-MEDICATING WITH FOOD, ALCOHOL, DRUGS, GAMBLING, SHOPPING, SEX**

14

PHYSICAL SIGNS AND SYMPTOMS

- CHANGES IN APPETITE
- SLEEP PROBLEMS
- HEADACHES
- FREQUENT COLDS, INFECTIONS
- BACK AND/OR NECK PAIN
- CHEST PAIN

WHY ARE LAWYERS RELUCTANT TO SEEK HELP?

- LAWYERS ARE NOT SUPPOSED TO HAVE PROBLEMS!
- STIGMA
- CONCERNS ABOUT CONFIDENTIALITY
- NOT WANTING OTHERS TO FIND OUT
- PERCEPTION OF COMPETENCY
- EFFECTS ON CAREER

LAWYER ASSISTANCE PROGRAM

- *FREE, CONFIDENTIAL ASSISTANCE*
- LAWYERS, JUDGES, LAW STUDENTS, BAR APPLICANTS, COURT AND FIRM STAFF AND FAMILY MEMBERS
- DEPRESSION, ALCOHOL AND DRUG ABUSE, STRESS, ANXIETY, GAMBLING, CAREER CONCERNS, RELATIONSHIP ISSUES, ANGER MANAGEMENT, GRIEF AND LOSS, CARE GIVING, FINANCIAL CONCERNS....

17

LAWYER ASSISTANCE PROGRAM

- CONFIDENTIALITY IS PROTECTED UNDER SECTION 499 OF THE NYS JUDICIARY LAWS
- 24/7 CONFIDENTIAL HELPLINE
- BAR MEMBERSHIP IS NOT REQUIRED TO ACCESS SERVICES

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SERVICES

- **CONFIDENTIAL PHONE CALL OR EMAIL**
- **INVITATION TO COME IN AND TALK**
- **DISCUSS THE ISSUE(S) YOU ARE HAVING**
- **IDENTIFY SOLUTIONS**
- **PROVIDE SUPPORTIVE COUNSELING**
- **ASSIST WITH RESOURCES**
- **PEER SUPPORT**

19

LAWYERS SPEAKING OUT

- **LISA SMITH-"Girl Walks Out of a Bar"**
- **BRIAN CUBAN-"The Addicted Lawyer"**
- **JOSEPH MILOWIC LAW JOURNAL-DEPRESSION**
- **LAW 360-"Mental Health Stigma in Biglaw Shows Signs of Fading"**

20

ABA NATIONAL TASK FORCE ON LAWYER WELL-BEING

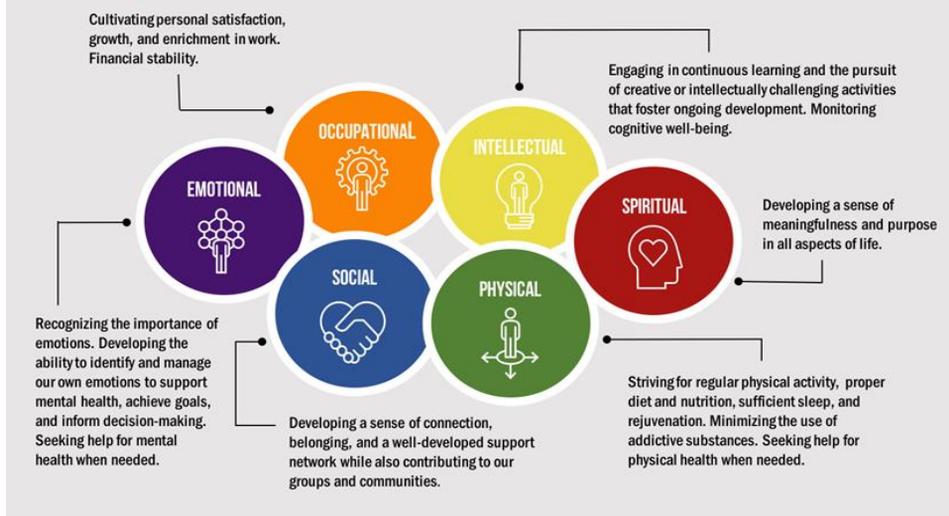
- 2017 “THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE”
- WELL-BEING IS A TEAM EFFORT
- LAW SCHOOLS, COURTS, BAR ASSOCIATIONS, LEGAL EMPLOYERS, LAWYER ASSISTANCE PROGRAMS, PROFESSIONAL LIABILITY CARRIERS

21

WHAT IS “LAWYER WELL-BEING?”



A continuous process in which lawyers strive for thriving in each dimension of their lives:



LAWYER WELL-BEING

- **WHAT DOES WORK-LIFE BALANCE LOOK LIKE FOR YOU PERSONALLY?**
- **HAVE A SUPPORT SYSTEM**
- **GET HELP FOR YOURSELF OR SOMEONE YOU CARE ABOUT**

23

GOOD NEWS!!

- **HIGH INCIDENCE-HIGH RATES OF RECOVERY**
- **PROBLEMS ARE TREATABLE**
- **YOU ARE NOT ALONE**

24

Handling a Real Estate Closing in Upstate New York

Contract Negotiations: Dissection of a Real Estate Contract

This is a paragraph by paragraph review of the standard form used by the Capital Region Multiple Listing Service, Inc. It is recommended that you undertake this review with your client during the attorney approval period.

Paragraph 1: Confirm spelling of your client's names and whether or not they intend to use a middle initial. Remember that misspellings here can be carried on to the note, mortgage and deed.

Paragraph 2: Yes, make sure the property address is correct. Really. And check the town and county. While you're at it, confirm the school district.

Unless you have a perfectly square lot or are absolutely sure of the acreage, the lot size of the property should be "as per deed".

Paragraph 3: Review this list. Remind your Seller not to remove items and remind your Purchaser to check that the items are there on walkthrough. Confirm that your Seller is including a smoke detector and carbon monoxide detector. Double check the add ons.

Paragraph 4: Confirm with your Seller that there's nothing attached that they want to remove or switch out. Confirm with your Purchaser that there's nothing on premises that should be removed.

Paragraph 5: Check the math!

Paragraph 6: A. ***Diary the dates for mortgage application, approval and notification of termination.*** Review the terms and make sure that the deadlines can be met. When representing a purchaser, confirm that they will be able to apply for a mortgage within the agreed upon time frame. Distinguish the process of obtaining a mortgage qualification letter from applying for a mortgage.

Review the type of mortgage to be applied for and the interest rate parameters.

B. Review this very carefully with your Seller to make sure that they understand the concept of the Seller's Contribution. For the Purchasers, advise about potential issues concerning appraisals and amounts allowed by lenders.

Paragraph 7: Talk to your Purchaser about the Good Faith Estimate.

Paragraph 8: Should there be any other terms?

Paragraph 9: Determination of the party who provides the updated abstract of title or title insurance is made by the title zone. Do you know who is responsible for providing title?

Albany.....purchaser provides
Columbia.....purchaser provides
Fulton.....seller provides
Greene.....purchaser provides
Montgomery.....seller provides
Rensselaer.....purchaser provides
Saratoga.....purchaser provides (exception to the mle)
Schenectady.....seller provides
Schoharie.....seller provides

Paragraph 10: Subject to tenancies? Usually not preferred. Purchaser, what use were you seeking?
Seller, what uses are allowed?

Paragraph 11: Review types of deeds with client. The expectation is that a Warranty Deed with Lien Covenant will be given. Why is Seller giving a Quitclaim or Bargain and Sale Deed?
Change to Executor's Deed if you represent an estate.

Paragraph 12: Calculate the transfer tax for your Seller.

Paragraph 13: Review the adjustments to be made. Discuss what your client can anticipate receiving or reimbursing. Confirm the type of fuel on premises if you haven't already by review of the PCDA. Discuss the process for oil adjustments.

Paragraph 14: Warn the Seller about the inspections and confirm that the Seller will be moved out in a timely fashion. Advise your Purchaser to schedule the walk through on the day of closing, testing everything and checking to see if the house is in the condition it is supposed to be in.

Paragraph 15: ***Diary the date for transfer of title.*** Is it feasible? Three and a half weeks is not feasible. Explain the concept of "on or about" vs. "time of the essence".

Paragraph 16: Advise Seller that the deposit will most likely be applied to the broker's commission and that it will be adjusted for at closing.

Paragraph 17: Self explanatory.

Paragraph 18: Explain to your Seller how this works.

Paragraph 19: ***Diary the date for attorney approval.*** Consider the failure to meet this date as evidence of malpractice. Meet with your client and review the contract paragraph by paragraph. Fax your letter and confirm that the fax transmission actually went through.

Diary a date for follow up on open contract issues raised through the attorney approval process.

At this time you should also be addressing the Letter of Engagement with your client. Discuss any agency relationships you may have with title companies.

Paragraph 20: This is the Merger Clause. Explain the concept of *caveat emptor*.

Paragraph 21: ***Diary the dates for inspections and notifications.*** There are different thresholds for each type of inspection, know the differences. If your client chooses to waive any of the inspections, consider a CYA letter to document that you advised your client to have all inspections.

- A. Structural Inspection: review the mechanics of this. One defect which will reasonably cost \$1500 to correct. Consider adding on other types: where does mold fall?
- B. Wood Destroying Organisms: Must be free from infestation or (and!) damage.
- C. Septic System: Must be in *working* order.
- D. Well Water Flow and Quality: must be potable, free from chemicals, metals or other organic matter as requested by Purchaser, and must have water flow.
- E. Radon: The test must reveal less than 4.0 picocuries per liter.

Paragraph 22: Are there any addenda? Have you reviewed them all?

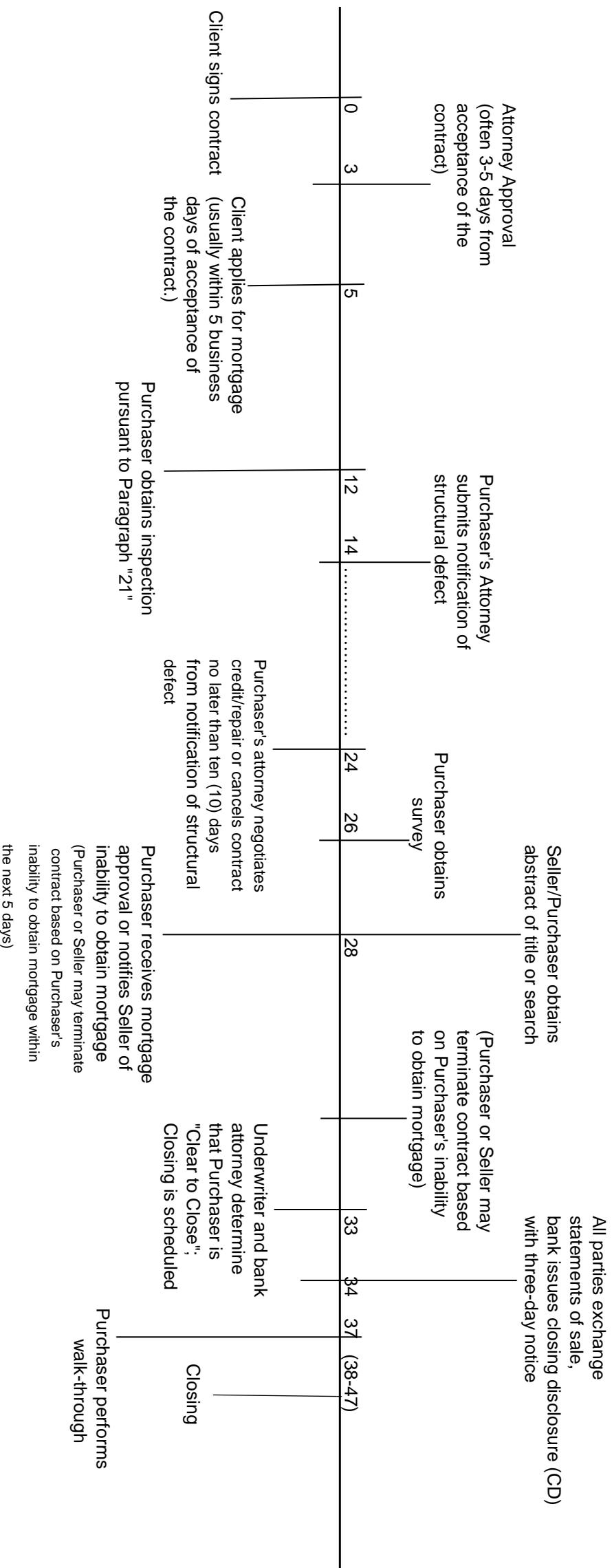
Paragraph 23: To be technical, you might add that attorneys will also receive copies of notices.

Paragraph 24: Confirm that there are no other agreements between the parties.

Finally, make sure that your client has initialed every page at the bottom and all changes to the contract. Check to see that everyone who should have signed the contract has signed the contract.

Michelle H. Wildgrube, Esq.
CIOFFI SLEZAK WILDGRUBE P.C.
1473 Erie Boulevard, 1st Floor
Schenectady, NY 12305

Timeline of a Residential Real Estate Closing



**FOR EXAMPLE PURPOSES ONLY
ALL DATES ARE APPROXIMATE, ACTUAL DATES ARE DETERMINED BY THE CONTRACT**

Michelle H. Wildgrube, Esq.
CIOFFI SLEZAK WILDGRUBE P.C
1473 Erie Boulevard, 1st Floor
Schenectady, New York 12305

STANDARD FORM CONTRACT FOR PURCHASE AND SALE OF REAL ESTATE

THIS IS A LEGALLY BINDING CONTRACT. IF NOT FULLY UNDERSTOOD, WE RECOMMEND ALL PARTIES TO THE CONTRACT CONSULT AN ATTORNEY BEFORE SIGNING.

1. IDENTIFICATION OF PARTIES TO THE CONTRACT

A. SELLER - The Seller is _____, residing at _____ (the word "Seller" refers to each and all parties who have an ownership interest in the property).

B. PURCHASER - The Purchaser is _____, residing at _____ (the word "Purchaser" refers to each and all of those who signed below as Purchaser).

2. PROPERTY TO BE SOLD

The property and improvements which the Seller is agreeing to sell and which the Purchaser is agreeing to purchase is known as _____, **County of Schenectady, State of New York**. This property includes all of the Seller's rights and privileges, if any, to all land, water, streets and roads annexed to, and on all sides of the property. The lot size of the property is as per deed.

3. ITEMS INCLUDED IN SALE

Awnings	Heating/Central Air	Storm & Screen Doors
Built-in Appliances & Cabinets	Lighting Fixtures & Paddle Fans	Storm Windows & Screens
Built-in Closet Systems	Plumbing Fixtures	Smoke & Carbon Monoxide Detectors
Drapery Rods & Curtain Rods	Pumps	Television Aerials & Satellite Dishes
Electric Garage Door Opener(s) & Remote(s)	Security & Alarm System(s)	Wall-to-Wall Carpeting, as placed
Fencing	Shades & Blinds	Water Filters & Treatment Systems
Fireplace Insert, Doors and/or Screen	Shrubs, Trees, Plants	

The items listed above, if now in or on said premises, and owned by the Seller free from all liens and encumbrances, are included in the sale "as is", on the date of this offer, together with the following items: _____

4. ITEMS EXCLUDED FROM SALE

The following items are excluded from the sale: _____

5. PURCHASE PRICE

The purchase price is THOUSAND DOLLARS (\$0.00).

The Purchaser shall pay the purchase price as follows:

- A. \$ _____ 0.00 deposit with this contract and held pursuant to paragraph 16 herein
- B. \$ _____ additional deposit on _____
- C. \$ _____ 0.00 in cash, certified check, bank draft or attorney escrow account check at closing
- D. \$ _____ 0.00 TOTAL

6. MORTGAGE CONTINGENCY

A. This Agreement is contingent upon Purchaser obtaining approval of a x **Conventional**, x **FHA** or **VA** (if FHA or VA, see attached required addendum) mortgage loan of \$ _____ 0.00 for a term of not more than **30** years at an initial **X fixed** or ___ adjustable nominal interest rate not to exceed **prevailing rate of interest**. Purchaser agrees to use diligent efforts to obtain said approval and shall apply for the mortgage loan within **5 business days after the Seller's acceptance of this purchase offer**. Purchaser agrees to apply for such mortgage loan to at least one lending institution or licensed mortgage broker. Upon receipt of a written mortgage commitment or in the event Purchaser chooses to waive this mortgage contingency, Purchaser shall provide notice in writing to **(Seller's Attorney)** of Purchaser's receipt of the mortgage commitment or of Purchaser's waiving of this contingency. Upon receipt of such notice this contingency shall be deemed waived or satisfied as the case may be. In the event notice as called for in the preceding sentence has not been received on or before _____, then either Purchaser or Seller may **within five business days of such date** terminate, or the parties may mutually agree to extend, this contract by written notice to **both parties' attorneys**. Upon receipt of termination notice from either party, and in the case of notice by the Purchaser, proof of Purchaser's inability to obtain said mortgage approval, this agreement shall be cancelled, null and void and all deposits made hereunder shall be returned to the Purchaser.

B. Seller's Contribution: At closing, as a credit toward prepaids, closing costs and/or points, Seller shall credit to Purchaser \$ _____ or _____ % of the Purchase Price or mortgage amount.

7. MORTGAGE EXPENSE AND RECORDING FEES

The Mortgage Recording Tax imposed on the mortgagor, mortgage and deed recording fees, expenses of drawing papers and any other expenses to be incurred in connection with procuring a mortgage, shall be paid by the Purchaser.

Page 1 of 4 Purchaser's Initials _____ Seller's Initials _____

For Use Beginning 1/1/2010

8. OTHER TERMS (if any) None

9. TITLE AND SURVEY

A **X**40-year abstract of title, tax search and any continuations thereof, or a **X** fee title insurance policy, shall be obtained at the expense of Purchaser or **X** Seller. (If both boxes are checked, the option of whether an Abstract of Title or fee policy is provided shall be that of the party paying for same.) The Seller shall cooperate in providing any available survey, abstract of title or title insurance policy information, without cost to Purchaser. The Purchaser shall pay the cost of updating any such survey or the cost of a new survey.

