



Bridging the Gap

September 2018

Thursday & Friday, September 6-7, 2018
New York State Bar Association | Albany

Thursday, September 6, 2018 | 9:00 a.m. – 5:30 p.m.
Friday, September 7, 2018 | 9:00 a.m. – 5:00 p.m.

16.0 MCLE Credits

7.0 in Areas of Professional Practice; 6.0 Skills; 3.0 Ethics

www.nysba.org/BridgingtheGap

*Sponsored 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, September 6, 2018

2.5 Skills, 3.0 Ethics, 2.5 Areas of Professional Practice

- 8:30 a.m. Registration and Continental Breakfast
- 9:00 a.m. **Welcome and Introductions**
- 9:05 - 10:45 a.m. **Advising Clients on the Basics of Immigration Law**
- Joanne Macri, Esq.**
NYS Office of Indigent Legal Services
Albany, NY
- (1.0 Areas of Professional Practice, 1.0 Skills)*
- 10:45 – 11:00 a.m. Break
- 11:00 – 12:15 p.m. **Reading Personal Tax Returns and Imputed Income | Matrimonial and Family Law Focus**
- Rosalia Baiamonte, Esq.**
Gassman Baiamonte Gruner, P.C.
Garden City, NY
- (1.5 Skills)*
- 12:15 - 1:30 p.m. **Young Lawyers Section Executive Committee Meeting**
All attendees are invited to attend. Lunch will be provided.
- Welcoming Remarks**
Terrence Tarver, Esq. | Chair, Young Lawyers Section
- 1:30 – 2:45 p.m. **Lawyer Assistance Program | Stress, Alcohol and Substance Abuse in the Legal Profession**
- Kelleena Richards, Esq.**
NYS Office of Children and Family Services
Rensselaer, NY
- Thomas E. Schimmerling, Esq.**
Delhi, NY
- (1.5 Ethics)*

2:45 – 4:00 p.m.

Intellectual Property 101 | Basics for New York Lawyers

David P. Miranda, Esq.

Heslin Rothenberg Farley & Mesiti, P.C.
Albany, NY

(1.5 Areas of Professional Practice)

4:00 – 5:30 p.m.

Trial Practice: Views from the Bench | Key Civility and Professionalism Considerations for New Attorneys

Hon. Mae A. D'Agostino

U.S. District Judge, Northern District of New York
Albany, NY

(1.5 Ethics)

5:30 p.m.

Networking Reception

Sponsored by the Young Lawyers Section

Day Two | Friday, September 7, 2018

3.5 Skills, 4.5 Areas of Professional Practice

8:30 a.m.	Registration & Continental Breakfast
9:00 – 10:40 a.m.	Real Estate Closings 101 Upstate New York Considerations and Practice Alice M. Breeding, Esq. Law Office of Alice M. Breeding, Esq., PLLC Clifton Park, NY Michelle H. Wildgrube, Esq. Cioffi Slezak Wildgrube P.C. Schenectady, NY <i>(1.5 Skills, 0.5 Areas of Professional Practice)</i>
10:40 – 10:50 a.m.	Break
10:50 – 12:30 p.m.	Drafting 101 Wills, Trusts and POA's Patricia J. Shevy The Shevy Law Firm, LLC Albany, NY <i>(2.0 Skills)</i>
12:30 – 1:30 p.m.	Lunch (on your own)
1:30 – 2:45 p.m.	Advising Clients Charged with DWI and Vehicle and Traffic Matters in New York State Joseph M. Gerstenzang, Esq. Gerstenzang, Sills, Cohn & Gerstenzang Albany, NY <i>(1.5 Areas of Professional Practice)</i>
2:45 – 3:35 p.m.	Landlord Tenant Practice in New York John Gable, Esq. Albany, NY <i>(1.0 Areas of Professional Practice)</i>

3:35 – 3:45 p.m.

Break

3:45 – 5:00 p.m.

Special Education Law 101

Jennifer Feeley, Esq.

Disability Rights New York
Albany, NY

(1.5 Areas of Professional Practice)

5:00 p.m.

Adjournment

Day One

8.0 MCLE Credits: 2.5 Skills, 3.0 Ethics, 2.5 Areas of Professional Practice

Day Two

8.0 MCLE Credits: 3.5 Skills, 4.5 Areas of Professional Practice

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/SeptemberBTG2018Materials

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
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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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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.

FAQ's for Newly Admitted Attorneys

The CLE Requirement for Newly Admitted Attorneys

- [What is a "newly admitted attorney"?](#)
 - [What if I was practicing law in another jurisdiction before I was admitted to the New York Bar?](#)
 - [As a newly-admitted attorney, what is my CLE requirement?](#)
 - [How do I satisfy my CLE requirement?](#)
 - [What are "transitional" CLE courses?](#)
 - [What formats are permissible for Skills credit?](#)
 - [What formats are permissible for Ethics and Professionalism credit?](#)
 - [What formats are permissible for Areas of Professional Practice and Law Practice Management credit?](#)
 - [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?](#)
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Fulfilling The Requirement

- [How do I find CLE courses close to home?](#)
 - [Do out-of-state courses count towards my CLE requirement?](#)
 - [What is New York's "Approved Jurisdiction" policy?](#)
 - [I attended a CLE course where the sponsor did not apply for CLE accreditation. Is there any way to get credit?](#)
 - [What if I practice in a foreign country?](#)
 - [May I earn credit for writing a legal article, or for teaching at a CLE program?](#)
 - [May I earn CLE credit for providing pro bono legal services?](#)
 - [May I earn credit for courses I attended before I was admitted to the New York Bar?](#)
 - [May I earn CLE credit for attending a CLE course if I arrive late? What about if I leave early?](#)
 - [May I earn credit for repeating a course?](#)
-

Exceptions To The Requirement

- [Are there any exemptions from the CLE requirement?](#)
- [How do I determine whether I am "practicing law in New York"?](#)
- [What are my CLE obligations if I practice law outside of New York?](#)
- [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?](#)

- What if I stop practicing law during my first two years of admission to the New York Bar?
 - 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?
 - Are there any conditions under which I may obtain a waiver or modification of my CLE requirement
-

Compliance & Reporting

- How and when do I report compliance with my CLE requirement?
- What should I do if I have not received an attorney registration form by my birthday?
- What if my birthday comes before the second anniversary of my admission? (My birthday is in March; I was admitted in June.)
- What if my birthday comes after the second anniversary of my admission? (I was admitted in March; my birthday is in June.)
- What should I do if I cannot complete my CLE requirement on time?
- 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?
- If I earn more credits than I need, may I carry them over?
- Who keeps track of my certificates of attendance?
- What happens if I do not fulfill my CLE requirement?
- What if I have more questions?

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

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**Advising Clients on the
Basics of Immigration Law**

Joanne Macri, Esq.