10. CONDITIONS AFFECTING TITLE

The Seller shall convey and the Purchaser shall accept the property subject to all covenants, conditions, restrictions and easements of record and zoning and environmental protection laws so long as the property is not in violation thereof and any of the foregoing does not prevent the intended use of the property for the purpose of single family residence; also subject to any existing tenancies, any unpaid installments of street and other improvement assessments payable after the date of the transfer of title to the property, and any state of facts which an inspection and/or accurate survey may show, provided that nothing in this paragraph renders the title to the property unmarketable.

11. DEED

The property shall be transferred from Seller to Purchaser by means of a Warranty Deed, with Lien Covenant, furnished by the Seller. The deed and real property transfer gains tax affidavit will be properly prepared and signed so that it will be accepted for recording by the County Clerk in the County in which the property is located. If the Seller is transferring the property as an executor, administrator, trustee, committee, or conservator, the deed usual to such cases shall be accepted.

12. NEW YORK STATE TRANSFER TAX, ADDITIONAL TAX AND MORTGAGE SATISFACTION

The Seller shall pay New York State Real Property Transfer Tax imposed by Section 1402 of the Tax Law and further agrees to pay the expenses of procuring and recording satisfactions of any existing mortgages. If applicable, the Purchaser shall pay the Additional Tax (a/k/a the "Mansion Tax" or "Luxury Tax") imposed by Section 1402-a of the Tax Law on transfers of \$1,000,000 or more.

13. TAX AND OTHER ADJUSTMENTS

The following, if any, shall be apportioned so that the Purchaser and Seller are assuming the expenses of the property and income from the property as of the date of transfer of title:

- a. Rents and security deposits. Seller shall assign to Purchaser all written leases and security deposits affecting the premises.
- b. Taxes, sewer, water, rents, and condominium or homeowner association fees
- c. Municipal assessment yearly installments except as set forth in item "10".
- d. Fuel, based upon fair market value at time of closing as confirmed by a certification provided by Seller's supplier.

14. RIGHT OF INSPECTION AND ACCESS

Purchaser and/or representative shall be given access to the property for any tests or inspections required by the terms of this contract upon reasonable notice to the Seller or a representative. Purchaser and/or a representative shall be given the right of inspection of the property, at a reasonable hour, within 48 hours prior to transfer of title.

15. TRANSFER OF TITLE/POSSESSION

The transfer of title to the property from Seller to Purchaser will take place at the office of the lender's attorney if the Purchaser obtains a mortgage loan from a lending institution. Otherwise, the closing will be at the office of the attorney for the Seller. The closing will be on or before _____. Possession shall be granted upon transfer of title unless otherwise mutually agreed upon in writing signed by the parties. In compliance with regulation 175.23 of the NYS Department of State all real estate brokers involved in the sale are to be provided a copy of the final HUD-1 or closing statement at transfer of title.

16. DEPOSITS

It is agreed that any deposits by the Purchaser are to be deposited with the Seller's attorney, of the purchase price. If the Seller does not accept the Purchaser's offer, all deposits shall be returned to Purchaser. If the offer is accepted by the Seller, all deposits will be held in escrow by the Seller's attorney and deposited into the Seller's attorney's escrow account in the institution identified above, until the contingencies and terms have been met. The Purchaser will receive credit on the total amount of the deposit toward the purchase price. If the contingencies and terms contained herein cannot be resolved, or in the event of default by the Seller or the Purchaser, the deposits will be held by the Purchaser's attorney pending a resolution of the disposition of the deposits.

17. TIME PERIOD OF OFFER

Purchaser and Seller understand and agree that, unless earlier withdrawn, this offer is good until _____ a.m. _____ p.m., _____, and if not accepted by the Seller prior to that time, then this offer becomes null and void.

18. REAL ESTATE BROKER AND COOPERATING BROKER COMPENSATION - N/A

A. REAL ESTATE BROKER: The Purchaser and Seller agree no broker brought about the sale, and Seller agrees to pay the brokerage commission as set forth in the listing agreement and Purchaser agrees to pay brokers' commission as set forth in the buyer's broker agreement, if applicable

B. COOPERATING BROKER COMPENSATION: The Cooperating Broker shall be paid N/A of the purchase price or N/A no later than closing. The amount paid shall be credited to the Purchaser as part of the purchase price and to the Seller as part of the commission due the listing broker. The Cooperating Broker agrees to apply this amount against its commission under any agency agreement with Purchaser. Nothing herein shall be deemed to have altered the agency relationships disclosed.

19. ATTORNEY APPROVAL

This agreement is contingent upon Purchaser and Seller obtaining approval of this agreement by their attorney as to all matters, without limitation. This contingency shall be deemed waived unless Purchaser's or Seller's attorney on behalf of their client notifies **the other attorney** in writing, as called for in paragraph "23", of their disapproval of the agreement no later than _____. If Purchaser's or Seller's attorney so notifies, then this agreement shall be deemed cancelled, null and void, and all deposits shall be returned to the Purchaser.

20. CONDITION OF PREMISES

The buildings on the premises are sold "as is" without warranty as to condition, and the Purchaser agrees to take title to the buildings "as is" in their present condition subject to reasonable use, wear, tear and natural deterioration between the date hereof and the closing of title: except that in the case of any destruction within the meaning of the provisions of Section 5-1311 of the General Obligations Law of the State of New York entitled Uniform Vendor and Purchaser Risk Act," said section shall apply to this contract.

21. INSPECTIONS: This agreement is contingent upon all of the following provisions marked with the parties' initials. All those provisions marked with "NA" shall not apply.

Purchaser Seller Initial

_____ **STRUCTURAL INSPECTION:** A determination, by a New York State licensed home inspector, registered architect or licensed engineer, or a third party who is **to be determined**, or other qualified person, that the premises are free from any substantial structural, mechanical, electrical, plumbing, roof covering, water or sewer defects. The term substantial to refer to any individual repair which will reasonably cost over **\$1,000.00** to correct. The following buildings or items on the premises are excluded from this inspection:
_____.

_____ **WOOD DESTROYING ORGANISMS (Pest, Termite Inspection):** A determination by a Certified Exterminator or other qualified professional that the premises are free from infestation or damage by wood destroying organisms.

N/A SEPTIC SYSTEM INSPECTION: A test of the septic system by a licensed professional engineer, licensed plumber, septic system contractor, County Health Department, or other qualified person indicating that the system is in working order.

N/A WELL WATER FLOW AND/OR QUALITY TESTS: (1) A potability water quality test to meet the standards of the New York State Department of Health to be performed by a New York State approved laboratory, (2) any chemical, metal, inorganic, or other tests as the Purchaser may request, and (3) a flow test to be performed indicating a minimum flow of sufficient quantity to:

- (a) _____ obtain mortgage financing on subject property; and/or
- (b) _____ to produce _____ gallons per minute for _____ hours

_____ **RADON INSPECTION:** The Purchaser may have the dwelling located on the property tested by a reputable service for the presence of radon gas. The Seller agrees to maintain a "closed house condition" during the test. "Closed-house condition" shall mean that the Seller shall keep the windows closed and minimize the number of times the exterior doors are opened and the time that they are left open. The Seller agrees to comply with all reasonable requirements of the testing service in connection with the test, provided such compliance shall be at no cost to the Seller. If the test reveals that the level of radon gas is four (4) picocuries per liter or higher, the presence of radon gas shall be deemed grounds for cancellation of the contract.

All tests and/or inspections contemplated pursuant to this paragraph "21" shall be completed on or before _____ and at Purchaser's expense, and shall be deemed waived unless Purchaser shall notify **Seller's attorney** pursuant to paragraph "23" of this agreement, no later than _____ of the failure of any of these tests and/or inspections. If Purchaser so notifies, and further supplies written confirmation by a copy of the test results and/or inspection report(s), or letter(s) from inspector, then this entire agreement shall be deemed cancelled, null and void and all deposits made hereunder shall be returned to Purchaser or, at Purchaser's option, said cancellation may be deferred for a period of ten (10) days in order to provide the parties an opportunity to otherwise agree in writing.

DISCLOSURE OF INFORMATION AND ACKNOWLEDGMENT LEAD-BASED PAINT AND/OR LEAD-BASED PAINT HAZARDS

Lead Warning Statement

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk or inspection for possible lead-based paint hazards is recommended prior to purchase.

Seller's Disclosure (initial)

_____ (a) Presence of lead-based paint and/or lead-based paint hazards (check one below):

- Known lead-based paint and/or lead-based paint hazards are present in the housing (explain):

- Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

_____ (b) Records and Reports available to the Seller (check one below):

- Seller has provided the Purchaser with all available records and reports pertaining to lead-based paint and/or lead-based hazards in the housing (list documents below):

- Seller has no report or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Purchaser's Acknowledgment (initial)

_____ (c) Purchaser has received copies of all information listed above.

_____ (d) Purchaser has received the pamphlet *Protect Your Family From Lead in Your Home*.

_____ (e) Purchaser has (check one below):

- Received a 10-day opportunity (or mutually agreed upon period) to conduct a risk assessment or inspection of the presence of lead-based paint or lead-based paint hazards; or
- Waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Agent's Acknowledgment (initial)

**Basics of Will Drafting (including
review of Powers of Attorney)**



Estate Planning Basics

Patricia J. Shevy, Esq., The Shevy Law Firm

patriciashevy@shevylaw.com

1

Reasons for Estate Planning

- **During Lifetime:** Management of assets and personal needs, or protection of assets for a spouse or other family in the event of disability or incompetence.
 - **After Death:** Management and distribution of estate assets after death, efficiently and while accomplishing the client's goals.
 - **What We Will Discuss Today:**
 - Planning Considerations - Family, Spousal and Beneficiary Issues, Assets, Estate Tax and Long-term Planning
 - Wills, Powers of Attorney, Health Care Proxies and Living Wills
-

2

Powers of Attorney

- A Power of Attorney permits another person (an agent) to complete financial transactions on a principal's behalf.
- Form appears simple, but lots of implications if not completed correctly. . . . and many times it is not!



3

Powers Granted

- (A) real estate transactions;
- (B) chattel and goods transactions;
- (C) bond, share, and commodity transactions;
- (D) banking transactions;
- (E) business operating transactions;
- (F) insurance transactions;
- (G) estate transactions;
- (H) claims and litigation;

4

Powers Granted

- (I) personal and family maintenance: (annual aggregate gifts \$500 or less);
- (J) benefits from governmental programs or civil or military service;
- (K) health care billing and payment matters; records, reports, and statements;
- (L) retirement benefit transactions;
- (M) tax matters;
- (N) all other matters;
- (O) full and unqualified authority to my agent to delegate any or all of the foregoing powers to any person or persons whom my agent selects;
- (P) EACH of the matters identified by the following letters: _____. You need not initial the other lines if you initial line (P).

5

Agent now has fiduciary relationship:

- Fiduciary relationship with principal, including:
 - Act according to principal's instructions, or if no instructions, in principal's best interest.
 - Avoid conflicts of interest.
 - Keep principal's property separate and distinct from other property controlled by agent.
 - May NOT make gifts to self without SGR.
 - Keep record of receipts, disbursements, transactions.



6

Statutory Short Form POA

- ❑ POA that meets the requirements of § 5-1501B(1)(a), (b) & (c), and that contains the exact wording of the form set forth in § 5-1513.
- ❑ Mistake in wording (spelling, punctuation or formatting) or use of bold or italics is still a SGR but § 5-1513 governs.
- ❑ Use of the form set forth in § 5-1513 is lawful and when used shall be construed as a statutory short form POA.



7

Statutory Short Form POA

- ❑ May contain modifications or additions as provided in § 5-1503, but in no event may it be modified to grant any authority provided in § 5-1514 (SGR provisions).
- ❑ If the authority (SGR) on statutory short form is initialed by the principal, the statutory short form POA must be executed in the manner provided in § 5-1501B **simultaneously** with SGR
- ❑ Statutory short form POA and SGR which supplements it **must be read together** single instrument.



8

Statutory Gifts Rider (SGR)

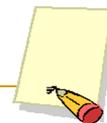
- Document supplementing statutory short form POA to authorize certain major gift transactions other than those authorized by § 5-1520I meeting requirements of Gen. Obligations Law § 5-1514.
- Must contain the exact wording of the form set forth in § 5-1514.
- Mistake in wording (spelling, punctuation or formatting) or use of bold or italics is still a SGR but § 5-1514 governs.



9

Statutory Gifts Rider

- SGR may contain modifications or additions as provided in § 5-1503 as they relate to ALL gift transactions.
- SGR must be executed in the manner provided in § 5-1514 simultaneously with the statutory short form POA in which the authority (SGR) is initialed by the principal.
- SGR & POA it supplements must be read together as a single instrument.



10

Modifications

- Modifications to statutory short form POA and SGR permitted, including provision revoking a prior POA, as long as following requirements are met:
 - 12 point font or equivalent writing
 - Signed, dated and acknowledged by principal with capacity
 - Signed, dated and acknowledged by agent.



11

Sample Modifications

- Nomination of Guardian, if necessary.
- Medicaid Planning, including use of promissory notes and gifting.
- Estate Tax Planning.
- Trust Planning.
- Specifics for payment to agent (hourly rate).

12

Executing a Power of Attorney

- POA is valid only when it has been signed, dated and acknowledged by the principal **AND THE AGENT.**
- The agent can sign later; still valid if lapse of time between principal's signature and agent's signature.



13

POA Problem Points

If you designate more than one agent above, they must act together unless you initial the statement below.

() My agents may act SEPARATELY.

() (P) EACH of the matters identified by the following letters: A, B, C, D, E, F, G, H, I, J, K, L, M, N and O.

() (SGR) I grant my agent authority to make gifts in accordance with the terms and conditions of the Statutory Gifts Rider that supplements this Statutory Power of

14

SGR Problem Points

() I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which my agent reasonably deems to be in my best interest: **YOU NEED TO DESCRIBE THE GIFTING POWERS HERE.**

() I grant specific authority for the following agents to make the following gifts to himself or herself: **YOU NEED TO DESCRIBE WHICH AGENTS CAN GIFT TO SELF AND THE GIFTING POWERS HERE.**

15

Health Care Proxies

- A Health Care Proxy appoints an agent to make health care decisions for the principal if the principal cannot make the decision for him/herself.



16

Health Care Proxy Statutory Requirements

- Name of Principal and Agent.
 - Statement of intent that agent has health care authority.
 - Signature and date by the Principal or other acting on the principal's behalf.
 - Two witnesses who observe the execution and who sign below a statement indicating that the Principal acted willingly and free from duress.
-

17

Health Care Proxy Mistakes

- Putting Proxy on same form as Power of Attorney.
- Picking a medical professional (unless related).
- Multiple appointments (never pick 2 people at the same time).
- - pick someone who will be able to stand up to the rest of the family.



18

What is a Living Will?

- A Living Will provides specific instructions regarding health care to the agent appointed under the principal's Health Care Proxy.
- Includes directions as to wanted medical treatments and unwanted medical treatments.
- Works in conjunction with a Health Care Proxy.



19

What a Living Will CANNOT Accomplish

- There is no statutory authority in New York for a Living Will.
- A Living Will may be subject to challenge by medical professionals or family members.



20

What happens if there is not a Health Care Proxy?

- Article 81 Guardianship OR Family Health Care Decision Act (Public Health Law Art 29-CC)
 - “Decision-making capacity” means the “ability to understand and appreciate the nature and consequences of proposed health care, including the benefits and risks of and alternatives to proposed health care, and to reach an informed decision.”
 - “Surrogate” means the “person selected to make a health care decision on behalf of a patient” pursuant to the FHCD Act.



21

Family Health Care Decision Act

- Empowers a Surrogate to make health care decisions for a person who is in a hospital or nursing home if the patient lacks decisional capacity and did not leave instructions or sign a health care proxy.
- Only applies to patients in hospitals and nursing homes who have lost the capacity to make medical decisions.

22

Family Health Care Decision Act

- Public Health Law Section 2994-d(1) lists the Surrogate priority as follows
 - a guardian authorized under the Mental Hygiene Law
 - a spouse (if not legally separated or domestic partner)
 - a child 18 years old or older
 - a parent
 - a sibling 18 years old or older
 - a close friend.
-

23

Importance of Having a Will

- **No Will:** Laws of intestacy govern the disposition of assets that are not covered by beneficiary designation or joint ownership.
- **Example:** H & W have 3 minor children. H has \$700,000 in assets. W has \$1,000 in assets. House is owned jointly by H & Wife. H dies.
- **Who gets what?**
 - W keeps the house as surviving joint tenant.
 - Wife receives \$375,000 (\$50,000 plus $\frac{1}{2}$ of \$650,000).
 - 3 minor children split the remaining \$325,000. Court-appointed Guardian must get Court approval to make payouts, and children get the balance of funds at age 18.



24

What You Need to Know

- **THE FAMILY TREE**, and who is an interested party in the estate under the law.
 - **THE ASSETS**, how they are owned (i.e. jointly, p/o/d, etc.), and the tax consequences (estate and otherwise) of different planning options.
 - **CONCERNS OF THE CLIENT**, i.e. family members with disabilities or other issues, future disability concerns of the client or spouse.
 - **THE WISHES OF THE CLIENT**, even if contrary to some planning recommendations.
 - **WHAT DOCUMENTS, TRANSFERS AND PLANNING** should be used for that client.
-

25

The Family Tree

A PERSON WHO DIES WITHOUT A PLAN HAS A PLAN BY STATUTE: DISTRIBUTEES - (EPTL 4-1.1)

- If survived by a spouse and children, spouse receives the 1st \$50,000, and ½ of the balance, and children equally share the other ½ of the balance.
- If survived by only a spouse and no children, the spouse receives everything. (Prior law included parents)
- If survived by only children, the children equally share everything. If there is a predeceased child, his or her children share their parent's inheritance, "by representation."
- If survived by only parents (no spouse, children, grandchildren or younger generations), the surviving parent or parents receive everything. (Siblings do not take if there is a living parent.)