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
September 6, 2018**

**Joanne Macri, Esq.
Statewide Chief Implementation Attorney
New York State Office of Indigent Legal Services**

AGENDA

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



UNDERSTANDING THE IMMIGRATION SYSTEM

OVERVIEW

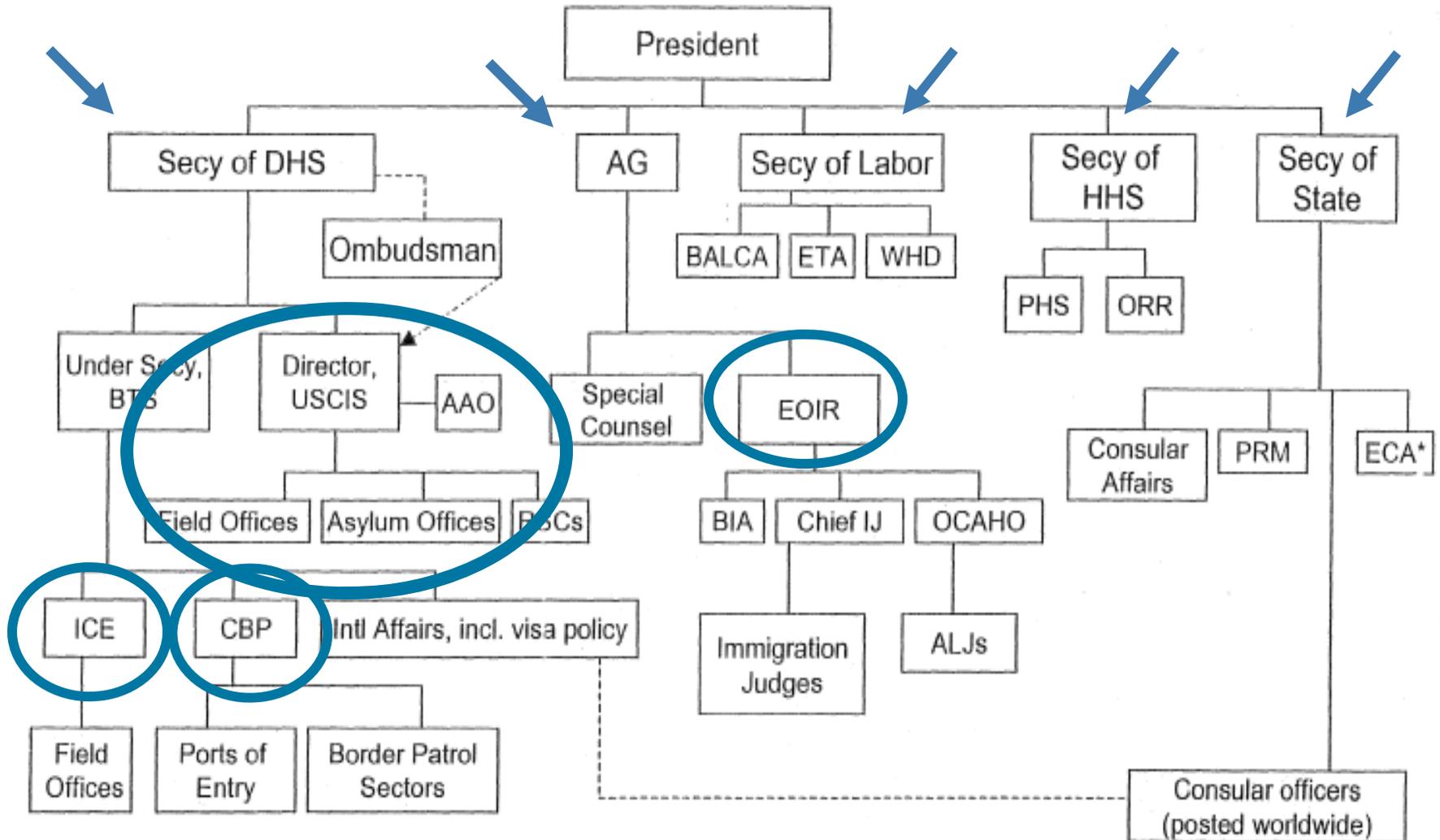
IMMIGRATION LAWS AND POLICY

- **Statutes:** 8 U.S.C. § 1101 (THE IMMIGRATION AND NATIONALITY (“INA”) ACT § 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.

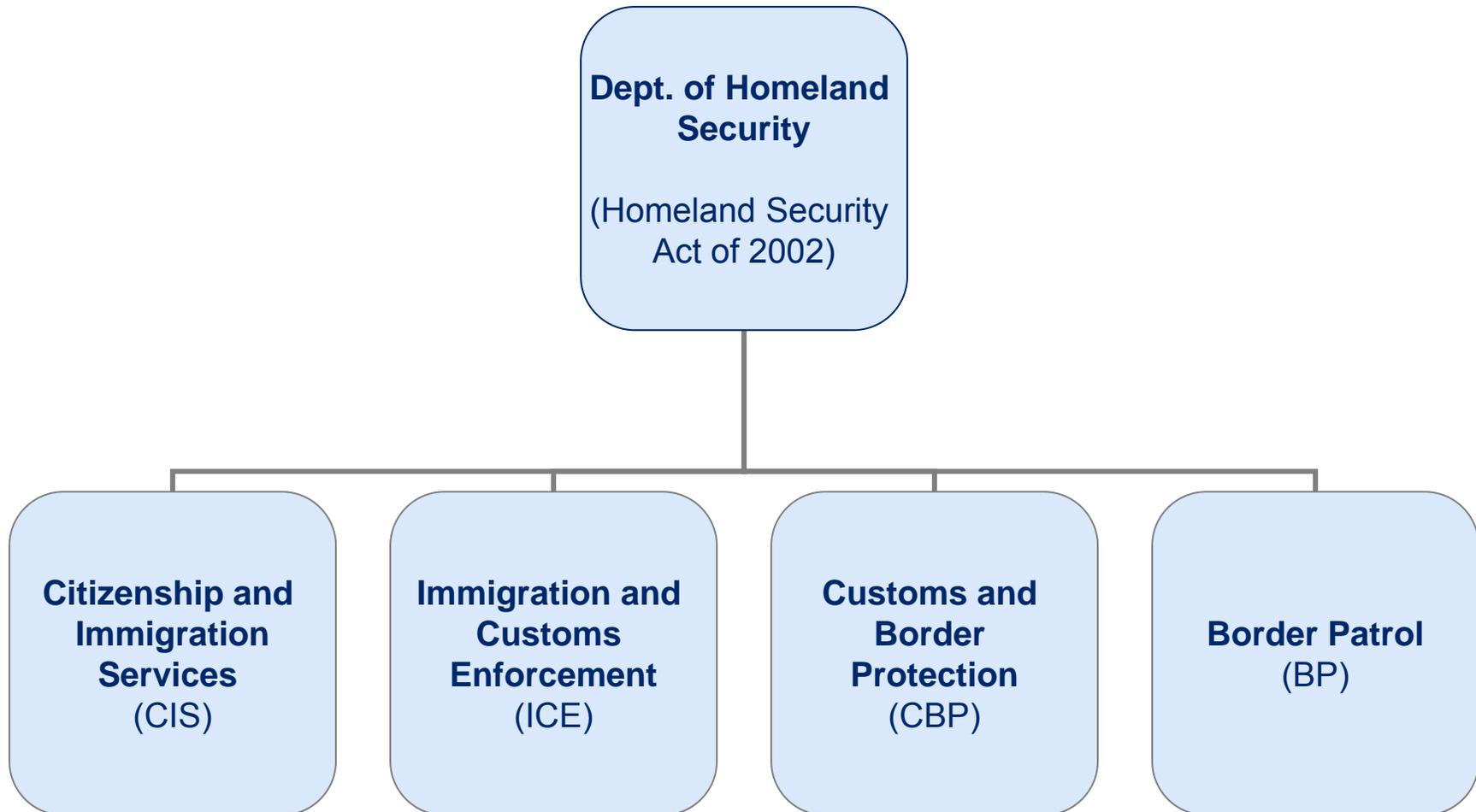
HOMELAND SECURITY ACT (2002)