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The Family Tree. . . continued

- If survived by only siblings and/or children of deceased siblings, the siblings and issue of deceased siblings take “by representation.”
- If survived by only aunts and uncles and/or children of deceased aunts and uncles (1st cousins), the aunts and uncles, and children of deceased aunts and uncles take “by representation” but distribution does not extend any further than 1st cousins (children of deceased 1st cousins get nothing if there is at least one 1st cousin living.)
- If survived by only great-grandchildren of grandparents (1st cousins once removed), the great-grandchildren of grandparents will equally share the estate.
- If survived by no one closer than the above (i.e. only 2nd cousins or 1st cousins twice removed), the estate escheats to the State of New York.

Note: Half-blood relatives are the same as whole (a half sister is treated the same as a full sister).

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“TO ISSUE, BY REPRESENTATION” OR “TO ISSUE, PER STIRPES”

- **"ISSUE"** descendants in any degree from a common ancestor, i.e. the person's children, grandchildren, great-grandchildren, great-great-grandchildren, and on down in a straight line of kinship.
 - Intestacy provisions use “BY REPRESENTATION”, not “PER STIRPES” as default of distribution (see EPTL 4-1.1).
 - An estate with a Will executed prior to 09/01/1992 which made a disposition to "issue" will be distributed "per stirpes", and an estate with a will executed after 09/01/92 will be distributed "by representation" if either or another method is not specified in the will (see EPTL 2-1.2).
-

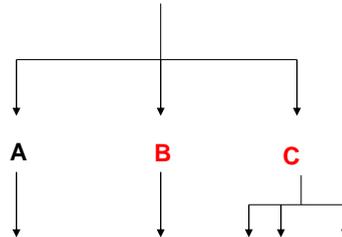
28

“BY REPRESENTATION” or “PER STIRPES”

Client had 3 children- A, B & C.

At Client's death, A is living, and B & C predeceased. All 3 had children: A has 1, B has 1, and C has 4.

- “By Representation” would be:
1/3 to A and
2/3 in 5 equal shares to B & C's children.
- “Per Stirpes” would be:
1/3 to A, 1/3 to B's child, and 1/3 to C's 4 children.



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Who Cannot Take Under Intestacy?

- Divorced spouse.
- Abandoning spouse (must be unjustified, without consent and continued through death).
- Abandoning parent (failure to provide support).
- Distributee Murderer of Decedent.
- Adopted Out Children.
- Step-Children (Not Adopted).



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Protecting Yourself as Drafter

Even if the client does not ask/want, be sure to:

- ❑ Discuss estate tax planning.
- ❑ Discuss long term care planning.
- ❑ **Document, document, document.**
- ❑ Terminate relationship when plan is complete, i.e. send a “we’re done - we did what you wanted” letter to get the statute of limitation started.



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Testamentary Capacity

- “Testamentary Capacity” for purposes of Will execution is knowing generally, without prompting:
 - ❑ Nature of the act performed (Will execution);
 - ❑ Nature and extent of assets to be disposed of;
 - ❑ Names and relationship of persons who are the “natural objects of one’s bounty” (distributees)



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Drafting the Estate Plan

- An attorney must know how to draft a will or trust, and be able to answer the following questions:
 - What items should be placed in a will?
 - What forms of gifts, outright or in trust, should be considered to accomplish the client's goals?
 - Should there be provisions for minor or disabled beneficiaries?
 - Who should be the fiduciaries and what authority should they be given?



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Wills: Due Execution

- A Will is a declaration of a person's wishes as to the disposition of his or her property, to take effect after death.
- EPTL 3-2.1: Will must be:
 - **in writing**, signed by Testator, age 18 or older, and executed and attested according to:
 - The laws of *New York State* (EPTL 3-2.1); or
 - The laws of the _____ ; or
 - The laws of the *place where testator was domiciled*, either when Will executed or at time of death.

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Wills: Due Execution (Cont'd)

- **Signed at the end** by testator (or another in testator's presence and by his direction);
- In **presence of** (or acknowledged to) each witness;
- Testator **declares** signed document is his Will to each witness; and
- At least **two witnesses sign** name and address at testator's request (within 30 days).

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Will: Witness Requirements

- Attestation clause, witness addresses and date are not necessary for Will to be valid.
- If a witness is a beneficiary under the Will, that witness will not receive more than the intestate share.
- **Best Practice: No distributees or beneficiaries act as witnesses.**

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Proper Execution of Will

- **Best practice: Same execution ceremony over and over, every time.**
 - No one but testator and witnesses in the room.
 - Review dispositive provisions out loud.
 - Attorney asks, “Is this your Will?” (Declaration)
 - Attorney asks, “Does the Will express your wishes?”
 - Attorney asks, “Are you asking W1 and W2 to be the attesting witnesses to your Will?”
 - Testator signs every page and at the end.
 - Witnesses sign after Testator.
 - Witnesses sign Self-Proving Affidavit.
-

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Affidavit of Attesting Witnesses

- Without “self-proving” witness affidavits, **actual testimony** needed to prove due execution of Will.
 - Witness affidavits (executed in compliance with SCPA 1406) are not copies of the attestation clause, but recite required minimum testimony regarding proper execution of the Will.
 - Can be signed at execution or any time thereafter, including after death. **Best practice is at execution.**
 - Actual testimony in person may still be required (contested estates or question re: execution).
-

Affidavit of Attesting Witnesses

- Affidavit states that:
 - the testator requested the signature of the witnesses to the Will,
 - Testator signed in their presence and they signed in each other's presence (or other acceptable alternative per execution statute),
 - the testator was competent, of full age, and not under any undue influence.
 - Signed by witnesses before a Notary Public
-

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Who is Executor?

- Letters Testamentary may be granted to natural person or entity authorized by law to be a fiduciary (i.e. bank with trust powers) except those ineligible under SCPA 707:
 - Infants (under age 18)
 - Judicially-declared incompetents
 - Non-domiciliary aliens (unless they serve as co-fiduciary with NY resident fiduciary)
 -
 - Those disqualified due to substance abuse, dishonesty, improvidence, want of understanding, or otherwise unfit
 - Persons unable to read/write English, in Court's discretion
-

40

What Every Will Should Include

- Specific Bequests (if any)
- Tangible Personal Property
- Cash Gifts (if any)
- Residuary Disposition
- Appointment of Executors and Trustees
- Fiduciary Powers
- Bonding or No Bonding
- Tax Allocation- Residuary or Apportionment?
- Resignation of Fiduciaries



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Other Common Provisions

- Marital Deduction Trusts.
 - Estate Tax Planning Trusts.
 - Trusts for Minor (or Young, not necessarily “Minor”) Beneficiaries.
 - Supplemental needs trusts for Disabled

 - Creditor Protection Provisions.
 - Medicaid Protection Provisions.
 - Lifetime Trusts (“Dynasty Trusts”).
-

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Common Will Mistakes

- **UNCLEAR:** “I give the sum of \$10,000 to my sister, Sue.”
- **CLEAR:** “I give the sum of \$10,000 to my sister, Sue, if she survives me.”
- **CLEAR:** “I give the sum of \$10,000 to my sister, Sue; or if she does not survive me, equally to her children who survive me.”



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Common Will Mistakes

- **UNCLEAR:** “I give \$10,000 to Sue and Bob.”
- **CLEAR:** “I give the sum of \$10,000 to each of Sue and Bob, who shall survive me.”
- **CLEAR:** “I give the sum of \$10,000 equally to Sue and Bob, or all thereof to such of them who survives me.”



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Common Will Mistakes

- **INCORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed in equal shares to my issue.”
 - **CORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed to my descendants who survive me, per stirpes.” (or ...“by representation.”)
 - **CORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed in equal shares to my children who survive me.”
-

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Estate Tax Planning

- **Why?** To ensure the use of both spouses’ estate tax exemption and to defer estate tax until second death.
 - Typically includes use of credit shelter and marital deduction trusts:
 - Estate tax exempt amount goes into a credit shelter trust (which can appreciate estate tax free).
 - Excess over estate tax exempt amount passes either outright to the surviving spouse or to a marital deduction trust for the surviving spouse.
-

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Estate Tax Issues



- **FEDERAL ESTATE TAX**

- \$11.4 Million exemption. 40% Tax Rate
- Portability- Unused exemption of first spouse to die passes to and can be used by the surviving spouse (\$22.8 Million total per couple). Consider whether wise to rely on portability availability.

- **NEW YORK STATE ESTATE TAX**

- Matches the federal exemption under 2014 law (currently \$5.74 Million).
 - Graduated tax rates, top rate of 16%.
 - No Portability.
 - The Cliff- Estate 5% over exemption- **NO EXEMPTION!**
-

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Sample Wills

- In Materials.
 - Remember to customize.
 - Remember to remove footnotes before signing.
 - Married Couple
 - With adult children
 - With trusts for minor children/grandchildren
 - Single Person
 - With adult children
 - With trusts for minor children/grandchildren
-

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What is a Trust?

- A Trust is a written, formal agreement between:
 - **The Grantor** (settlor, creator)- the person who makes the contribution to the Trust.
 - **The Trustee**- the person who takes over control of the Trust.
 - **The Beneficiary**- the person who is going to receive benefits (income and/or principal from the Trust).
-

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Major Law Governing Trusts

- Surrogate's Court Procedure Act
 - Estates Powers and Trusts Law
 - Article 7- General Trust Provisions
 - Article 11- Fiduciary Duties and Responsibilities
 - Article 11-A- Principal and Income Act
-

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Article 7: General Trust Provisions

- **EPTL §7-1.14:** Any person (a natural person, an association, board, any corporation, court, governmental agency, authority or subdivisions, partnership or other firm and the state under EPTL §1-2.12) may by lifetime trust dispose of real and personal property. A natural person must be at least age 18.
 - **EPTL §7-1.16:** A lifetime trust is irrevocable unless it expressly provides that it is revocable.
-

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Article 7: General Trust Provisions

- **EPTL §7-1.17(a):** A lifetime trust shall be in writing and executed and acknowledged by the grantor and at least one trustee (who may be grantor) in the manner required for the recording of a deed; or in lieu of acknowledgement, 2 witnesses.
 - **§7-1.18:** A lifetime trust is valid as to any assets therein to the extent the assets have been transferred to the trust.
 - **EPTL §7-1.19(a):** Any trustee or beneficiary may petition to terminate an uneconomical trust.
-

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What kinds of trusts exist?

- **Testamentary Trusts**– established under your Will or other Lifetime Trusts
 - Trusts for Minor Children/Grandchildren
 - Trusts for Spendthrifts
 - **Revocable Trusts**
 - **Irrevocable Trusts**– lots of kinds
 - Medicaid Trusts
 - Insurance Trusts
 - Pet Trusts
-

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Revocable Trust

- **What is it?** A revocable trust is an agreement established by a donor that acts as the donor's "alter ego."
 - The donor can amend, alter or revoke the agreement.
 - The donor can act as sole Trustee of the trust.
 - The donor is in full control.
-

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When to use a Revocable Trust

- Client owns real estate in a foreign jurisdiction
 - Client has a domestic partner – who the clients want to inherit his/her estate.
 - The client is involved in a non-traditional marriage (second marriage, no marriage).
 - Client wishes to keep something private.
 - Client may move to a state that is more complex.
 - Client may acquire vacation/retirement home in another state.
-

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Provisions During Lifetime

- **Disbursement of Income-** who decides, who can receive, convert to principal if not taken.
 - **Disbursement of Principal-** who decides, who can receive.
 - **Power to Amend/Revoke** Remember, trust is irrevocable unless specifically stated that it can be revoked; and by whom.
-

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What happens after death?

- **Payment of Taxes and Administration Expenses-** are they allocated proportionally, paid from residue, . . . Remember to coordinate with beneficiary designations and joint ownership.
 - **Cash Gifts/Other Gifts-** Be specific, and clear in drafting. Remember to coordinate timing (“who survives me” versus “is then surviving.”)
-

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What happens after death?

- **Residuary-** how are the remaining assets distributed after death, outright or held in further trust.
 - **Trusts for Young Beneficiaries-** assets available for health, support, maintenance or education until a specified age (25 or 30 or forever).
-

Administrative Provisions

- Trustee's powers to manage trust assets.
 - Appointment of Trustee and successors.
Discretionary distribution rules.
 - No bonding or insurance, minimal court involvement.
 - Accounting requirements.
 - Compensation.
 - Governing law.
-

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Drafting Reminders. . . .

- Samples are samples. You need to customize based on the client's facts, family and goals.
 - Footnotes in *italics* are notes to you, the drafter. Normal footnotes are explanations for the client when reviewing a draft.
 - Remove the footnotes before the client signs.
-

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THE END.
Questions?



**Advising Clients Charged with DWI |
Local Criminal Court Practice**

EFFECTIVE CLIENT REPRESENTATION IN CRIMINAL AND VTL MATTERS



By: Joseph Gerstenzang
Gerstenzang, Sills, Cohn
& Gerstenzang

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Should I take the
test?



2
3/13/2019

2

The late night phone call

- Do not ask the person open-ended questions
 - How much have you had to drink?
- Ask very specific questions
 - I want you to answer all my questions with a "yes" or a "no"
 - Do you have any priors?
 - Was there an accident?



3
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3

License consequences for 1st offense refusal versus DWAI

Refusal

- 1 year revocation
 - No conditional license unless it matches up with an alcohol conviction
 - May be forced into pleading guilty to drive

DWAI

- 90-day suspension (may be eligible to get their full license in about 2 months)
- DDP and conditional license eligible

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Should a person refuse

- Accident involving serious physical injury
- Felony DWI
- Commercial driver's license
- Plea bargaining policy

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Arraignment

- At the arraignment in a refusal case, the court is required to temporarily suspend your client's license or privilege to drive
- Provided with a "Notice of Temporary Suspension and Notice of Hearing" form
- Court is going to schedule the refusal hearing for the next available date

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Temporary suspension

- The temporary suspension lasts until:
 - The refusal hearing is held, or
 - 15 days
- Whichever is *earlier*
- If the refusal hearing is scheduled beyond 15 days from the arraignment, the temporary suspension is lifted

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Should you contest the refusal?

- I often hear attorneys advise their clients not to appear at the refusal hearing because they are likely going to lose
- I completely disagree with this advice with a few exceptions
 - Pled at the arraignment and needs conditional license
 - Pled guilty to DWI

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Attending the refusal

- Felony cases
 - Most defendants accept a negotiated plea bargain prior to being indicted
 - A refusal hearing is your best opportunity to get discovery and see if there are any issues in the case
- Negotiating a better deal



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Attending cont'd

- Police officers do not always prepare for the hearings
 - They don't always bring their paperwork with them
 - No refusal warning card
- Great opportunity to lock in testimony for the criminal case
 - FOIL the refusal hearing CD

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Issues to be determined at the Refusal Hearing

- Reasonable grounds to believe that such person had been driving in violation of VTL § 1192
- Lawful arrest
- Was the person read the refusal warning
- Did the person refuse

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Can you win?

- Officer fails to appear
- Invalid basis for the stop
- Requested an attorney
- Refusal by conduct
- Was the warning read in "clear or unequivocal language"

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Suspension pending prosecution

- Charged with DWI and alleged to have a BAC of .08% or more at the time of the arrest
- Does not apply to refusals or where the BAC is < .08
- Does not apply to a person who accepts a plea at the arraignment and is sentenced

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Suspension procedure

- Court must make initial findings
 1. The accusatory instruments are sufficient on their face
 2. Reasonable cause to believe the person operated with a BAC of .08% or more as shown by the chemical test printout

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Evidence *tending* to rebut

- If the Court makes the initial findings, the defendant is entitled to an adjournment in order to present evidence tending to rebut at a Pringle hearing
- Common problems:
 - Times
 - Dates
 - Chemical test -- not properly certified

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Driving While Ability Impaired ("DWAI")

- Under our law, no person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol
- When that person's consumption of alcohol has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a vehicle as a reasonable and prudent driver
- Criminal Jury Instructions

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DWAI consequences

- 90-day suspension of driver's license (with certain exceptions)
- Impaired Driver Program ("IDP")/conditional license eligible
- Victim Impact Panel
- Alcohol screening/assessment
- \$300-\$500 fine + \$255/\$260 surcharge
- Driver responsibility assessment

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Driving While Intoxicated ("DWI")

- A person is in an INTOXICATED condition when such person has consumed alcohol to the extent that he or she is *incapable*, to a substantial extent, of employing the physical and mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent driver
- CJI

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DWI consequences

- 6-month license *revocation* -- no full re-licensing until the expiration of statutory revocation period
- Eligibility for the IDP and a conditional license?
- Ignition Interlock Device

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The client with 3 or more alcohol-related convictions

- Lifetime driving record (Form MV-15F)
- Length of revocation likely impacted by the new DMV regulations
- Possible lifetime denial
- Revocation/suspension is critical



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The Impaired Driver Program ("IDP")

- What is the IDP?
 - 7 week course, 16 hours total
 - Helps participants examine the arrest experience and make more appropriate choices in the future
 - \$225 to enroll in the course

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Eligibility for the IDP

- Conviction of an alcohol or drug-related driving violation
- Cannot participate in the IDP if you have within past 5 years
- The 5-year window runs from the *completion* date
- Prior conviction within 5 = ineligible (cannot bank the IDP)

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When to enroll in the IDP

- 15-18 days from sentencing
- May be times when you advise your client to enroll sooner
- Failing to enroll in the IDP within 20 days and continuing to drive = AUO 2nd
- \$75 due immediately at the DMV, \$225 is payable to the program

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Conditional license

- Upon enrolling in the IDP, your client *may* be eligible for a conditional license
- For example, a person who has 3 convictions within 25 years is not eligible
- Upon completion of the IDP, your client *may* be able to obtain full license

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Scope of conditional license

- Employment
- Alcohol treatment
- School (not high school)
- Court ordered probation activities
- DMV
- 3 hours
- Medical
- Child care

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Referral for additional treatment

- Preliminary screening part of the course
- If your client is referred for an evaluation, person must go to an approved provider under OASAS -- <http://www.oasas.ny.gov>
- Advise your clients about the possible referral

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20-day Order

- Issued at the time of sentencing by the Court
- Stays the suspension/revocation
- Ability to enroll in the IDP and obtain conditional license without losing driving privileges
- Generally, Courts will issue the 20-day Order if your client is eligible
 - Fine/surcharge

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Eligibility for a 20-day Order

- If eligible for the IDP and a conditional/restricted = 20-day stay
- Irrelevant if suspended/revoked
- A defendant convicted of a felony may still be eligible
- VTL § 1193(2)(d)(2) -- not eligible if:
 - manslaughter/homicide, or
 - (2) prior conviction within past 5 years

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Chemical test refusals and 20-day Orders

- Facts:
 - Your client is charged with DWI and he is alleged to have refused the chemical test. He enters a plea to DWAI at the arraignment. Is he eligible for the 20-day Order?
 - Yes, however, he is unable to drive while there is a temporary suspension.

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20-day Orders cont'd

- If you appear at the refusal hearing and the officer fails to appear, the temporary suspension is lifted = 20-day
- If your client is revoked at the refusal hearing, the 20-day Order is a nullity

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Underage offender

- Zero tolerance --
VTL § 1192-a
- Youthful offender
- DWAI



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Zero tolerance

- 6-month suspension of driver's license
- Civil penalty of \$125
- Likely eligible for the IDP and a conditional license
- No plea in criminal court
- Sealing of records after 3 years or 21, whichever period of time is greater

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New York State Department of Motor Vehicles
Traffic Hearings



**WAIVER OF 1192-a HEARING IN SATISFACTION
OF 1192(1) CHARGE**
(Person under 21)



To: Commissioner of Motor Vehicles

Motorist Name: _____

Date of Birth: _____ Client ID No. _____

Ticket No. _____

On _____, I was arrested in the city/town/village (*circle one*) of _____
in the County of _____, New York by a member of _____
(Police Agency)
on a charge of driving while ability is impaired (a violation of subdivision one of Section 1192 of the New York State Vehicle and Traffic Law).

By signing this document in satisfaction of this charge, I agree to be subject to action by the Commissioner of Motor Vehicles pursuant to Section 1194-a of the Vehicle and Traffic Law, and I waive any right to a hearing under such section. I understand that this waiver has the same force and affect as being found guilty of a violation of Section 1192-a of the Vehicle and Traffic Law (operating a motor vehicle after having consumed alcohol).

I understand that my license will be suspended for six months (or revoked for at least one year if I have any prior alcohol-related offenses) and that I must pay the Commissioner of Motor Vehicles a civil penalty of \$125 and a suspension termination fee of \$100 before my license can be restored. I also understand that I will be subject to increased sanctions if I commit more violations of Section 1192 or Section 1192-a of the Vehicle and Traffic Law.

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Underage offender

- Convicted of alcohol offense or adjudicated youthful offender
- Driver's license *revoked* for at least 1 year
- Likely eligible for the IDP and a conditional license

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Ignition interlock device ("IID")

- Definition
 - BAC measuring device connected to a motor vehicle and prevents vehicle from starting without first determining that the BAC level does not exceed calibrated setting
 - .025% BAC



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Who is required to install and maintain an IID?

- Misdemeanor DWI;
- Y/O adjudication for DWI (11/01/13);
- Felony DWI; or
- Any other crime in either the VTL or Penal Law of which an alcohol-related violation of VTL § 1192 is an essential element

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Who *may not* be required to install an IID?

- DWAI -- VTL § 1192(1);
- DWAI Drugs -- VTL § 1192(4); or
- DWAI Combined Influence -- VTL § 1192(4-a)
- People v. Levy, 91 A.D.3d 793, 938 N.Y.S.2d 315 (2d Dep't 2012)

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What if your client owns a vehicle but cannot drive?

Condition imposed on any vehicle(s) you own or operate -- not access

- Imposed *regardless* if your client can operate a vehicle
- If your client is sentenced to probation, they may want to sell the vehicle(s) prior to being sentenced

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How long does your client have to install the IID?

- 10 business days from sentencing
- Cannot drive during those 10 days without an IID
- Must provide proof to the monitor within 3 business days of installation

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When should the IID be installed?

- Have your client install the IID prior to sentencing
 - Allows the client to drive away from Court
 - Minimizes potential violations
- Make sure your client contacts the monitor

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How long is the IID condition imposed?

- Effective November 1, 2013, the IID is imposed for no less than 12 months
- However, IID restriction **shall terminate upon proof of installation for at least 6 months**
- Unless the court ordered such person to install the IID for a longer period
 - Probation term

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How much does the IID cost?

- Approximately \$100-\$125 installation and \$100-\$120 per month
 - Maximum Fee Schedule
- Financial disclosure form -- must be done prior to
 - DPCA-500IID-FDR
 - 9 NYCRR § 358.8
 - Submit 3 copies

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Blowing into the IID

- Start-up test
- Rolling test within 5-15 minutes
- Subsequent rolling tests not to exceed 30 minutes



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What happens if you test positive or miss a test?

- Start-up retest is required within 5-15 minutes of missed/failed start-up test
- Rolling retest within 1-3 minutes after missed/failing rolling test

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Lockout mode

- Failed start-up retest
- Missed start-up retest
- Failed rolling retest
- Missed rolling retest
- Missed service visit



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Duty of IID monitor to report defendant to Court and DA

- Failed to have IID installed
- Failed to comply with service visits
- Tampering/circumventing
- Lockout mode
- Positive test of .05% BAC or higher (Conditional Discharge/Probation)

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What happens when the Court is notified of an alleged violation?

- IID condition lengthened
- Alcohol treatment
- Jail

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Handling traffic tickets -- what you need to know

- Client's driving history -- possibly
lifetime record (MV-15)
 - Accident
 - Alcohol involvement
- Office policies

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Courts outside of the 5 boroughs and Rochester

- Plea bargaining
- The goal is a non-moving, 0-point violation

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Contacting the Court

- Letter of representation
- Enter plea of "not guilty"
- Request supporting deposition
- Plea by mail/in person

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Sample letter of representation

Dear Sir/Madam:

Please be advised that this office has been retained to represent ----- with regard to the above-referenced matter. In this regard, please accept this letter as an entry of a plea of "not guilty" on ----- behalf.

In addition, I am requesting that a copy of the ticket and supporting deposition be faxed to our office at the Court's earliest convenience.

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Correspondence from the Court

- Notifies you of the next date
- Allows time to negotiate

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Negotiating with the prosecutor by mail

- Copy of the ticket/supporting deposition
- Driver's abstract
- Proof of insurance, if accident
- Brief explanation

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3/13/2019

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Sample letter to the prosecutor

Please be advised that this firm represents ---- with regard to the above-referenced matter. In this regard, enclosed please find:

- a copy of ----- "clean" driving abstract;
- a copy of the ticket and supporting deposition; and
- a self-addressed, stamped envelope.

There was no accident or alcohol involvement in this case. Accordingly, would you please consider reducing the charge to a violation of VTL § 1201(a).

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3/13/2019

Negotiating in person

- Be prepared to provide the following:
 - Driver's abstract
 - Proof of insurance
 - Whether there was alcohol involvement
- Waiver of appearance (notarized)

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Waiver of appearance

I, -----, the above-named defendant, whose address is -----, New York ----- hereby waive my right to personally appear in Court on the charge of Speed in Zone, in violation of Vehicle and Traffic Law ("VTL") § 1180(d), currently pending against me. I authorize the law firm of Gerstenzang, Sills, Cohn & Gerstenzang, my attorneys, with offices at 210 Great Oaks Boulevard, Albany, New York 12203, to proceed on my behalf in this matter without my presence, to negotiate a plea bargain on my behalf, and to enter a plea in accordance therewith.

56
3/13/2019

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What is a supporting deposition?

- Supplements the ticket
- Supports or tends to support the charge

57
3/13/2019

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supporting deposition?

- Must request within 30 days after the defendant is directed to appear
- Officer must serve the supporting deposition within 30 days of request to Court
- Officer must file proof with the Court

58
3/13/2019

58



LOCAL CRIMINAL COURT
STATE OF NEW YORK
THE PEOPLE OF THE STATE OF NEW YORK
VS

COUNTY OF _____

UTT NUMBER _____

Officer _____ of the NEW YORK STATE POLICE

a Police Officer and the Complainant alleges that the Defendant committed a violation of:

1. VTL Section _____ Description _____

2. Date _____ Time _____ C/T/V of _____

3. Vehicle Year _____ Make _____ Color _____
License Plate No. _____ State NY

4. General Direction of Travel by Defendant _____

5. Highway (Type/Name) _____

6. Defendant's Speed: _____ MPH in a _____ MPH Zone

7. Charge based on Officer's _____

8. Speed Verified By _____ Model _____

9. Additional Information: _____

TO THE ABOVE NAMED DEFENDANT:
PLEASE TAKE NOTICE THAT PURSUANT TO SECTION 710.30(1)(A) OF THE CRIMINAL PROCEDURE LAW, THE PEOPLE
INTEND TO OFFER AT A TRIAL OF THE ABOVE ENTITLED ACTION EVIDENCE OF A STATEMENT MADE BY YOU
on _____ at _____ To _____
_____ a public servant,
IN WHICH YOU SUBSTANTIALLY STATED AS FOLLOWS:

FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A
MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW OF THE
STATE OF NEW YORK.
Affirmed Under Penalty of Perjury

59

Move to dismiss

- Failure to provide a timely supporting deposition
- Facially insufficient

60
3/13/2019

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The DMV Point System

- There are 2 important rules you **must** remember
 - 11 points is too many
 - Avoid 3 speeding tickets in 18 months

61
3/13/2019

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How the DMV calculates points

- Violation date -- not conviction date
- Last 18 months

62
3/13/2019

What happens if your client has 11 or more points in 18 months?

- Persistent violator = suspension
- DMV offers plea bargain
- 31-day suspension



63
3/13/2019

63

Why 31 days?

- Eligibility for restricted use license
- Plea bargain with the DMV

64
3/13/2019

64

Point & Insurance Reduction Program

- Eligible for the course every 18 months
- Up to 4 points in the last 18 months
- Reduces insurance premiums by a minimum of 10% of base rate for 3 years
- Convictions are not removed

65
3/13/2019

65

When should your client take the course?

- Within 18-months of the *violation* date
- You can take it prior to the conviction being entered

66
3/13/2019

Driver Responsibility Assessment

- 6 points in any 18-month period
- \$100 each year for the next 3 years
- \$25 for each additional point
- Completion of course will not reduce the calculation of points

67
3/13/2019

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3 speeds within 18 months

- 6-month license *revocation*
- Likely eligible for a restricted use license

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3/13/2019

68



Restricted use license

- Employment
- Accredited school, university or state approved institution (not high school)
- DMV
- Medical examination or treatment (for self and members of household)
- Child care

69
3/13/2019

69

Traffic Violations Bureau ("TVB")

- Non-criminal traffic cases handled
of Motor Vehicles
- New York City and Rochester
- TVB Ticket Management for
Attorneys

70
3/13/2019

70

Plea bargaining at the TVB?

- Very different system from upstate system
- No plea bargaining
- hearing

71
3/13/2019

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How long do most convictions stay on the driving record?

- Calendar year plus 3
- Alcohol convictions remain on driving record for at least 10 years

72
3/13/2019

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Contact information

Joseph Gerstenzang

Gerstenzang, Sills, Cohn

& Gerstenzang

(518) 456-6456 (o)

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3/13/2019

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**Immigration 2019 –
Basics for New Attorneys**



IMMIGRATION LAW 101

WHAT NEW YORK LAWYERS NEED TO KNOW WHEN ADVISING CLIENTS

Basic Primer on Immigration Law

New York State Bar Association – Bridging the Gap
March 22, 2019

Mary E. Armistead, Esq.
Equal Justice Works Crime Victims Justice Corps Fellow
THE LEGAL PROJECT

This program is supported by a subaward from Equal Justice Works as part of an original award from the U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, Award Number 2017-MU-MU-K131. The opinions, findings, conclusions or recommendations expressed are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice or Equal Justice Works.

1



AGENDA

- Understanding the Immigration System
- Determining Immigration Status
- The
- Understanding Immigration Enforcement
- Immigration Related Developments and Policy

2



3

STATISTICS

- 40.3 million victims of human trafficking globally. (International Labor Org.)
 - 81% forced labor.
 - 25% children.
 - 75% women and girls.
- Hundreds of thousands in the U.S. (Polaris)
- California, Florida, and New York particularly vulnerable
 - Proximity to international borders
 - Numerous ports of entry
 - Significant immigrant populations
 - Large economies including industries that attract forced labor

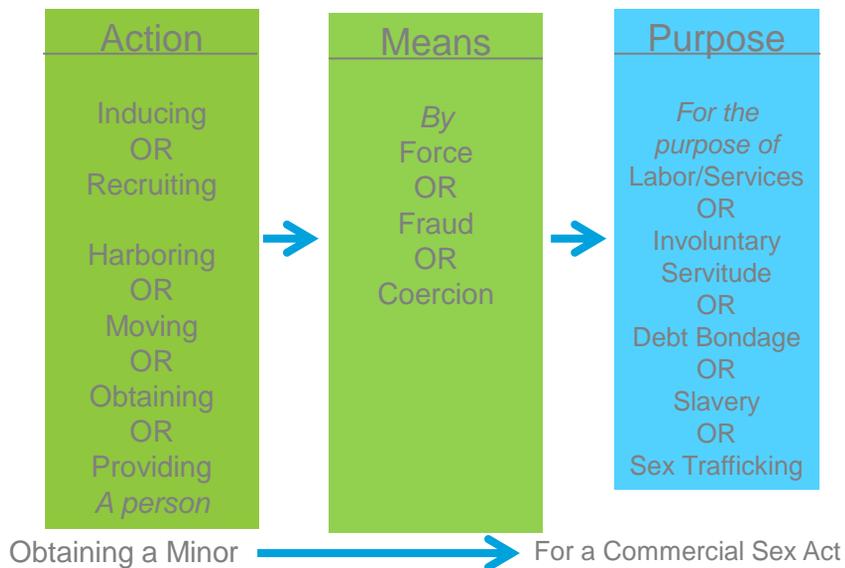
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WHAT IS HUMAN TRAFFICKING?

- The exploitation of human beings through force, fraud or coercion for the purposes of commercial sex or forced labor.
- Through physical restraint, coercion, fear, or intimidation
 - Threats of deportation
 - Debt bondage (commonly, fees associated with immigration applications)
 - Lack of viable alternatives (especially for undocumented immigrants with no viable work alternatives)

5

ACTION-MEANS-PURPOSE (AMP) MODEL



6

COERCION

- 22 USC 7102(3) defines “coercion:”
 - Threat of serious harm to or physical restraint against a person
 - Serious harm need not be physical, e.g. reputation (be sure to use the relevant cultural lens)
- OR
- Any scheme, plan, or pattern intended to cause a person to believe that failure to act would result in serious harm or physical restraint
- OR
- Abuse or threatened abuse of legal process
 - E.g. threats of deportation

7



8

IMMIGRATION LAWS AND POLICY

- **Statutes:** 8 U.S.C. § 1101 (THE IMMIGRATION AND NATIONALITY ACT (“INA”) § 101)
- **Published Regulations:** 8 CFR, (i.e., Chapter I – Department of Homeland Security (Immigration and Naturalization), (Amended 6/13/03; [68 FR 35273](#)) (Amended 2/28/03; [68 FR 9824](#))
- **Caselaw:** Administrative (i.e., USCIS and Executive Office for Immigration Review) and Judicial Opinions (i.e., US federal courts)
- **Other:** Agency Manuals, Policy Memos and Executive Orders, etc.

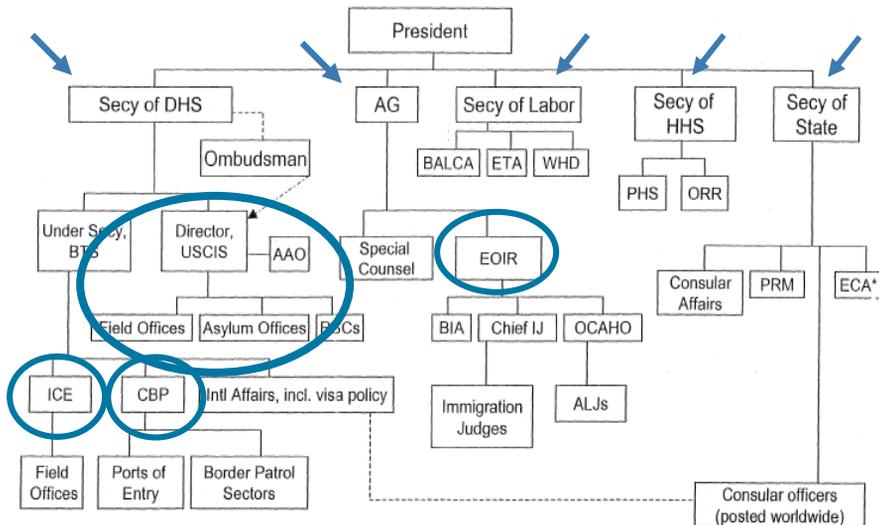
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HOMELAND SECURITY ACT (2002)

- Abolishes the need for Immigration and Naturalization Service (“INS”)
- Creates a Secretary for Department of Homeland Security (“DHS”)
- address issues of national security

10

Executive Branch Agencies: Immigration & Citizenship



11

THREE PRIMARY IMMIGRATION DEPARTMENTS

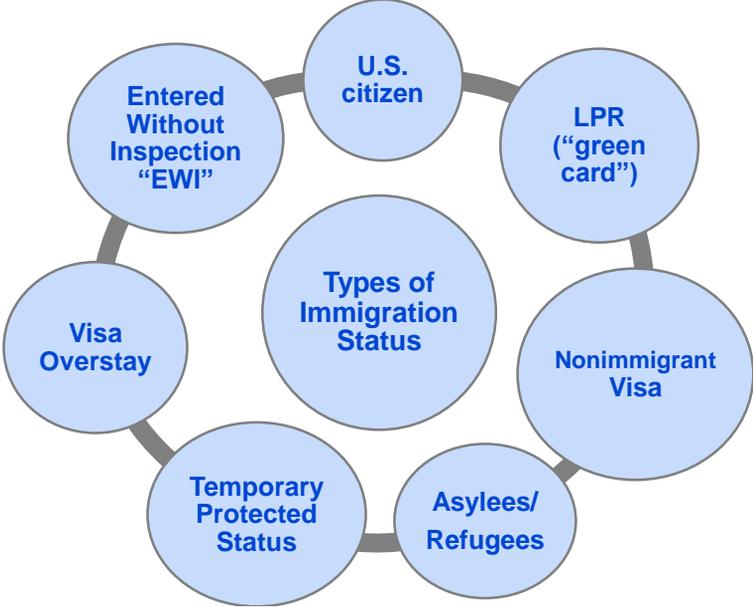
- Department of Homeland Security, charged with enforcing immigration laws, houses:
 - Immigration and Customs Enforcement (ICE), houses Customs and Border Patrol (CBP)
 - responsible for locating, arresting, and charging individuals who are within the US without documentation
 - United States Citizenship and Immigration Services (USCIS):
 - oversees lawful immigration to the US, and is charged with processing immigrant visa petitions, naturalization petitions, and asylum & refugee applications
- Executive Office for Immigration Review (EOIR) housed in the Department of Justice (DOJ), under AG:
 - home of Immigration Courts, wherein immigration judges (IJs) preside over removal hearings, and the Board of Immigration Appeals (BIA), which reviews IJ decisions & administrative decisions by DHS officers

12



13

**CLIENT INTAKE
KNOWING A CLIENT'S STATUS IS CRITICAL**



14

INVESTIGATE & RECORD THE FACTS

First, determine whether the person is a US Citizen (USC):

■ASK “WHERE WERE YOU BORN?”