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

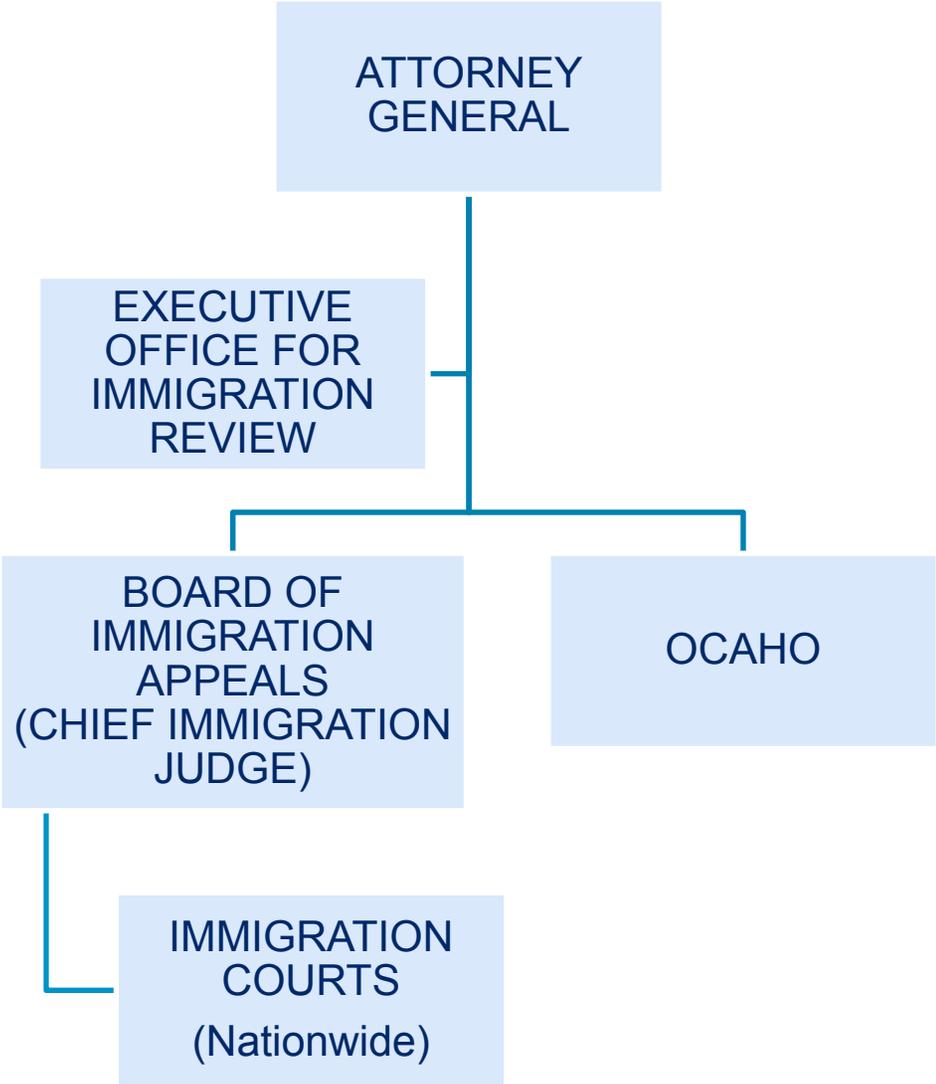
Executive Branch Agencies: Immigration & Citizenship



POST-MARCH 2003 US DEPT OF HOMELAND SECURITY



POST-MARCH 2003 US EXECUTIVE OFFICE FOR IMMIGRATION REVIEW





DETERMINING CLIENT'S IMMIGRATION STATUS

GATHERING INFORMATION

INVESTIGATE & RECORD THE FACTS

- 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

CITIZENSHIP BY TREATY

- **Puerto Rico:** as of April 11, 1899
- **Canal Zone & Panama:** Canal Zone after February 26, 1904 with parent as USC and Panama with USC parent employed by US or Panama Railroad Co. until 1979
- **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