■ANSWER: UNITED STATES

■ANSWER: NOT THE UNITED STATES?

Determine if NATURALIZED U.S. CITIZEN or DERIVATIVE U.S. CITIZEN or other immigration status

15

CITIZENSHIP BY TREATY

- **Puerto Rico:** as of April 11, 1899
- **Alaska:** as of March 30, 1867 (except Native Americans until June 2, 1924)
- **Hawaii:** as of April 30, 1900
- **Virgin Islands:** as of January 17, 1917
- **Guam:** as of April 11, 1899
- **US nationals:** America Samoa & Swain Island
- **Canal Zone & Panama:** Born between February 26, 1904 and October 1, 1979; if born in Canal Zone, one parent need only be USC; if born in Republic of Panama, one parent must be USC AND employed by US government OR Panama Railroad Co.

16

DERIVATIVE CITIZENSHIP: CHILD CITIZENSHIP ACT OF 2000

Pursuant to INA §320, a child is a US citizen if,
as of February 27, 2001:

- child is UNDER 18 yrs of age and
- One parent is a U.S. citizen (i.e., biological or adoptive parent if adoption completed before child was 16 yrs of age) and
- The child is residing in the legal and physical custody of the U.S. citizen parent and
- The child was lawfully admitted to the U.S. as an immigrant (i.e., admitted for LPR status). 

NOTE: If client is 18 yrs or older as of 02/27/01 – refer to Citizenship Chart

17

ACQUISITION OF CITIZENSHIP

- Children born outside of the US who acquire citizenship at birth
 - At least one of the USC parents must have resided within US or territory;
 - If only one USC parent, residence must have been for certain length of time
- Children born outside of the US and born out of wedlock to non-citizen mother (father not on BC)
 - Paternity must be established, usually before age 18
- Children with Lawful Permanent Resident (i.e., green card) status acquiring citizenship based on naturalization of parent(s) if before 18

Immigrant Legal Resource Center – Quick Reference Charts:
<https://www.ilrc.org/acquisition-derivation-quick-reference-charts>

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ACQUIRING CITIZENSHIP THROUGH THE NATURALIZATION PROCESS

Lawful Permanent Residents can become Citizens:

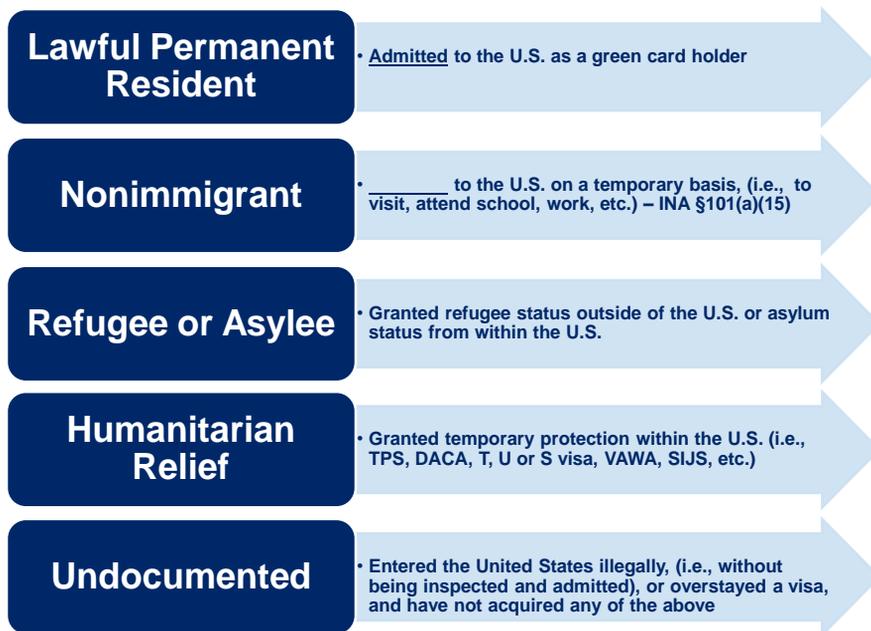
- Filing is done on a Form N-400, **Application for Naturalization** (i.e., income taxes, employ't, etc.)
- **Biometrics (fingerprints)** and a security clearance must be completed before naturalization application can be adjudicated
- Provided with **US civics/history test** and **English competency test** (exceptions: longtime LPR or medical disability or veteran)
- Must attend **swearing-in ceremony**

19

IF NOT A U.S. CITIZEN....



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SCREENING CLIENTS FOR IMMIGRATION-RELATED ISSUES

- Where were you born?
- What is your date of birth?
- What is your current immigration status? Since when [date]?
- When did you come to the U.S. [date]?
- How did you enter the U.S.? In what status? (e.g. green card, visa, undocumented)
- Do you have an immigration number (A number)? If so, what is it?
- Have you had past contact with immigration?
- Do you have any pending immigration applications? If so, what and where are you in the process? (receipt number) (www.uscis.gov)
- Is there a deportation case against you? ([EOIR Hotline 1-800-898-7180](https://www.eoir.gov/EOIR_Hotline))
- Immigration status of mother/father; legal spouse/partner; children

NOTE: Photocopy any documentation client has of immigration status.

Helpful Resource: Immigration Status Guide for Assigned Counsel, Immigrant Defense Project – Padilla Support Center available at <https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-Immigration-Status-101-Oct-2017.pdf>

22

LAWFUL ADMISSION TO THE U.S.



25

ADMISSION REQUIREMENTS

*Every non-citizen must present themselves at a Port of Entry (POE) and apply for admission

“**Application for admission**” is an application for admission into the United States and not an application for the issuance of an immigrant or nonimmigrant visa.

But, must also prove “admissibility” if already in US and applying for visa

Illegal entrance may be waived or can apply for waiver

INA §101(a)(13) defines “**admission**” and “**admitted**” to mean, with respect to an alien,

- **lawful entry** into the United States
- **after inspection and authorization by an immigration officer.**
 - INA §101(13)(B) An alien who is “**paroled**” (i.e., INA §212(d)(5)) or permitted to land temporarily as an “**alien crewman**” shall **not** be considered to have been **admitted**.

Admitted v. Paroled v. Permitted to Temporarily Land

26

ADMISSION REQUIREMENTS

Burden of Proof is on Person seeking Admission:

1. **Statutory qualifying requirements are met and**
2. **NOT inadmissible (pursuant to INA §212(a))**

Presumption = those seeking “admission” presumed
“IMMIGRANTS” (INA §214(b))

- look at **“intent”** at time of admission (i.e.,
“Immigrant” defined in **INA §101(a)(15)(A)-(V)**)

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ADMISSION REQUIREMENTS

Example of Statutory Requirements

INA 101(a)(15)(F) – Foreign Student:

- (i) “an alien **having a residence in a foreign country** which he has **no intention of abandoning**, who is a **bona fide student** qualified to pursue a **full course of study** and who seeks to **enter the United States temporarily** and **solely for the purpose of pursuing such a course of study** consistent with section 214(l) at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, **which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student**, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn,
- (ii) the **alien spouse and minor children** of any alien described in clause (i) **if accompanying or following to join** such an alien, and
- (iii) an alien who is a **national of Canada or Mexico**, who **maintains actual residence and place of abode in the country of nationality**, who is described in clause (i) except that the alien's qualifications for and actual course of **-time**, and who commutes to the United States institution or place of study from Canada or Mexico;

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DEFINITION OF “ADMISSION” FOR LAWFUL PERMANENT RESIDENTS

INA §101(a)(13)(c): Lawful Permanent Residents are not seeking admission to the United States if they have NOT:

- Abandoned or relinquished LPR status
- Been absent for continuous period of more than 180 days
- Engaged in illegal entry abroad
- Departed the US while in removal proceedings
- Committed an offense identified in INA §212(a)(2)
- Entered at an undesignated time and place

(**Note:** If inadmissibility goes undetected at time of admission, INA §237(a)(1)(A) charges deportation if noncitizen was inadmissible at the time of admission or adjustment of status.)

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IF INADMISSIBLE AT POE

- ▶ **WITHDRAW APPLICATION FOR ADMISSION:** Ask to
- ▶ **DEFERRED INSPECTION:** Permitted to enter US but will be later inspected by US CBP or to US CIS (discretionary when documentation of status not available)
- ▶ **PAROLE STATUS:** Permit physical entry into the US without granting any lawful immigration status to applicant (discretionary: may be granted for humanitarian reasons)
- ▶ **CHARGED WITH REMOVAL:** Charged with inadmissibility pursuant to *INA §212; 8 USC 1182.*
 - ▶ **CREDIBLE FEAR INTERVIEW:** Fear of persecution.
- ▶ **EXPEDITED REMOVAL:** Ordered removed without a hearing.

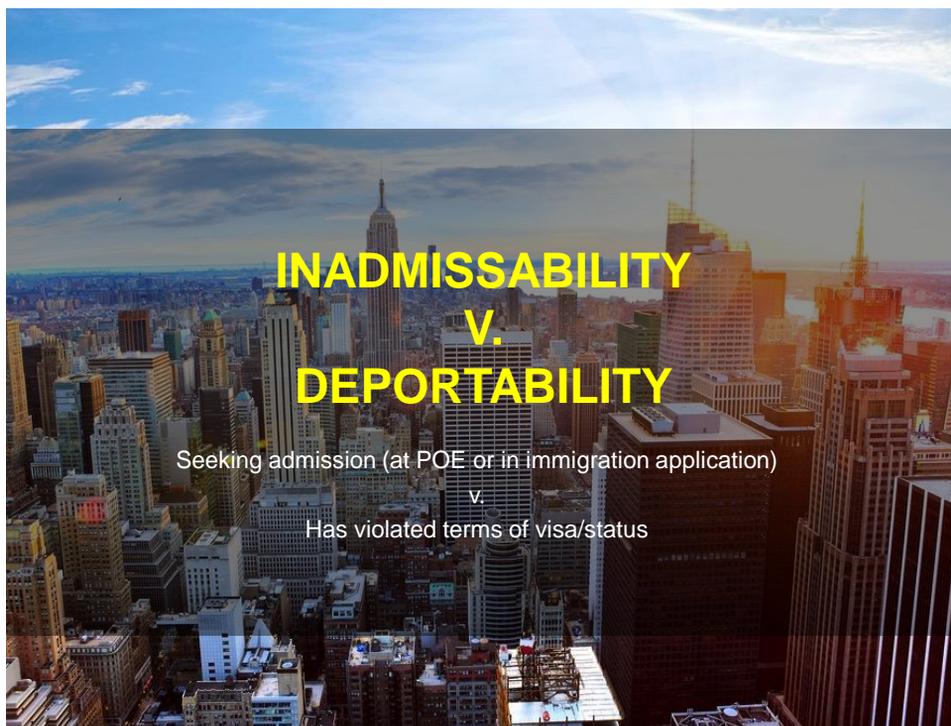
(See *INA §235; 8 USC §1225*)

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EXPEDITED REMOVAL (at POE or INSIDE U.S.)

- **Not** admitted or paroled into the U.S. for less than 2 years
- Inadmissible for either:
 - fraud or misrepresentation to procure immigration benefit; or
 - lacking a valid visa or other entry document
- Under Obama and earlier administrations, limited (e.g. Obama 2 weeks and within 100 miles of border), but Trump administration expanded to full statutory allowance
- Review by an Immigration Judge **ONLY IF**:
 - Claim of asylum (i.e., claim of fear of persecution/torture); or
 - Claim of LPR, refugee, asylee status or U.S. citizen
- Detained without bond – **NOT** eligible for parole (i.e., except as matter of limited discretion – medical emergency or for law enforcement purpose)

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DEPORTATION VS. INADMISSIBILITY

DEPORTATION	INADMISSIBILITY
LPR's ("Greencard Holder")	Refugees & Asylees, Undocumented, Non-LPRs
Nonimmigrants (ex. visitors, students, workers on valid status)	Returning LPR's (Green Card Holders) (i.e., even after brief departure from U.S.)
Visa "Overstayers" (ex. overstayed authorized period of stay in U.S.)	Nonimmigrants (i.e., persons seeking permission to visit, work or go to the school in the U.S.)

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INADMISSIBLE GROUNDS INA § 212; 8 USC § 1182

- **Health-related** (i.e., communicable diseases, vaccinations, physical or mental disorder, drug abuse or addict)
- **Criminal-related** (i.e., admit to or convicted of crimes involving moral turpitude (CIMT), controlled substances, prostitution, gambling, reason to believe drug trafficker, etc.)
- **National Security-related** (i.e., espionage, sabotage, terrorist activities, etc.)
- **Public Charge-related** (i.e., likely at any time to become a public charge...")
- **Illegal Immigrants and Immigration Violators-related** (i.e., present without authorization, failure to attend hearing, fraud or willful misrepresentation, false claim to US citizenship, etc.)

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INADMISSIBLE GROUNDS INA § 212; 8 USC § 1182

- **Documentation Requirement-related** (i.e., not in possession of valid immigration-related documents)
- **Draft Evaders**
- **Unlawful Presence-related** (i.e., 3- and 10-year bar)
- **Practicing Polygamists**
- **International Child Abduction**
- **Unlawful Voters**
- **Renounced US citizenship for tax evasion**

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DEPORTATION GROUNDS INA § 237; 8 USC § 1227

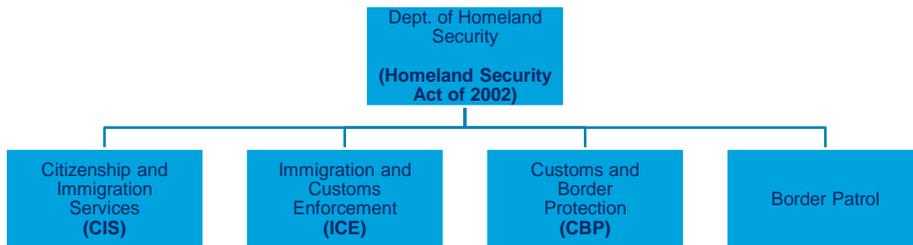
- **Inadmissible at Time of Entry or Adjustment of Status or Violates Status** (i.e., unlawful entry, marriage fraud, smuggling, etc.)
- **Criminal-related** (i.e., aggravated felony, crime involving moral turpitude (CIMT), controlled substances, firearm-related convictions, domestic violence, stalking, crimes against a child and violations of orders of protection, high speed flight, failure to register as a sex offender, etc.)
- **Failure to Register and Classification of documentation**
- **Security-related** (i.e., terrorist and national-security grounds)
- **Public Charge-related** (i.e., deportable within 5 years of admission)
- **Unlawful Voters**

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WHO IS AUTHORIZED TO ENFORCE US IMMIGRATION LAWS?



Immigration Detainer (immigration “hold”) lodged by ICE.

Protecting the Administration of Justice in New York State: Impact of ICE Arrests on New Yorkers' Access to State Courthouses,
<http://moderncourts.org/wp-content/uploads/2017/12/Modern-Courts-Report-December-2017-ICE-> -NY-COURTHOUSES2-1.pdf

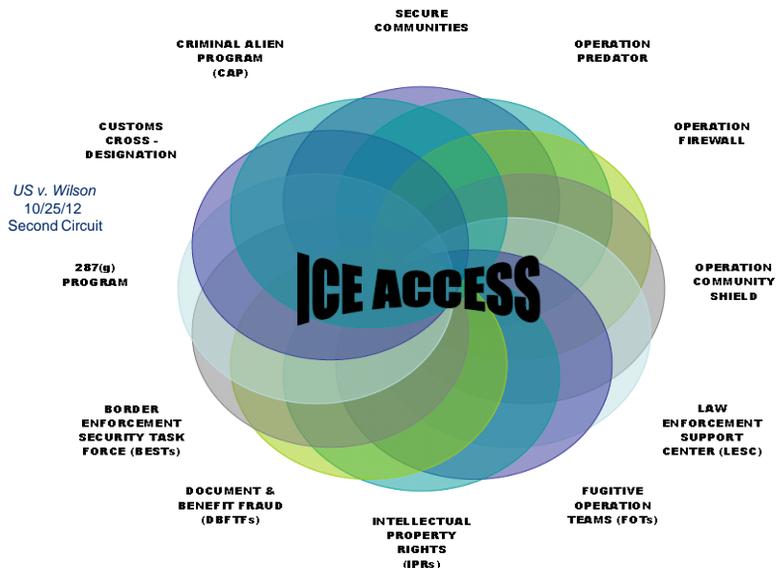
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NATIONAL SECURITY DATABASES

CLASS	DOS Consular Lookout and Support System – flag dangerous and other inadmissible persons
IBIS	CBP’s Interagency Border Inspection System – consolidates records from 20+ federal law enforcement and intelligence for “interoperability” (i.e., more extensive screening at admission)
TSC	(2003) FBI’S centralized Terrorist Screening Center
ASC	CIS Application Support Centers (digital fingerprints/photos)
APIS	Advance Passenger Information System for airlines/vessels
NSEERS	“special registration” for new arrivals and “call-in registration”
US-	Visitor and Immigrant Status Indicator Technology to create an automated entry and exit control system at POE’s
SEVIS	Student and Exchange Visitor Information System that monitors students and exchange visitors (F, J and M) from time of receiving documents to time of graduating and leaving school.