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

ACQUISITION OF CITIZENSHIP

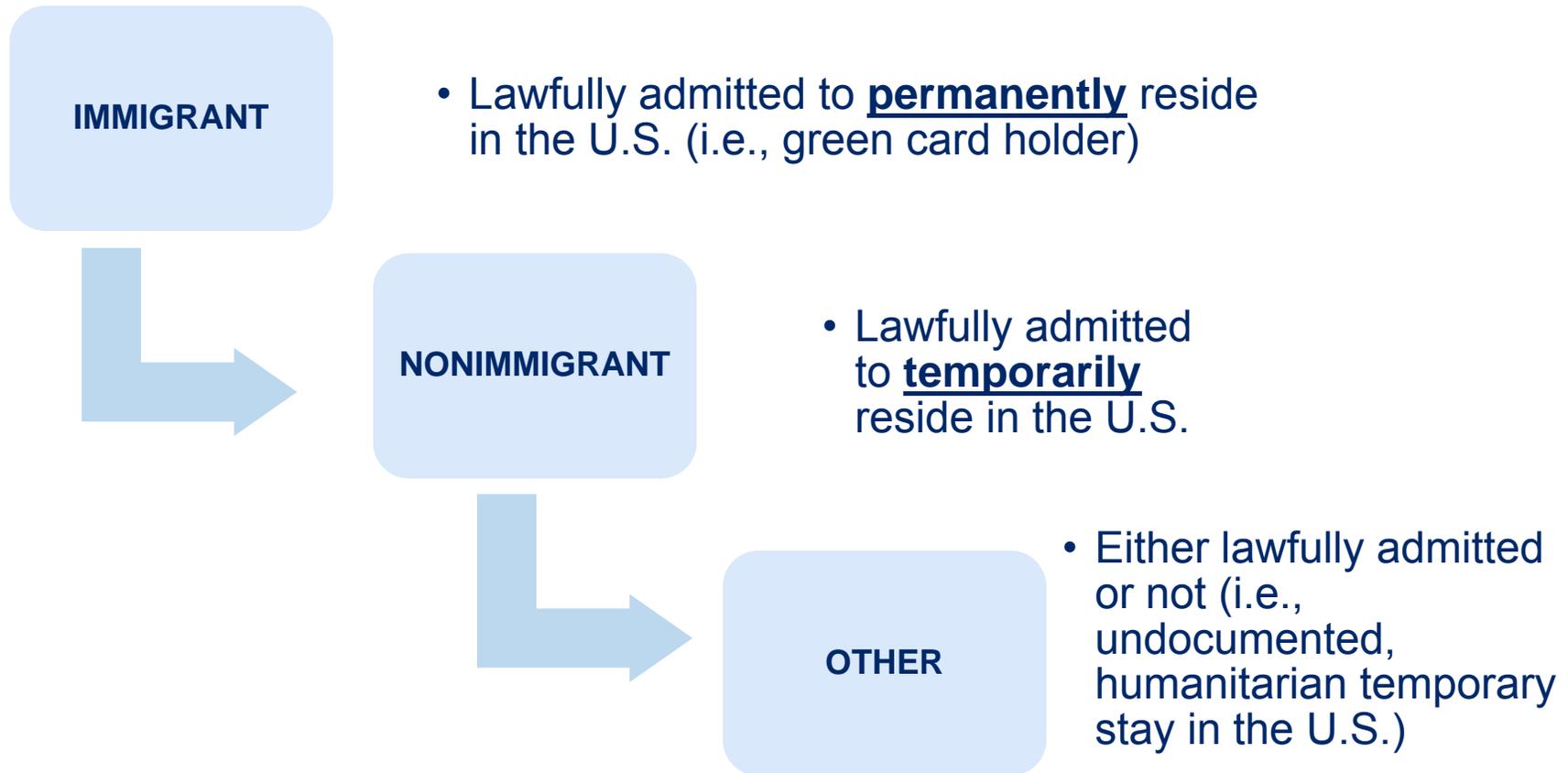
- Children born outside of the US who acquire citizenship at birth
- Children born outside of the US and born out of wedlock
- Children with Lawful Permanent Resident (i.e., green card) status acquiring citizenship based on naturalization of parent(s)
- Children acquiring citizenship through lawful adoption

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

ACQUIRING CITIZENSHIP THROUGH THE NATURALIZATION PROCESS

- 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** (exception: longtime LPR or medical disability or veteran)
- **Sworn-in at a ceremony** in order to be naturalized

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



...AND SUBJECT TO REMOVAL

Lawful Permanent Resident

- Admitted to the U.S. as a green card holder

Refugee or Asylee

- Granted refugee status outside of the U.S. or asylum status from within the U.S.

Nonimmigrant

- Admitted to the U.S. on a temporary basis, (i.e., to visit, attend school, work, etc.) – INA §101(a)(15)

Humanitarian Relief

- Granted temporary protection within the U.S. (i.e., TPS, DACA, T, U or S visa, etc.)

Undocumented

- Entered the United States illegally, (i.e., without being inspected and admitted)

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? (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>

ADMISSION TO THE U.S.



<https://www.youtube.com/watch?v=iap04VxoDsw&feature=related>

ADMISSION REQUIREMENTS

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

Burden of Proof on Person seeking Admission:

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

Presumption = those seeking “admission” presumed to “**IMMIGRANTS**” (INA §214(b)) - look at “**intent**” at time of admission (i.e., “**Immigrant**” defined in **INA §101(a)(15)(A)-(V)**)

ADMISSION REQUIREMENTS

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

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 **study may be full or part-time**, and who commutes to the United States institution or place of study from Canada or Mexico;

DEFINITION OF “ADMISSION” FOR LAWFUL PERMANENT RESIDENTS

- **INA §101(a)(13)(c):** defines when LPR is NOT seeking “admission” to the US:
- Not abandoned or relinquished LPR status
- Not absent for continuous period of more than 180 days
- Not engaged in illegal entry abroad
- Not departed the US while in removal proceedings
- Not committed an offense identified in INA §212(a)(2)
- Not entered at an undesignated time and place

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

IF INADMISSIBLE AT POE

- ▶ **WITHDRAW APPLICATION FOR ADMISSION:** Ask to withdraw application for admission without referral for removal.
- ▶ **PAROLE STATUS:** Permit physical entry into the US without granting any lawful immigration status to applicant (i.e., often granted for humanitarian reasons).
- ▶ **DEFERRED INSPECTION:** Permitted to enter US but will be later inspected by US CBP or to US CIS.
- ▶ **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*)

EXPEDITED REMOVAL (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
- 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)

CATEGORIES OF IMMIGRANT ADMISSION

- **FAMILY-BASED PREFERENCE** (FB)
480,000
- **EMPLOYMENT-BASED PREFERENCE** (EB)
140,000
- **DIVERSITY IMMIGRANT PROGRAM** (D)
55,000
- **REFUGEES** (REF)
47,000 to 126,000 (range)
(i.e., includes overseas resettlement programs and asylum applications on US soil)

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

OBTAINING IMMIGRANT VISA FROM ABROAD

See INA §§ 204-206

Petitioner

Files Family Based Immigrant Petition with USCIS
(i.e., Form I-130 Petition for Alien Relative)

Files Labor Certification with US Dept of Labor and then Employment Based Immigrant Petition with USCIS
(i.e., Form I-140, Petition for Alien Worker)

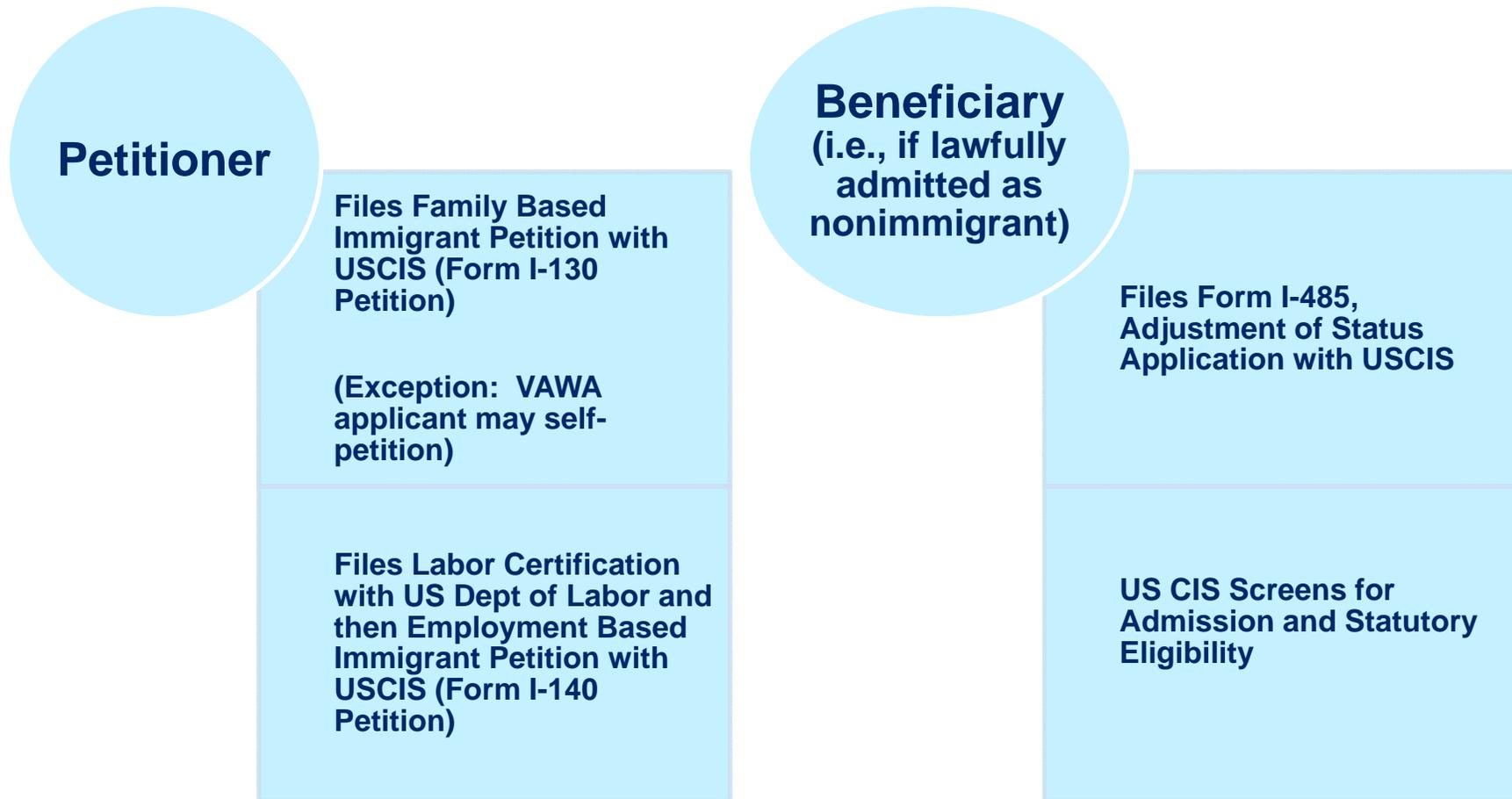
Beneficiary

Approval of Petition Goes to US State Dept. National Visa Center

US Consulate Abroad Notified and Screening for Admission and Statutory Eligibility Conducted with Beneficiary Abroad

OBTAINING IMMIGRANT VISA FROM WITHIN US

See INA § 245



GETTING A GREEN CARD THROUGH FAMILY RELATIVES

- **“IMMEDIATE RELATIVES” INA §201(b)(2)(A)(i)**
(= SPOUSE, PARENT OR CHILD OF A U.S. CITIZEN)
- **“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 citizenship rules*)
- **“Child” INA §101(b)(1)**
= UNDER 21 YRS OF AGE AND UNMARRIED (see INA § 201(b))
(= **adopted “child”** if adoption completed before child is 16 years of age)

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	LPR Spouse and “Child” & Unmarried Son or Daughter	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)

State Department Visa Bulletin

Immigrant Family Based Preference Categories

AUGUST 2018

<u>Family-Sponsored</u>	All Charge-ability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	08MAY11	08MAY11	08MAY11	01AUG97	01AUG06
F2A	22JUL16	22JUL16	22JUL16	01JUL16	22JUL16
F2B	22OCT11	22OCT11	22OCT11	01APR97	15FEB07
F3	15JUN06	15JUN06	15JUN06	01DEC95	01MAY95
F4	22DEC04	22DEC04	22MAR04	15JAN98	22APR95

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

https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_august2018.pdf

ADMISSION CATEGORY RELEVANT INA STATUTES

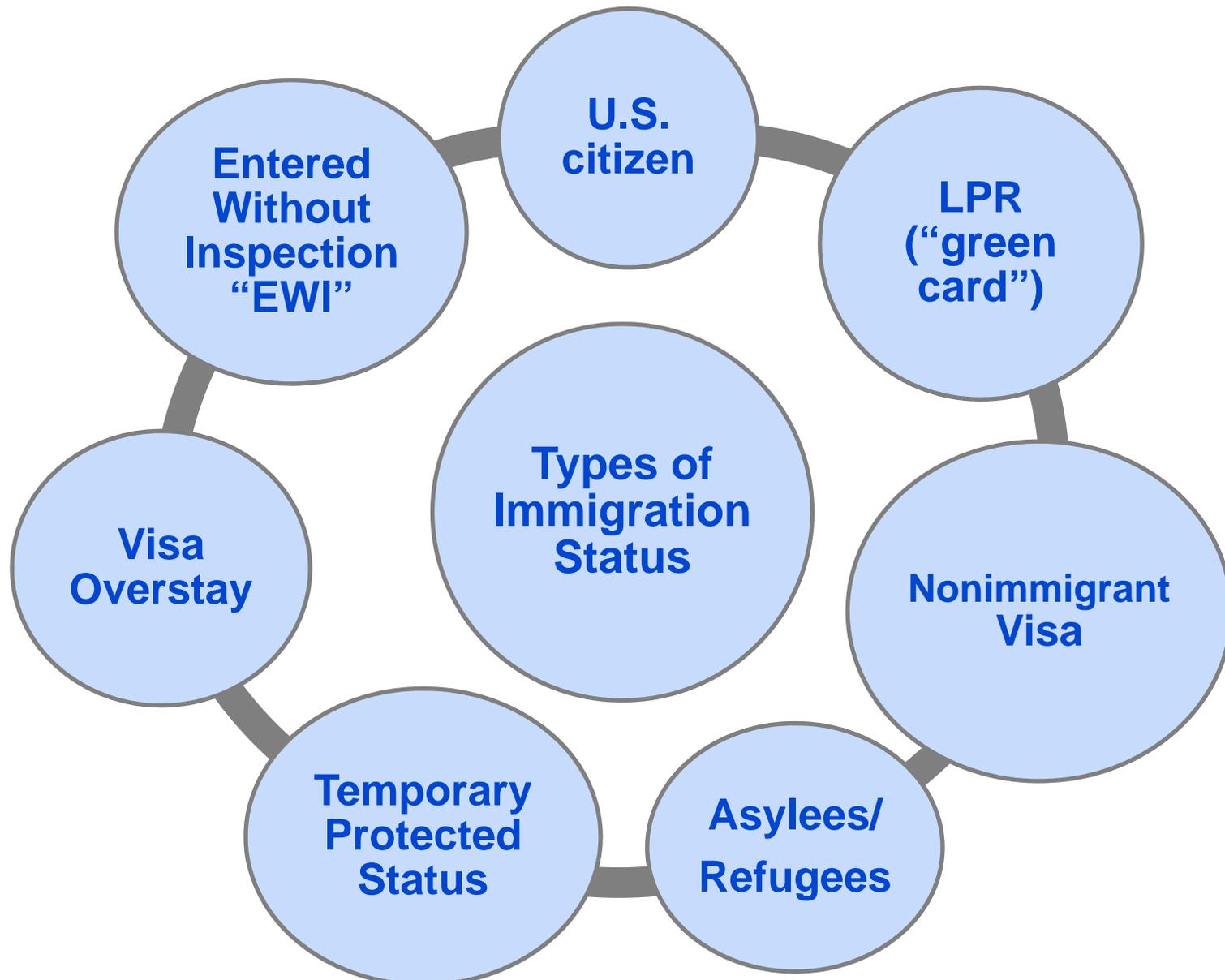
- **INA §101(a)(13)** (“admission”)
- **INA §101(a)(15)** (“immigrant”)
- **INA §201** (annual quotas)
- **INA §202** (state quotas)
- **INA §203** (preference categories- family-based, employment-based and diversity)
- **INA §§ 204-206** (immigrant visa processing from outside the US)
- **INA § 245** (adjustment of status to LPR--within the US)
- **INA §201(b)(2)(A)(i)** (immediate relative)
- **INA §101(a)(35)** (“spouse”)
- **INA §101(b)(2)** (“parent”)
- **INA §101(b)(1)** (“child”)