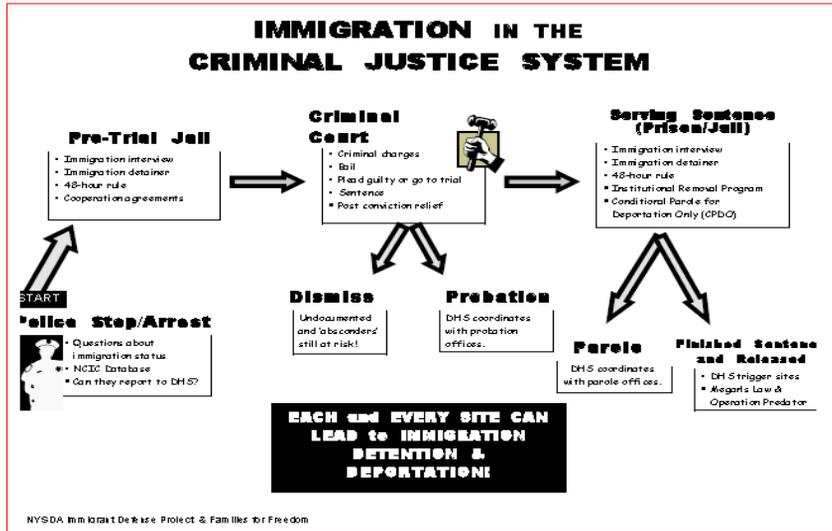
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ICE ACCESS = AGREEMENTS OF COOPERATION IN COMMUNITIES TO ENHANCES SAFETY AND SECURITY



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IMMIGRATION WITHIN THE CRIMINAL JUSTICE SYSTEM



41

WHAT IS AN IMMIGRATION DETAINER (FORM I-247)?

- **IMMIGRATION DETAINER** is a “hold” that will prevent a client’s release from state or local jail/prison
- Pursuant to 8 C.F.R. Sec. 287.7(a):
*“... is a **request** that such agency **advise** the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate custody is either impracticable or impossible.”*
(emphasis added)

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WHAT IS AN IMMIGRATION DETAINER (FORM I-247)?

- Pursuant to 8 C.F.R. Sec. 287.7(d):
“... such agency shall maintain custody of the alien for a period **not to exceed 48 hours**, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.” (emphasis added)

(See NYSDA Advisory, “Immigration Detainers: What You Need to Know” at <http://www.nysda.org/docs/PDFs/CIDP/NYSDA%20DETAINER%20ADVISORY.pdf>)

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ICE “HOLDS” ARE _____ MANDATORY

“While immigration detainers are an important part of ICE’S effort to remove criminal aliens who are in Federal, state or local custody, they are **not mandatory as a matter of law.**”

Letter to Congressman Mike Thompson (CA -5th District)
From ICE Deputy Director, Daniel Ragsdale
February 25, 2014

See also [Liranzo v United States](#) (690 F3d 78, 82 [2d Cir 2012]) ;
[Galarza v Szalczyk](#) (No. 12-3991, 2014 US App LEXIS 4000 [3d Cir 3/4/14]);
[Miranda-Olivares v. Clackamas County](#), 2014 WL 1414305 (D. Or.)

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IMMIGRATION DETAINERS

PEP Terminated, Replaced by SCP

- **Termination of Priority Enforcement Program (PEP)**
 - Enabled DHS to work with state and local law enforcement to take custody of individuals who posed a public safety risk before being released into the community
 - Focused on those convicted of *significant* criminal activity or threat to public safety
 - ICE issued a detainer only where an individual fit within the narrower DHS enforcement priorities and ICE has probable cause that the individual is removable

- **Restoration of Secure Communities Program**
 - Previously discontinued and replaced by PEP
 - ICE to issue a detainer when it has reason to believe that an individual is removable and falls within one or more of the new, broad enforcement priorities
 - Any immigrants who is “removable,” i.e. has a final order of deportation, is undocumented, or has criminal convictions/allegations (even if LPR)

- **Exercise of prosecutorial discretion on a case-by-case basis**

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INCREASED IMMIGRATION ENFORCEMENT & THE CRIMINAL JUSTICE SYSTEM

INDIVIDUALS WHO ARE IMMIGRATION ENFORCEMENT PRIORITIES

Those IN VIOLATION of U.S. immigration laws	Those who MAY BE in violation of U.S. immigration laws
<ul style="list-style-type: none"> • Subject to removal for criminal grounds of deportation, (i.e., convicted of deportable crimes such as an aggravated felony, controlled substances offense, a crime involving moral turpitude (CIMT), firearm offense, crime of domestic violence, stalking or a crime against child); • Subject to removal for criminal grounds of inadmissibility, (i.e., admission to or conviction of certain CIMTs and controlled substance offenses); • Subject to removal for deportable or inadmissible security-related (i.e., national security) grounds; • Subject to removal for inadmissible grounds related to fraud or misrepresentation; or • Subject to “expedited” removal (i.e., entered the U.S. without inspection within a 2-year period). 	<ul style="list-style-type: none"> • have been convicted of any criminal offense; • have been charged with any criminal offense, where such charge has not yet been resolved; • have committed acts that constitute a chargeable criminal offense; • have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency; • have abused any program related to receipt of public benefits; • are subject to a final removal order, but have not complied with departing the U.S.; or • in the judgement of an immigration officer, otherwise poses a risk to public safety or national security.

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INA §287(g) PROGRAM

- **Expansion of INA § 287(g) Program:** Allows a qualified state or local law enforcement officer to be designated as an “immigration officer” for the purposes of enforcing federal immigration law
 - Authority to **investigate, identify, apprehend arrest, detain, transport, and conduct searches** authorized under the INA 287(a)
 - 32 law enforcement agencies in 16 states currently participate in the program
- Under Section 287(g), the Secretary of Homeland Security is authorized to **enter into agreements with state and local law enforcement agencies** for the purpose of **delegating immigration enforcement functions** to select officers.
 - (Note: The text of 8 U.S.C. 1357(g) specifically names the Attorney General, rather than the Secretary of DHS, as having the authority to enter into an MOA with an LEA but this and other enforcement functions were transferred to DHS pursuant to the Homeland Security Act of 2002 (i.e., see 6 U.S.C. 251)).
- 1996 (IIRIRA) added section 287(g) to the Immigration and Nationality Act. at a time when the DOJ recognized no inherent authority for state and local law enforcement authorities to enforce federal immigration laws.
- A 2002 opinion from the DOJ Office of Legal Counsel (OLC), however, reversed that earlier position, and concluded that state and local law enforcement authorities do have such inherent authority.

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OTHER ENFORCMENT CHANGES

EXECUTIVE ORDER 13767 BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS

- **Expand Detention Capacity** (34,000 – at 41,000 beds as of Jan. 2017)
- **Conduct Removal Proceedings Outside U.S.**
- **Increase Criminal Prosecutions** of Unlawful Entry (i.e., 8 U.S.C. §1325 Improper Entry by Alien and 8 U.S.C. §1326 Reentry After Deportation)
- **Additional Immigration Officers**
 - DHS to hire **10,000** immigration officers; **5,000** Border Patrol Agents; and **500** Air & Marine Agents/Officers
 - **Expansion of Fraud Detection and National Security (FDNS)**
 - Focus on detecting and preventing fraud in the asylum and benefits adjudication processes
 - **Expansion of Consular Fellows Program**
 - DOS directed to hire and train additional Fellows

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RECENT “NOTICE TO APPEAR” POLICY MEMORANDUM

On June 28, 2018, USCIS issued a new Notice to Appear (NTA) policy memorandum by USCIS for denied applications.

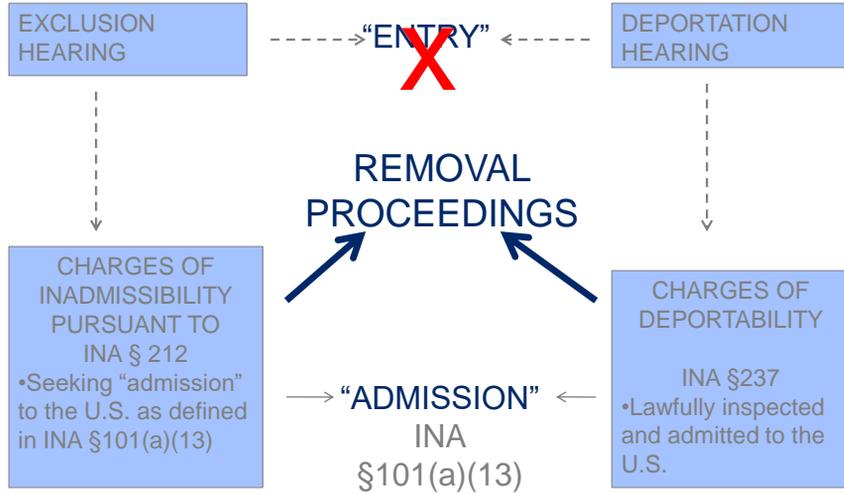
- Starting Oct. 1, 2018, USCIS may issue NTAs on denied status-impacting applications, including, Application for Permanent Residence and Application to Extend/Change Nonimmigrant Status.
- Starting Nov. 19, 2018, USCIS may also issue NTAs based on denials of humanitarian-based forms of immigrations relief.
- USCIS will not implement the June 28, 2018, NTA Policy Memo with respect to employment-based petitions at this time. Existing guidance for these case types will remain in effect

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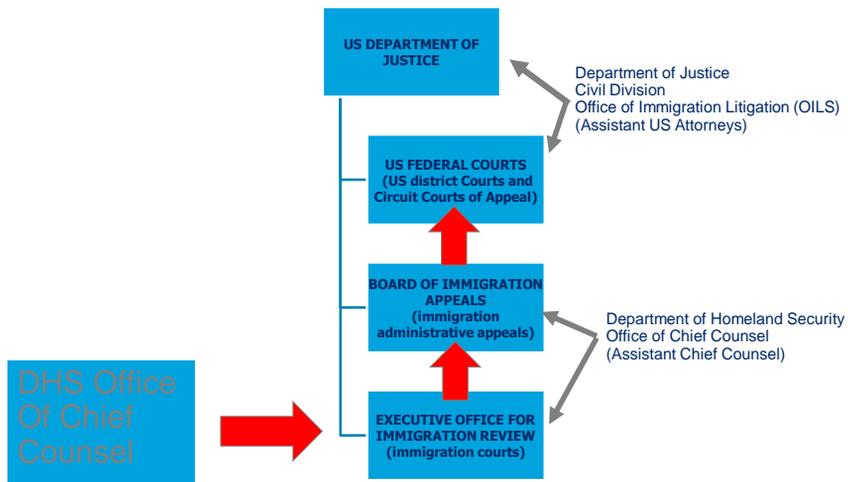
POST- IIRIRA* (1996 TO PRESENT): REMOVAL



*Illegal Immigration Reform and Immigrant Responsibility Act

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IMMIGRATION COURT SYSTEM



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REMOVAL PROCEEDING BASICS

- Administrative proceeding to determine whether an individual is removable under United States immigration law.
Conducted in Immigration Court by an Immigration Judge.
- The immigrant charged with removability is called the respondent.
- Commenced by a Notice to Appear

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SAMPLE "NOTICE TO APPEAR"

U.S. Department of Homeland Security Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: [REDACTED] FILE # 1168563354 Event No. IHC1168563354

DOB: [REDACTED]

In the Matter of: [REDACTED]

Respondent: [REDACTED] currently residing at:

(Number, street, city and ZIP code) (Area code and phone number)

1. You are an arriving alien.
 2. You are an alien present in the United States who has not been admitted or paroled.
 3. You have been admitted in the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of EL SALVADOR and a citizen of EL SALVADOR;
3. You entered in the United States at or near Hidalgo, TEXAS, on or about June 3, 2014;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following section(s) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who entered in the United States at any time or place other than as designated by the Attorney General.

This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
 Section 235(b)(1) unless vacated pursuant to: BCFR.208.30(d)(2) BCFR.215.5(b)(2)(v)

YOU ARE ORDERED to appear before an Immigration Judge of the United States Department of Justice at:

AT A PLACE TO BE SET

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set at a time to be set to show why you should not be removed from the United States based on the charge(s) set forth above.

Date: June 04, 2014 Signature of Issuing Officer

[Signature] **IMMIGRATION BORDER PATROL AGENT**

See reverse for important information Form I-862 (Rev. 06/01/07) 3

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SAMPLE "NOTICE TO APPEAR"

U.S. Department of Homeland Security Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: [REDACTED] FIND #: 1160563354 Event No: HCU1406009204

DOB: [REDACTED]

In the Matter of: [REDACTED]

Respondent: [REDACTED] currently residing at:

(Number, street, city and ZIP code) (Area code and phone number)

1. You are an arriving alien.
 2. You are an alien present in the United States who has not been admitted or paroled.
 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of EL SALVADOR and a citizen of EL SALVADOR ;
3. You entered in the United States at or near Hidalgo, TEXAS, on or about June 3, 2014;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

55

SAMPLE "NOTICE TO APPEAR"

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:
212 (a) (6) (A) (i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who entered in the United States at any time or place other than as designated by the Attorney General.

- This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
 Section 235(b)(1) order was vacated pursuant to: 8CFR 208.30(f)(2) 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
AT A PLACE TO BE SET

on _____ at _____ (Complete Address of Immigration Court, including Room Number, if any)
(Date) (Time) at a time to be set to show why you should not be removed from the United States based on the charge(s) set forth above.

[REDACTED SIGNATURE] SUPERVISORY BORDER PATROL AGENT
(Signature and Title of Issuing Officer)

Date: June 04, 2014 Houston, Texas (City and State)

See reverse for important information

Form I-852 (Rev. 06/01/07) N

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REMOVAL HEARING PROCEDURES

RIGHT TO COUNSEL:

- Have the right to be represented by counsel at no expense to the Government by counsel of the alien's choosing who is authorized to practice in such proceedings (see INA §240(b)(4)(A)).
- If cannot afford legal counsel - must be informed of free legal services in the area (see 8 C.F.R. §240.10(a)(2)).

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COMMON FORMS OF RELIEF

- LPR cancellation
- Former 212(c) waiver
- 212(h) waiver
- Non-LPR cancellation
- Former 10-year suspension
- Withholding of Removal
- UN Convention Against Torture
- Adjustment of status
- Asylum/ Refugee Adjustment
- Temporary Protected Status (TPS)
- Naturalization
- Acquired or Derived Citizenship
- VAWA
- DV waiver for Victims
- Special Immigrant Juvenile
- T and U Visa

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APPLYING FOR STATUS

- **Affirmative**
 - Obtain Visa abroad
 - Consular Process
 - Enter with Inspection

 - Enter without inspection or overstay visa
 - Apply for eligible relief to USCIS (must meet admission requirements)

- **Defensive**
 - Enter with inspection but paroled rather than admitted
 - Placed in Removal Proceedings
 - Apply for eligible relief to USCIS or EOIR (must meet admission req.s)

 - Enter without inspection or visa overstay
 - Detected by ICE
 - Placed in Removal Proceedings before EOIR
 - Apply for eligible relief to USCIS or EOIR (must meet admission req.s)

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CATEGORIES OF IMMIGRANT ADMISSION

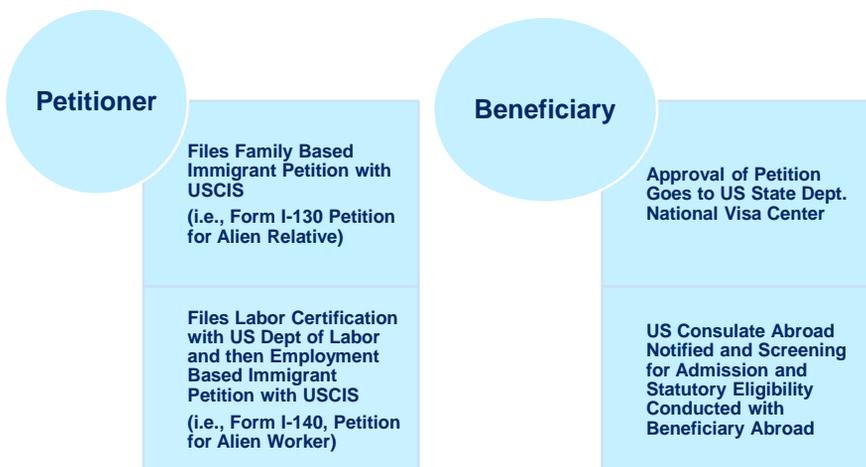
- **FAMILY-BASED PREFERENCE** (FB)
480,000
- **EMPLOYMENT-BASED PREFERENCE** (EB)
140,000
- **DIVERSITY IMMIGRANT PROGRAM** (D)
55,000
- **REFUGEES** (REF)
currently 30,000
- **OTHER HUMANITARIAN IMMIGRATION RELIEF**
Asylum (no cap), TPS (no cap), DACA* (no cap), VAWA (no cap);
U-Visa (10,000), T-Visa (5,000), SIJS (EB4 category),
S-Visa (200 criminal org, 50 terrorist org)

INA §201 (annual quotas), **INA §202** (state quotas) and **INA §203** (preference categories)

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OBTAINING IMMIGRANT VISA FROM ABROAD