INADMISSIBILITY vs. DEPORTATION & IMMIGRATION ENFORCEMENT



CLIENT INTAKE

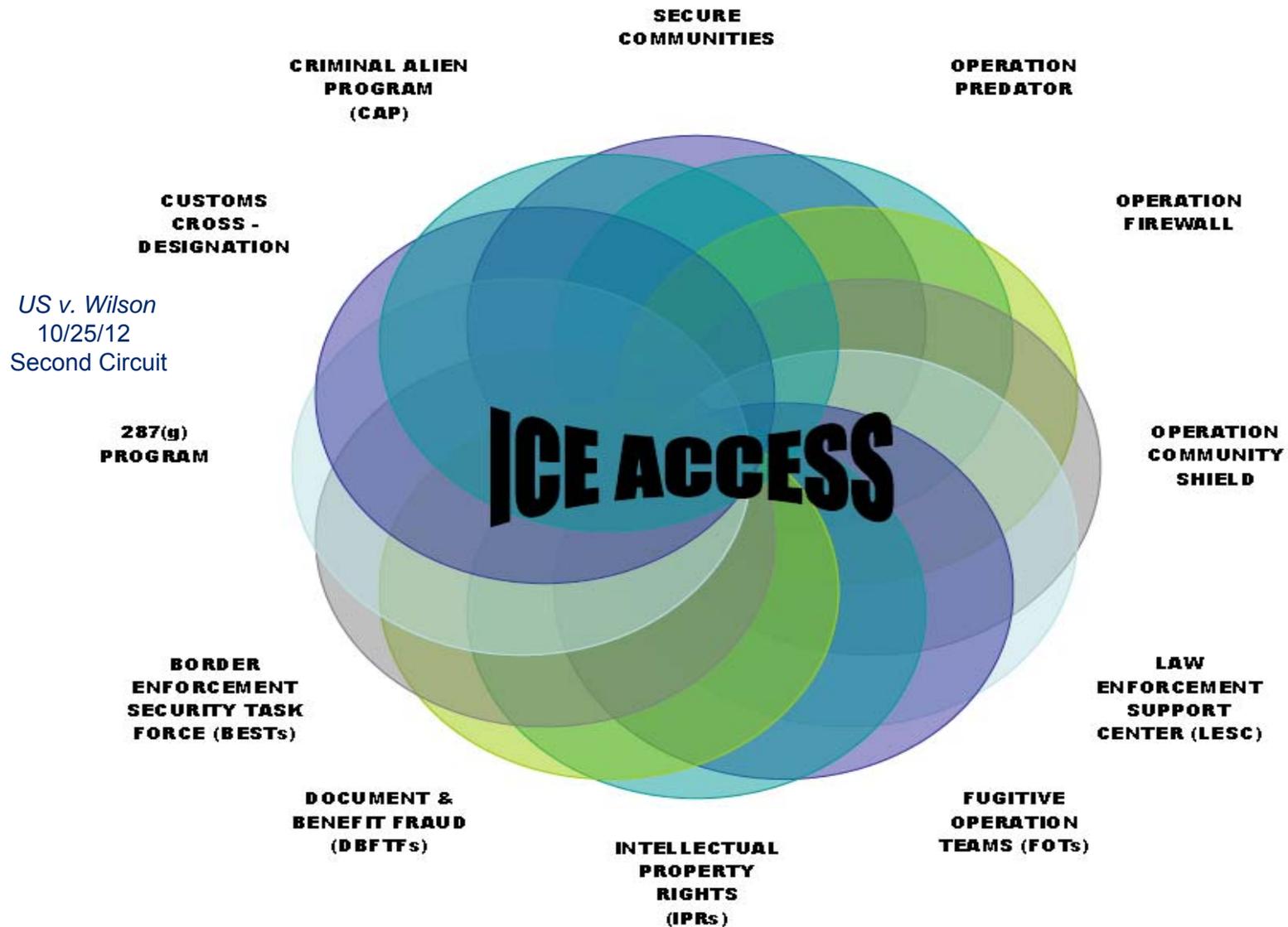
KNOWING A CLIENT'S STATUS IS CRITICAL



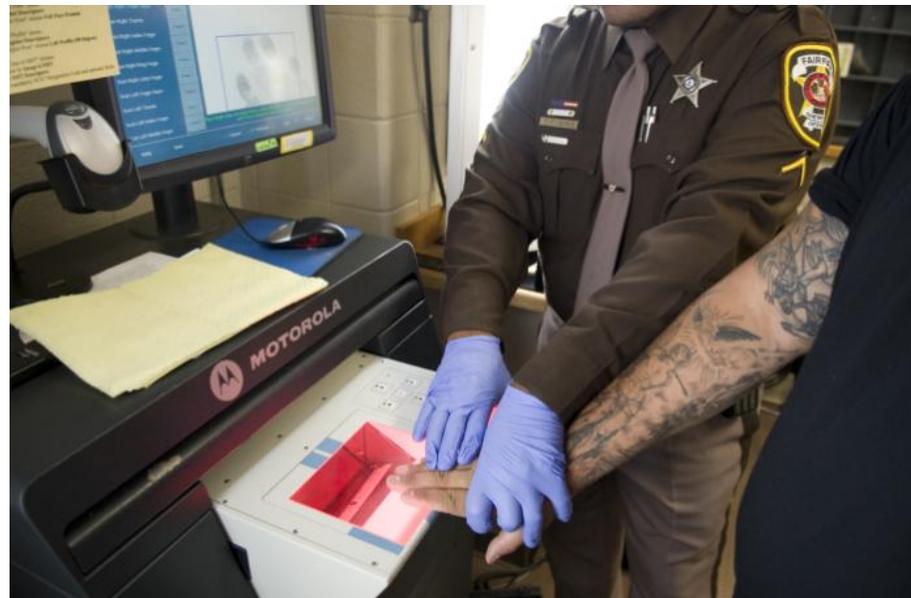
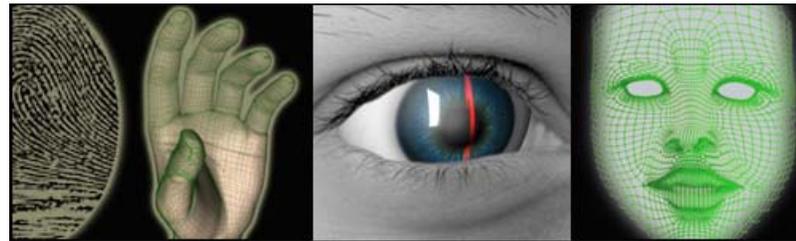
NATIONAL SECURITY

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-VISIT	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.

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



FBI BIOMETRICS THE NEXT GENERATION



DEPORTATION VS. INADMISSIBILITY

DEPORTATION

LPR's (“Greencard Holder)

Nonimmigrants

(ex. visitors, students,
workers on valid status)

Visa “Overstayers”

(ex. overstayed authorized
period of stay in U.S.)

INADMISSIBILITY

**Refugees & Asylees,
Undocumented, Non-LPRs**

**Returning LPR's (Green Card
Holders)** (i.e., even after brief
departure from U.S.)

Nonimmigrants (i.e., persons
seeking permission to visit, work or
go to the school in the U.S.)



GROUNDS OF INADMISSIBILITY

INA §212
(8 USC §1182)

HEALTH-RELATED GROUNDS

INA § 212(a)(1)

- **communicable diseases** (ex. active TB, AIDS, leprosy, syphilis)
- **Vaccination** requirements
- **physical or mental disorder** and poses a **threat** to property, safety or welfare of self or others
- Determined to be a **drug abuser** or **addict**

□ **DEPORTATION GROUNDS: NO SIMILAR GROUNDS**

CRIMINAL AND RELATED GROUNDS

INA § 212(a)(2)

- **Conviction** or **admitted commission** of a controlled substance offense **OR** crime involving moral turpitude

-or-

- § 212(a)(2)(C) DHS has **reason to believe** individual is a **drug trafficker**

WAIVERS: INA §212(h) waiver is available only for a **single offense** of simple possession of **30g or less of marijuana** for personal use.

NATIONAL SECURITY GROUNDS

INA § 212(a)(3)

- Engage in **prejudicial and unlawful activities**, including **espionage, sabotage, “any unlawful activity,”** or **violation or evasion** of **“any law prohibiting the export from the U.S. of goods, technology or sensitive information.”**
- Persons “engaging in” **“terrorist activities”**
- Persons whose admission into the US would bring about **serious foreign policy consequences**
- Members of the **Communist or totalitarian party**
- Participants in **Nazi persecution or genocide.**

PUBLIC CHARGE GROUND

INA § 212(a)(4)

- **INADMISSIBLE** if “likely at any time to become a public charge...”
- Factors to be considered: **age, health, family status, assets, resources, financial status, education and skills**

NOTE: “public charge bond” or cash deposit of \$1000 at AG discretion to allow for admission

ILLEGAL ENTRANTS & IMMIGRATION VIOLATORS

INA § 212(a)(6)

- present in the U.S. **without being admitted or paroled**
- ...without reasonable cause...**fails or refuses to attend removal proceeding**
- who seeks **admission** to the U.S. **within 5 years** of subsequent **departure or removal** is inadmissible
- **fraud** and **willful misrepresentation of material facts**
- **falsely claiming U.S. citizenship**
- **Stowaways, Smugglers** and **Student Visa Abusers**

DOCUMENTATION REQUIREMENTS

INA § 212(a)(7)

Inadmissible if **not in possession of:**

- Valid unexpired visa, reentry permit, border crossing ID card, or other valid entry document and valid, unexpired passport or other travel document or document of identity and nationality

-or-

- Visa issued without compliance to INA § 203 (i.e., immigrant visa preference categories)

INELIGIBLE FOR CITIZENSHIP and ALIENS PREVIOUSLY REMOVED

- Ineligible for citizenship – **DRAFT EVADERS**

INA §212(a)(8)

- Aliens **previously removed** (i.e., within 5 years, 10 years or 20 years of removal)

- **UNLAWFUL PRESENCE:** as of April 1997

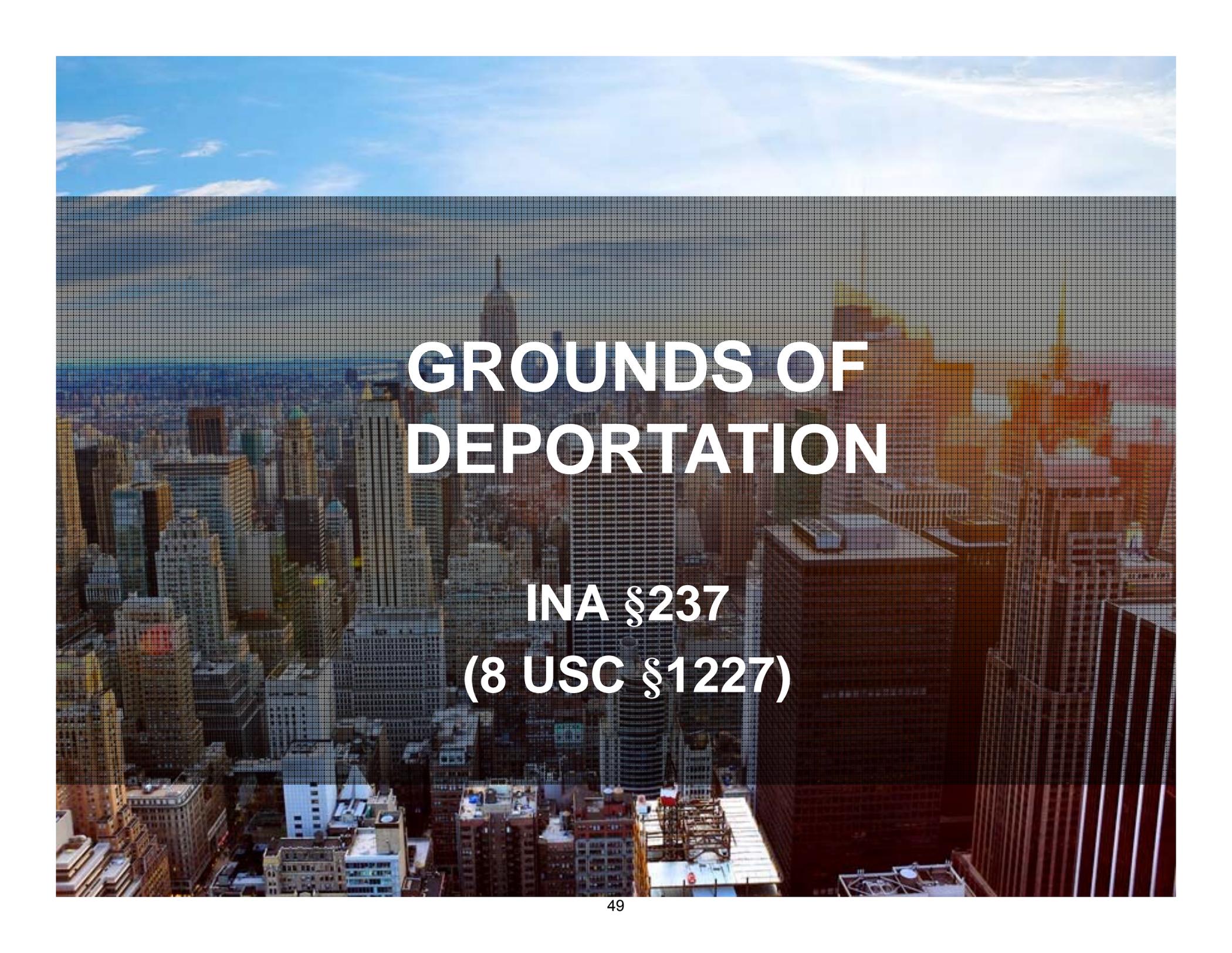
- 3 yr. bar** (for unlawful presence 6 mos. to 1 yr.)
- 10 yr. bar** (for unlawful presence 1 yr. or more)