See INA §§ 204-206

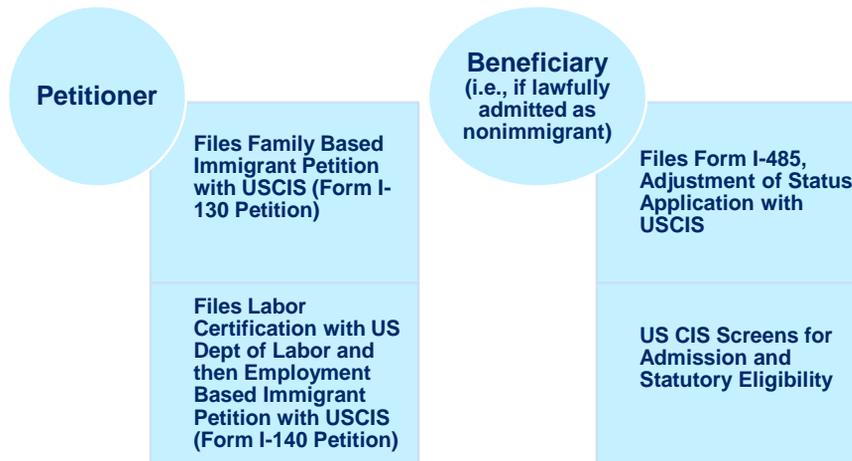


Exception: diversity immigrants and refugee seekers may self-petition

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OBTAINING IMMIGRANT VISA FROM WITHIN US

See INA § 245



Exception: those seeking humanitarian relief (including VAWA, asylum, and more) may self-petition; entrance without inspection may be waived.
Cannot seek Diversity Immigrant visa from within US

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GETTING A GREEN CARD THROUGH FAMILY RELATIVES

“IMMEDIATE RELATIVES” INA §201(b)(2)(A)(i)
(SPOUSE, PARENT OR CHILD OF A U.S. CITIZEN)

Not subject to numerical limitations

- **“Spouse” INA §101(a)(35)**
= “CONDITIONAL LAWFUL PERMANENT RESIDENT” SPOUSE
(i.e., married to US citizen spouse for less than 2 years when lawful permanent residence granted based on marriage)
- **“Parent” INA §101(b)(2)**
= PARENTAL RELATIONSHIP ESTABLISHED WHEN SON/ DAUGHTER WAS A “CHILD”) (*Jus soli [birthplace] citizenship rules*)
- **“Child” INA §101(b)(1)**
= UNDER 21 YRS OF AGE AND UNMARRIED (see INA §
(= **adopted “child”** if adoption completed before child is 16 years of age)

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GETTING A GREEN CARD THROUGH FAMILY RELATIVES (Family Based Preference)

FIRST (1ST) FAMILY-BASED PREFERENCE	Unmarried Son or Daughter of USC	INA §203(a)(1)
SECOND (2ND) FAMILY-BASED PREFERENCE	Spouse and “Child” & Unmarried Son or Daughter of LPR	INA § 203(a)(2)
SECOND (2A) FAMILY-BASED PREFERENCE	Spouse and “Child” of LPR	INA § 203(a)(2)(A)
SECOND (2B) FAMILY-BASED PREFERENCE	Unmarried Son & Daughter of LPR	INA § 203(a)(2)(B)
THIRD (3RD) FAMILY-BASED PREFERENCE	Married Son & Daughter of USC	INA § 203(a)(3)
FOURTH (4TH) FAMILY-BASED PREFERENCE	Brother or Sister of USC (USC sibling must be 21 yrs old +)	INA § 203(a)(4)

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State Department Visa Bulletin Immigrant Family Based Preference Categories MARCH 2019

Above dates = the “Priority Date” = “Receipt Date” of the filed Form I-130, Petition for Alien Relative

<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-march-2019.html>

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REFUGEE/ASYLUM

- Refugee = applying outside US; Asylum= applying within US
- Must meet the definition of a “**refugee**” under the Immigration and Nationality Act.
 - *unable or unwilling to return to home country, and suffered **past persecution** or have a **well-founded fear of future persecution** in home country on account of one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.*
- Persecution feared in home country must be by the government or a **group** the government is **unable or unwilling to control**.
- Applications **must be filed within one (1) year of entry** into the United States, but an exception allows unaccompanied children to continue to be eligible for asylum even after the deadline has passed.
- Affirmative with USCIS or Defensive before Immigration Court
- Even if in removal proceedings, unaccompanied children can first have asylum case decided by the Asylum Office instead of an Immigration Judge, but if not approved, will be referred to Immigration Court

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VIOLENCE AGAINST WOMEN ACT (VAWA) SELF-PETITION

- Immigration relief for battered spouses and children of USC or LPR
- Path to green card and citizenship
- Purpose: prevent abusive spouses and parents from using immigration status as a means of power and control
- Child applicants can either self-petition or be included as a derivative or parent’s application
- **Requirements:**
 - Good-faith spousal relationship to or child of U.S citizen or LPR
 - Battery or extreme cruelty by spouse/parent
 - Resided with spouse/abusive parent
 - Good moral character (presumed for children under 14)
 - Current residence in U.S.
 - Child applicant must be under 21 at time of filing (or under 25 when delay in filing due to abuse)

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U-NONIMMIGRANT STATUS (U-VISA) VICTIMS OF QUALIFYING CRIMES

- Immigration relief for victims of qualifying crimes who suffered substantial harm as a result of the crime and who are helpful to law enforcement
 - Certain “indirect victims,” such as parents of child victims, may be eligible to apply as well
- Purpose: encourage immigrants to report crimes and cooperate with law enforcement; encourage law enforcement to work with and protect immigrant victims
- Benefits and Limitations:
 - U-status is valid for four years and allows employment authorization
 - Eligible to apply for green card after three years
 - 10,000 annual limit. Waiting list may provide deferred action and employment authorization.

Qualifying Crimes: <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>

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-NONIMMIGRANT STATUS (T-VISA) VICTIMS OF TRAFFICKING

- Similar to U-nonimmigrant Status
- Eligibility
 - Victim of trafficking, as defined by federal or state law
 - Physically in the U.S. or at a port of entry due to trafficking
 - Comply with reasonable request from law enforcement for assistance in investigation or prosecution of human trafficking (exception for victims under 18 who are unable to cooperate due to physical or psychological trauma)
 - Would suffer extreme hardship, unusual and severe harm, if removed from U.S.
 - Admissible to U.S. (waivers may be available)
- Law enforcement certification (Form I-914 B) is not required, but is strongly encouraged
- T-status expires after four years. Eligible to apply for green card after three years.

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SPECIAL IMMIGRANT JUVENILE STATUS (SIJS)

- An immigration status for children who meet eligibility requirements pursuant to 8 U.S.C. § 1101(27)(J) and 8 C.F.R. § 204.11(c)(1):
 - Under 21 years old;
 - Unmarried;
 - Declared dependent on a juvenile court, or placed under the custody of an agency, department of a State, or an individual or entity appointed by a State or juvenile court;
 - Unable to be reunited with one or both parents due to abuse, neglect, abandonment, or a similar basis found under State law (e.g. death); and
 - It is in the child’s best interests not to be returned to their home country.
- SIJS involves certain determinations made by state courts in a “Special Findings Order”—New York law controls.
- Enables a child to seek lawful permanent residence.

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State Department Visa Bulletin Employment Based Preference Categories MARCH 2019

Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES	VIETNAM
1st	01JAN18	22FEB17	01JAN18	22FEB17	01JAN18	01JAN18	01JAN18
2nd	C	01JAN16	C	09APR09	C	C	C
3rd	C	08JUL15	C	22MAY09	C	01DEC17	C
Other Workers	C	15AUG07	C	22MAY09	C	01DEC17	C
4th	C	C	01MAR16	C	01JAN18	C	C
Certain Religious Workers	U	U	U	U	U	U	U
5th Non-Regional Center (C5 and T5)	C	08SEP14	C	C	C	C	15JUL16
5th Regional Center (I5 and R5)	U	U	U	U	U	U	U

<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-march-2019.html>

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DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

- A type of prosecutorial discretion exercised by immigration authorities for certain individuals brought to the U.S. before their 16th birthday
- Executive policy introduced June 15, 2012 - effective August 15, 2012
- Expanded on November 20, 2014 to include parents, but the expansion has been blocked by federal courts
- DACA is solely a decision not to subject the DACA applicant to deportation and allows the applicant to apply for work authorization. It may be revoked at any time.
- No path to a green card or citizenship
- Expires after two years (renewal is possible)
- Trump issued Executive Order rescinding DACA on Jan. 25, 2017
 - January 10, 2018 - Regents of the University of California, et al. v. Department of Homeland Security - temporary order preventing government's termination of DACA
 - SCIS must accept DACA renewals while litigation continues to pend, but not new applications
 - Future of DACA is currently unknown

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TEMPORARY PROTECTED STATUS (TPS)

- The Secretary of Homeland Security may designate a foreign country for TPS based on conditions in the country that temporarily prevent the country's nationals from returning safely
- Examples of such conditions include:
 - Ongoing armed conflict (such as civil war)
 - An environmental disaster (such as earthquake or hurricane), or an epidemic
 - Other extraordinary and temporary conditions
- Individuals with TPS:
 - Are not removable from the United States
 - Can obtain an employment authorization document (EAD)
 - May be granted travel authorization

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TEMPORARY PROTECTED STATUS (TPS)

Countries currently receiving TPS designation:

[El Salvador](#)*

[Haiti](#)*

[Honduras](#)**

[Nepal](#)**

[Nicaragua](#)*

[Somalia](#)

[Sudan](#)*

[South Sudan](#)

[Syria](#)

[Yemen](#) (<https://www.uscis.gov/humanitarian/temporary-protected-status>)

*Termination of TPS for these countries were set to terminate as follows:

El Salvador- September 9, 2019; Haiti- July 22, 2019; Nicaragua-
January 5, 2019; and Sudan- November 2, 2018.

However, on Oct. 3, 2018, in *Ramos v. Nielsen*, No. 18-cv-01554 (N.D. Cal.), the Court enjoined DHS from implementing and enforcing termination of TPS for these countries pending resolution of the case.

**Termination of TPS for these countries were set to terminate as follows:

Nepal- June 24, 2019; Honduras -January 5, 2020

However, on March 12, 2019, in *Bhattarai v. Nielsen*, No. 3:19-cv-00731 (N.D. Cal.), the parties agreed to temporarily halt termination of TPS for these countries pending resolution of the case.

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IMMIGRATION-RELATED DEVELOPMENTS & POLICY CHANGES

DACA, TEMPORARY PROTECTED STATUS
AND UNIVERSAL ENFORCEMENT

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Executive Orders

<i>Border Security and Immigration Enforcement Improvements</i> (E.O. 13767)* January 25, 2017	<i>Enhancing Public Safety in the Interior of the United States</i> (E.O. 13768)* January 25, 2017	<i>Protecting the Nation From Foreign Terrorist Entry into the United States</i> (E.O. 13769)
<ul style="list-style-type: none"> • Building a wall on the Southwest Border • Expanding expedited removal • Changing unaccompanied minor children classification • Detention of asylum seekers <p><small>*See also USCIS memo and FAQs re: implement of the E.O.</small></p>	<ul style="list-style-type: none"> • Increasing interior enforcement and expanding enforcement priorities • Focusing on Secure Communities, Sanctuary Cities, and immigration detainees • Hiring an additional 10,000 enforcement and removal officers <p><small>*See also USCIS memo and FAQs re: implement of the E.O.</small></p>	<ul style="list-style-type: none"> • Ordering 90-day suspension of entry for nationals of 7 majority Muslim countries • Suspending U.S. Refugee Admissions Program for 120 days • Suspending entry of all Syrian refugees indefinitely <p><small>*Travel Ban Temporarily Suspended by Litigation in WD Washington</small></p>

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Immigration Enforcement SANCTUARY

“Enhancing Public Safety in the Interior of the United States”

- The Executive Order announced a policy to withhold federal funds from “sanctuary jurisdictions.” See section 9(a)
- A sanctuary city is a jurisdiction that does not comply or partially complies with Detainer Requests from the Department of Homeland Security

Key Federal Law: Title 8, Section 1373 of the United States Code

provides that local governments may not prohibit or restrict any government entity or official from “sending to, or receiving from, [federal immigration officials] information regarding the citizenship or immigration status ... of any individual

- *US v. State of California, et al.*, (No. 18-264, filed March 6, 2018 in the US District Court, Eastern District of California)
- *In the Matter of C. Doe, et al.*, Supreme Judicial Court, Suffolk County, MA filed on March 15, 2018.

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Immigration Enforcement Fines and Penalties

- DHS Secretary is authorized to assess and collect fines: from:
 - **(1) foreign nationals present unlawfully present in the U.S. and**
 - **(2) those who facilitate their presence in the U.S. (e.g., “Sanctuary Cities”)**
- Jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 **may not be eligible to receive Federal funds** (except for law enforcement purposes)
 - Discretion of DOJ and USCIS to determine designation as a sanctuary jurisdiction and eligibility to receive federal funds on that basis
- ICE, CBP, and USCIS charged with issuing **guidance to ensure the assessment and collection of all fines and penalties**

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ADDITIONAL RESOURCES

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PRO BONO REPRESENTATION & Meeting the Needs of Immigrants

- **Pro Bono Interest** - Contact the New York State Bar Association:

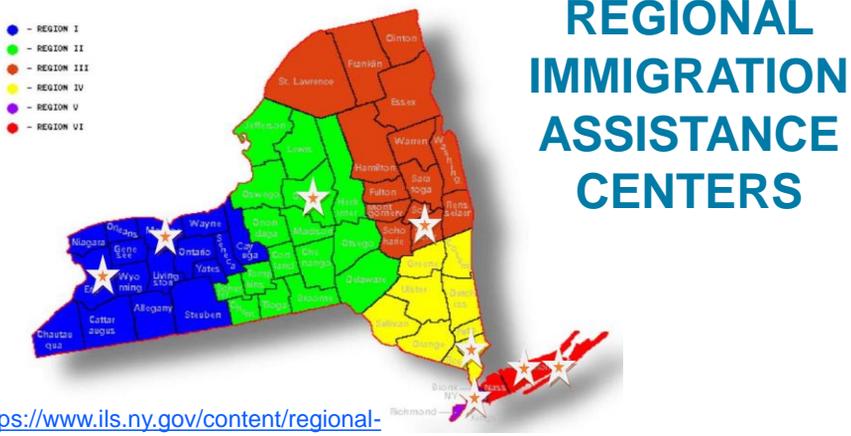


Department of Pro Bono Services
 New York State Bar Association
 One Elk Street, Albany, NY 12207
phone: 518.487.5641

- **Training Interests** – Contact the NYSBA Committee on Immigration Representation (co-chairs Jojo Annobil, Esq. & Joanne Macri, Esq.)

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Immigration Assistance Criminal/Family Court Matters



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Immigration Assistance Criminal Court Matters

- Immigrant Defense Project www.immigrantdefenseproject.org
- Defending Immigrants Partnership www.defendingimmigrants.org
- NLG National Immigration Project
www.nationalimmigrationproject.org
- Immigrant Legal Resource Center www.ilrg.org
- Columbia Law School Collateral Consequences Calculator
http://ccnmtl.columbia.edu/portfolio/law/collateral_consequen.html

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Immigration Assistance Family Court Matters

- New York Office of Indigent Legal Services Immigration Assistance Centers (Family & Criminal)
- Fund for Modern Courts: “Immigrants & State Courts” Website
 - <http://moderncourts.org/programs-advocacy/immigrants-state-courts/>
- Office for Court Administration Advisory Council for Immigration Issues in Family Court
 - Guidance on Guardianship Matters (fingerprinting, home studies)
 - <http://moderncourts.org/wp-content/uploads/2017/05/AdvCouncil-guardianshi-fingerprintSIJmemo-Final-142017.pdf>
 - Memo re: Family Court Role in U Nonimmigrant Status Certifications
 - <http://moderncourts.org/wp-content/uploads/2017/05/342742124-U-Visa-Certification-Guidance-Memo-PDF.pdf>

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CONTACT INFORMATION

Mary E. Armistead, Esq.
Equal Justice Works
Crime Victims Justice Corps Fellow
The Legal Project
24 Aviation Rd #101 Albany, NY 12205
518-435-1770 ext. 328
marmistead@legalproject.org

Albany Biographies

(In Alphabetical Order)

Mary Armistead, Esq.
Equal Justice Works Crime Victims
Justice Corps Fellow
The Legal Project
24 Aviation Road
Albany, NY 12205
marmistead@legalproject.org
(518) 435-1770 ext. 328

Mary Armistead, Esq. is an attorney at the Legal Project as an Equal Justice Works Crime Victims Justice Corps Fellow. She works with victims of human trafficking by providing direct representation, capacity-building, education, and working on policy issues. Mary earned her Bachelor of Arts degree in Psychology at Queens University of Charlotte, graduating summa cum laude. She was also a summa cum laude graduate of Albany Law School, where she developed her passion for helping vulnerable immigrant populations through multiple internships, including with the Worker Justice Center, Empire Justice Center, Legal Aid Society of Northeastern New York, and in the Family Violence Litigation Clinic and Immigration Project. Following graduation from Albany Law School, Mary held a clerkship at the New York State Court of Appeals for one year before working as the Staff Attorney of the Immigration Law Clinic at Albany Law School for three years. As Staff Attorney, Mary both supervised students and maintained a personal docket in providing legal advocacy services and direct representation to clients eligible for humanitarian immigration relief. Her expertise played a critical role in developing law students' ability to provide legal advocacy services and direct representation to clients seeking U.S. immigration benefits including Special Immigrant Juvenile status, U visas for victims of crime, self-petitions under the Violence Against Women Act for victims of violence or abuse, as well as those seeking relief from immigration detention or Immigration Court proceedings.

Scott W. Bush, Esq.
Corrigan, McCoy & Bush, PLLC
220 Columbia Turnpike
Rensselaer, NY 12144
sbush@cmb-lawfirm.com
(518) 477-4575



EDUCATION

Juris Doctorate from Albany Union University, Albany Law School - May, 1982
Admitted to the Bar - January, 1983
Admitted to the United States District Court for the Northern District of New York -
September, 1984
Admitted to the Western District of New York - February, 1986
Admitted to the United States Court of Appeals for the 2nd Circuit - March, 1989

UNDERGRADUATE STUDIES

Clarkson University, Potsdam, New York - Bachelor of Arts in Social Science

AREAS OF PRACTICE

Professional liability, defense work representing attorneys, accountants and real estate
agents being sued for malpractice and/or negligence
Personal injury defense work
Products liability defense work
Property damage defense work
Coverage issues for various insurance companies
Real estate litigation
Real estate practice

EMPLOYMENT HISTORY

Member of the firm of Corrigan, McCoy & Bush, PLLC - January, 2009 to the present
Member of the firm of Roche, Corrigan, McCoy & Bush, PLLC - January, 2007 to
December, 2008
Member of the firm of Roche, Corrigan, McCoy & Bush - May, 1985 to December, 2006
Member of the firm of Roche & Wolkenbreit - 1983 to May, 1985
Federal Mediator and Arbitrator for approximately ten years for the United States District
Court for the Northern District of New York

Hermes Fernandez, Esq.
Bond, Schoeneck & King, PLLC
22 Corporate Woods, Suite 501
Albany, NY 12211
hfernandez@bsk.com
(518) 533-3209

Hermes concentrates his practice in the areas of administrative and legislative law, health law, government regulation and litigation, advising clients on the requirements of and compliance with State statutes and regulations.

He frequently represents clients before the Legislature and state agencies and appears in administrative proceedings and in the courts. His experience runs the gamut from state contracts to constitutional issues to rate-making to regulatory compliance to minority and women-owned business enterprises. Hermes frequently structures client's business transactions and negotiates contracts. He has handled numerous cases of first impression.

Prior to joining the firm, Hermes served as Assistant Counsel to Governor Mario Cuomo. Before coming to Albany, he was a trial attorney with the Civil Division of the United States Justice Department in Washington, D.C., and judicial clerk to the Hon. John A. MacKenzie, Chief Judge, U.S. District Court for the Eastern District of Virginia. Hermes has written and lectured on various topics in health law, and administrative and governmental practice.

Joseph M. Gerstenzang, Esq.
Gerstenzang, Sills, Cohn &
Gerstenzang
210 Great Oaks Boulevard
Albany, NY 12203
joe.gerstenzang@gmail.com
(518) 456-6456



Joseph Gerstenzang is an associate at the law firm of Gerstenzang, Sills, Cohn & Gerstenzang. He received his Bachelor's Degree from Boston University. He is a 2011 magna cum laude graduate of Albany Law School, where he served as a Senior Editor of the Albany Law Review. During Law School, he interned at the District Attorney's Offices in Rensselaer, Albany and Schenectady counties.

Mr. Gerstenzang has also lectured across the state about how to handle a DWAI drugs case.

Since joining the firm, Mr. Gerstenzang's practice has focused on the defense of driving while intoxicated and driving while ability impaired by drugs cases.

Danielle E. Holley, Esq.
O'Connell & Aronowitz PC
54 State Street, 9th Floor
Albany, NY 12207
dholley@oalaw.com
(518) 462-5601

Danielle Holley is a Partner who brings a wealth of health law experience to the O'Connell & Aronowitz Health Law practice. She represents and advises a broad spectrum of health care providers and trade associations on operational and compliance issues, fraud and abuse, HIPAA, litigation and regulatory matters. Danielle has also guided health care providers through a number of complex re-organizations and affiliations, with a particular emphasis on representing clinical laboratories, long-term care facilities, and physician group practices. She routinely advises her clients on how to navigate the complex maze of federal and state laws and the assists in structuring those corporate arrangements.

Danielle has a unique perspective that she brings to her clients. This is in part due to her clinical ethics fellowship that she completed at Albany Medical College after graduating from law school and obtaining her M.S. in Bioethics at the Alden March Bioethics Institute at Albany Medical Center simultaneously.

Due to her experience in ethics and care for the elderly or disabled, Danielle actively advises clients on the ethical and legal requirements related to delivery of health care services and consent issues, as well as guardianship and other advanced care planning.

Danielle serves on the Board of Directors of the Cerebral Palsy Associations Guardianship Corporation, and is a member of the Institutional Review Board at Albany Medical Center, where she is also an Assistant Adjunct Professor. She is also a frequent writer and lecturer on health-related legal and bioethical issues.

Danielle has been named to the Upstate New York Risings Stars list by Super Lawyers from 2015–2018, which acknowledges attorneys under 40 years old and in practice 10 years or less.

Education

Albany Law School – JD

Albany Medical College, MS in Bioethics

University of Virginia, BA in Political Philosophy, Policy and Law

David P. Miranda, Esq.
Heslin Rothenberg Farley & Mesiti, PC
5 Columbia Circle
Albany, NY 12203
dpm@hrfmlaw.com
(518) 452-5600



David P. Miranda, a Partner with the firm, is an experienced trial attorney whose intellectual property law practice includes trademark, copyright, trade secret, false advertising, and patent infringement, as well as licensing, and internet related issues. He has litigated cases in federal district courts, state courts, the International Trade Commission, and the Trademark Trial and Appeals Board; and has successfully appeared before the Federal Circuit, Second Circuit, Ninth Circuit and New York Court of Appeals.

In 2006 Mr. Miranda obtained a \$7.8 million jury verdict in a copyright infringement and trade secret misappropriation case in U.S. district court. Since 2007, Mr. Miranda has been selected by his peers as a “Super Lawyer” by *Thompson Reuters*, in the area of Intellectual Property Litigation. Mr. Miranda commenced some of the first domain name dispute proceedings before the World Intellectual Property Organization and was counsel in one of the first New York cases determining the enforceability of online agreements.

In June 2016 Mr. Miranda completed his one year term as President of the New York State Bar Association, with 74,000 members, the largest voluntary state bar association in the nation. He previously served as President of the Albany County Bar Association, Secretary of the New York State Bar Association and in the House of Delegates for the ABA and NYSBA. He also served as General Counsel and on the Board of Directors of the Rensselaer County Chamber of Commerce, and is a recipient of the Capital District Business Review’s “40 Under Forty” award for community service and professional achievement. In May of 2016 he received the Dean’s Medal from Albany Law School for his contributions to the legal profession and law school community. In 2009, Mr. Miranda was appointed to the Independent Judicial Election Qualification Commission for the Third Judicial District of the State of New York. In 2002, Mr. Miranda was appointed by Hon. Judith Kaye, then Chief Judge of New York’s Court of Appeals, to the statewide “Commission on Public Access to Court Records.”



Mr. Miranda serves as an arbitrator of intellectual property law disputes with the American Arbitration Association, and National Arbitration Forum and has rendered decisions regarding disputes involving such famous trademarks as McDonald's, Amazon.com, Bausch & Lomb, Target, 3M, US News, Citigroup, and ChevronTexaco. He is listed with the United States District Court for the Northern District of New York as a court approved mediator, arbitrator and early neutral evaluator.

Kelleena Richards, Esq.
NYS Office of Children and Family Services
52 Washington Street, Room 133
Rensselaer, NY 12144
kelleena91@msn.com
(518) 402-6722

Kelleena M. Richards is a Senior Attorney for the NYS Office of Child and Family Services (OCFS). She received a B.S. magna cum laude from Virginia Commonwealth University and earned her J.D. at Albany Law School.

Ms. Richards is responsible for conducting Administrative Reviews on indicated reports of child abuse and neglect. To date, she has reviewed over 75,000 child abuse and neglect reports for 32,000 indicated subjects. Ms. Richards also trains those who are required by law to report child abuse and neglect and has created several training programs designed for specific professions (e.g., Paramedics, Day Care Providers).

Ms. Richards is also an Adjunct Instructor at Hudson Valley Community College where she teaches Criminal Procedure and Public Personnel Administration.

Thomas E. Schimmerling, Esq.
Schimmerling Injury Law
PO Box 168
Delhi, NY 13753
nytrialman@aol.com
(607) 746-2193



Thomas E. Schimmerling is an attorney with a significant concentration of his legal practice in the field of personal injury law. After obtaining his Bachelor of Arts degree from Hartwick College in Oneonta, New York, he received his Juris Doctor degree from the Syracuse University College of Law in 1976.

Mr. Schimmerling is a member of the Torts and Insurance Practice and Litigation Sections of the New York Bar Association and the American Bar Association, where he is a member of the Professional Liability Committee. He is also a member and former Section Chair of the Association of Trial Lawyers of America and a member of the New York State Trial Lawyers Association.

He is listed in the "Who's Who In American Law" and lectures frequently to Bar and Trial Lawyers Associations. His advice and counsel is sought by attorneys from across the country. Mr. Schimmerling is a regular participant in the New York State Bar Association's "Hot Tips from the Experts" program, where he lectures other attorneys on personal injury topics.

Robert T. Schofield, IV, Esq.
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Fl.
Albany, NY 12260
rschofield@woh.com
(518) 487-7616

Robert Schofield is a partner in Whiteman Osterman & Hanna's Labor and Employment Law, Education, and Litigation, Arbitration and Mediation Practice Groups. His areas of expertise include public sector labor and employment issues, education law, and general litigation, as well as State Court practice. Mr. Schofield has been with Whiteman Osterman & Hanna LLP since 2000.

REPRESENTATIVE ACCOMPLISHMENTS

- Negotiation and administration of public and private sector collective bargaining agreements.
- Representation of public, private, and corporate clients in labor, employment, and commercial lawsuits and arbitrations.
- Advise clients regarding daily employment decisions such as hiring, discipline, and termination of employees; draft employment contracts, personnel policy manuals and other employment related documents; and work with employers to ensure compliance with federal and State statutes such as the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act, and others.
- Representation of municipalities on a full range of labor and employment matters.
- Representation of school districts on all manner of school and employment law matters and in tax certiorari litigation.
- Representation of public libraries and library systems in full range of legal issues, including funding litigation, construction projects, employment matters, governance issues, and creation of new library districts.
- Representation of multiple *FORTUNE 500* companies in discrimination cases and commercial disputes.
- Representation of a *FORTUNE 100* manufacturing company in a nuisance action against a neighboring industry.

AFFILIATIONS

Mr. Schofield is a past President of the Albany County Bar Association and the Albany County Bar Foundation. He is a member of the House of Delegates of the New York

State Bar Association, and a past member of the State Bar's Committee on Attorney Professionalism. He has served as the President of the NY Capital Chapter of the Labor and Employment Research Association, an organization of practitioners and arbitrators in the labor-management community. He is a member of the New York State School Boards Association Council of School Attorneys.

Mr. Schofield is a member of the City of Albany's Industrial Development Agency and of the Boards of Capital Region Chamber of Commerce and its subsidiary, the Albany-Colonie Regional Chamber of Commerce, where he also served as co-chair of its Leadership Tech Valley Program. He previously co-chaired the former Capital Leadership Program and was a member of the Capital Leadership Class of 2002. In 2007, he was named one of the Capital Region's "40 Under Forty" by *The Business Review* newspaper. In 2008, Mr. Schofield was appointed to the City of Albany's Comprehensive Plan Review Board and in 2011 to its Community Advisory Committee on Sustainability. In 2010, Mr. Schofield was awarded the New York Library Association's Outstanding Advocate of Libraries Award. He has served on the Board of Habitat for Humanity of the Capital District and currently serves as a Director of the Plattsburgh College Foundation.

BACKGROUND/EDUCATION

Prior to joining the Firm, Mr. Schofield was the law clerk to the Hon. Justices Bernard J. Malone, Jr. and Joseph Harris of the New York Supreme Court, and previously served as an Appellate Court Attorney for the New York Supreme Court, Appellate Division, Third Department. Mr. Schofield graduated, *magna cum laude*, from Syracuse University College of Law, where he was an editor of the *Syracuse Law Review*. He holds a Master of Public Administration degree from Syracuse University's Maxwell School of Citizenship and Public Affairs, as well as a Bachelor of Arts degree from Plattsburgh State University. He is admitted to practice in New York and in the United States District Courts for the Northern and Southern Districts of New York, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court. He has been listed in the upstate editions of *Best Lawyers in America* and *New York Super Lawyers*.

Jeffrey J. Sherrin, Esq.
O'Connell & Aronowitz PC
54 State Street, 9th Floor
Albany, NY 12207
jsherrin@oalaw.com
(518) 462-5601

Jeffrey is the President of O'Connell & Aronowitz. Primarily a health care attorney, he is also an accomplished litigator in health care, commercial and employment cases. In his national health law practice, Jeffrey has represented providers and their trade associations for over 35 years. His clients include hospitals, clinical laboratories, alcohol and substance abuse providers, behavioral health providers, nursing homes, home health care agencies, adult care facilities, DME and respiratory suppliers, physician practices, and ancillary health care practitioners. His clinical laboratory clientele, in particular, is nationwide, and he is regularly tapped to speak at national conferences and forums on issues affecting clinical laboratories.

Jeffrey practices in all federal and state courts, and before all federal and state health care regulatory agencies. He has successfully represented the New York State hospital industry in two appeals before the United States Supreme Court and actively represents clients in all types of healthcare litigation, including criminal, civil and administrative fraud and abuse investigations; Medicare, Medicaid and private insurer audits, and commercial litigation. He also represents providers in professional discipline and regulatory enforcement matters.

In the area of Employment Law, Jeffrey obtained a \$15.4 million jury verdict for an individual plaintiff in a sexual harassment trial, which, at the time, was the largest verdict in the country for an individual plaintiff in an employment discrimination case. He also recovered over \$23 million for clinical laboratories from the New York State Department of Health in two lawsuits, due to the State's collection of excessive license fees, and over \$8 million for an individual clinical laboratory from a major health insurance company for wrongful denials of claims. Jeffrey has also successfully represented shareholder interests in major class action litigation.

Formerly in charge of litigation for the New York State Department of Mental Hygiene, Jeff was also an Adjunct Professor of Law for Union College's graduate program in Health Care Administration. He has been listed in the publication *The Best Lawyers in America* for over 20 years and also consistently been listed in the Upstate New York Super Lawyers list, a distinction earned by less than 5% of attorneys in the state.

Education

Albany Law School of Union University
State University of New York, Albany

Patricia J. Shevy, Esq.
The Shevy Law Firm, LLC
7 Executive Centre Drive
Albany, NY 12203
patriciashevy@shevylaw.com
(518) 456-6705



Patricia J. Shevy is the founder of The Shevy Law Firm, LLC, of Albany, New York. Tricia focuses her practice exclusively in the areas of estate planning and administration and elder law/special needs planning.

Tricia believes in the teamwork approach and regularly works with her clients and their investment advisors, bankers, insurance agents and accountants to ensure that the plan meets the client's long term objectives.

Tricia is an active member of the New York State Bar Association- Member of the Continuing Legal Education Committee, Trusts and Estates Section (Chairperson of the Continuing Legal Education Committee and former Chairperson/active member of the Life Insurance and Employee Benefits Committee) and Elder Law and Special Needs Section (Co-Chair of the Publications Committee and Co-Chair of the Board of Editors of the Elder and Special Needs Law Journal). She is also a member of the Albany County Bar Association and National Academy of Elder Law Attorneys.

Tricia's past public service includes serving on the Boards of Directors of Childs Nursing Home, Albany County Correctional Facility for Children's Benefit, Rensselaer County Housing Resources Corporation and the Watervliet City School District Board of Education, serving as president for 3 years. Currently, Tricia is on the Board of Directors and Treasurer of The Bus Stop Club, Inc., a support program for the siblings of chronically ill children.

Tricia earned a Bachelor of Science in Management-Finance from Rensselaer Polytechnic Institute in 3 years. Following graduation from RPI in 1994, Tricia received her Juris Doctor, cum laude, from Albany Law School of Union University in 1997, where she was a member of the Justinian Society.

Tricia routinely lectures to small groups regarding estate tax planning, long term care planning, estate planning issues for parents of disabled children as well as the unique issues of estate planning for non-traditional families and small business owners. Tricia was honored with the opportunity to teach all attorneys applying for admission to

practice by the New York State Board of Law Examiners the basics of powers of attorney, health care proxies and trusts. Tricia also regularly lectures and writes for continuing legal education programs offered by the New York State Bar Association.

Michelle H. Wildgrube, Esq.
Cioffi • Slezak • Wildgrube P.C.
1473 Erie Boulevard, 1st Floor
Schenectady, NY 12305
mwildgrube@cswlawfirm.com
(518) 377-6700



Michelle has been a principal of Cioffi • Slezak • Wildgrube P.C. (formerly Carpenter & Cioffi, P.C.) since 2004, and has been with the firm since 1999. Prior to joining Cioffi • Slezak • Wildgrube P.C., Michelle worked for a general practice firm that provided a broad foundation for her practice which now concentrates in the areas of estate planning and administration, corporate and business law, and real estate.

Michelle frequently lectures for the New York State Bar Association and the Schenectady County Bar Association on real estate and estate planning issues. Michelle is also a panel member of the Legally Speaking Program for The Legal Project. Through this program, she presents seminars on estate planning and elder law issues to community groups and is a frequent lecturer for the Albany Guardian Society.

Michelle is a member of the Committee on Character and Fitness for the Fourth Judicial District and the Independent Judicial Election Qualification Commission for the Third Department. She currently serves on the boards of directors of the Federation of Bar Associations, Fourth Judicial District (Past President), Our Ability Alliance (Treasurer), and the Capital Region Chamber Foundation (Secretary/Treasurer). In addition, Michelle serves as Secretary of the New York State Bar Association's Real Property Law Section. Michelle is a member of the Schenectady County Bar Association's Real Estate Practice Committee and is an appointed trustee for the John Alexander Trust Memorial Scholarship which is administered through the Schenectady County Bar Association.

From 2016-2018, Michelle will serve as Co-Chair of the NYSBA President's Membership Challenge. If you are interested in joining the New York State Bar Association, please reach out to her!

Michelle was the recipient of the Schenectady County Bar Association's first Young Lawyer Award, the Schenectady County Bar Association's 2012 Lawyer of the Year Award, and the New York State Bar Association's 2013 President's Pro Bono Award.

Michelle holds a Bachelor of Arts Degree in English from Rutgers College and a Juris Doctor from the State University of New York at Buffalo School of Law. She resides in Niskayuna, New York, with her husband, Drew Lochte, and Flopsy, the family pup (who sometimes hangs out at the office).