INA §212(a)(9)

MISCELLANEOUS

INA § 212(a)(10)

- **Practicing Polygamists**
- **Guardian required to accompany helpless alien**
- **International Child Abduction**
- **Unlawful Voters**
- **Renounced US citizenship for tax evasion**



GROUNDS OF DEPORTATION

INA §237
(8 USC §1227)

Inadmissible at Time of Entry or Adjustment of Status or Violates Status INA § 237(a)(1)

- **INA §237(a)(1)(A) Inadmissible** at entry or adjustment of status
- **INA §237(a)(1)(B) Present in violation** of any law in the US or has revoked visa or other admission doc't
- **INA §237(a)(1)(C) Violated nonimmigrant status** or failed to maintain conditions of admission
- **INA §237(a)(1)(D) Termination of conditional permanent residence** status

Exception: extreme hardship Waiver (i.e., terminated good faith marriage; battered by or subjected to extreme cruelty by USC or LPR spouse or parent)

Inadmissible at Time of Entry or Adjustment of Status or Violates Status INA § 237(a)(1)

INA §237(a)(1)(E) Smuggling (i.e., knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the U.S. up to 5 years of the date of any entry to the U.S.

Exception: Family Reunification – immigrant physically present in the U.S. on May 5, 1988 and is seeking admission as an immigrant

Waiver: humanitarian or to assure family unity for LPR attempting to smuggle spouse, parent, son/daughter

Inadmissible at Time of Entry or Adjustment of Status or Violates Status INA § 237(a)(1)

- **INA §237(a)(1)(G) Marriage Fraud** – Procure immigration benefit by fraud
- **INA §237(a)(1)(H) Waiver** for inadmissibility by procuring an immigration benefit by way of fraud or misrepresenting a material fact if
 - spouse, parent, son/daughter of USC or LPR
 - in possession of a valid visa or other immigration document at the time of being inadmissible for fraud-related labor certification or immigration admission document

CRIMINAL OFFENSES

INA § 237(a)(2)

- INA §237(a)(2)(A) **General Crimes:**
 - **CIMT** within 5 years after admission for which a sentenced of 1 year or more **may be imposed**
 - **2 or more crimes** not arising out of a single scheme of criminal misconduct **at any time** after admission
 - Convicted of an **aggravated felony** at any time after admission
 - **High speed Flight** (i.e., from immigration checkpoint)
 - **Failure to Register as a Sex Offender**

WAIVER: CIMTs, Aggravated Felony, High Speed Flight if granted **full and unconditional pardon** by President or Governor

CRIMINAL OFFENSES

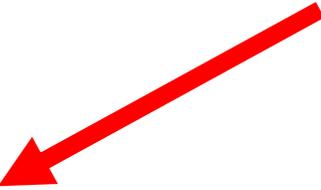
INA § 237(a)(2)

CRIMINAL GROUNDS OF DEPORTABILITY

AGGRAVATED FELONY OFFENSES

Includes state offenses that are not “felonies”
(i.e., NY State Class A misdemeanors)

**VERY
BAD!!!**



Conviction of an **Aggravated Felony**

➤ *Consequences*, in addition to deportability:

- ◆ Ineligibility for most waivers of removal
- ◆ Permanent inadmissibility after removal
- ◆ Enhanced prison sentence for illegal reentry

➤ *Crimes included*, probably even if not a felony:

- ◆ **Murder**
- ◆ **Rape**
- ◆ **Sexual Abuse of a Minor**
- ◆ **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
- ◆ **Firearm Trafficking**
- ◆ **Crime of Violence + at least 1 year prison sentence ****
- ◆ **Theft or Burglary + at least 1 year prison sentence ****
- ◆ **Fraud or tax evasion + loss to victim(s) >10, 000**
- ◆ **Prostitution business offenses**
- ◆ **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence ****
- ◆ **Obstruction of justice or perjury + at least 1 year prison sentence ****
- ◆ **Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)**
- ◆ **Other offenses listed at 8 USC 1101(a)(43)**
- ◆ **Attempt or conspiracy to commit any of the above**

**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. It also includes a cumulative sentence of 1 year or more resulting from a VOP.

CRIMINAL OFFENSES

INA § 237(a)(2)

- INA §237(a)(2)(B) **Controlled Substances:**
 - Convicted of **any controlled substance violation** at any time after admission (except: possession of 30 grams or less of marijuana for personal use)
 - **Drug abuser** or **addict** at any time after admission
- INA §237(a)(2)(C) **Certain Firearm Offenses:**
 - Convicted of any crime relating to a **firearm** (accessory or part) or **destructive device**

CRIMINAL OFFENSES

INA § 237(a)(2)

- INA §237(a)(2)(D) **Miscellaneous Crimes:**
 - espionage, sabotage, treason, sedition, threats against President, etc.
- INA §237(a)(2)(E) **Crimes of Domestic Violence, Stalking, Crimes Against Children** or (Civil or Criminal) **Violation of Protection Order**
- INA §237(a)(2)(F) **Trafficking**

FAILURE TO REGISTER AND CLASSIFICATION OF DOCUMENTS INA § 237(a)(3)

- INA §237(a)(3)(A) **Change of Address:** (i.e., unless reasonably excusable or not willful)
- INA §237(a)(3)(B) **Failure to Register or Falsification of Documents**
- INA §237(a)(3)(C) **Document Fraud**
 - **WAIVER:** Committed by LPR in assisting, aiding or supporting spouse or child
- INA §237(a)(3)(D) **Falsely Claiming Citizenship**
 - for any purpose or benefit under any Federal or State law

Exception: parents who are U.S. citizens & alien resided in the US prior to the age of 16 years.

SECURITY AND RELATED GROUNDS INA § 237(a)(4)

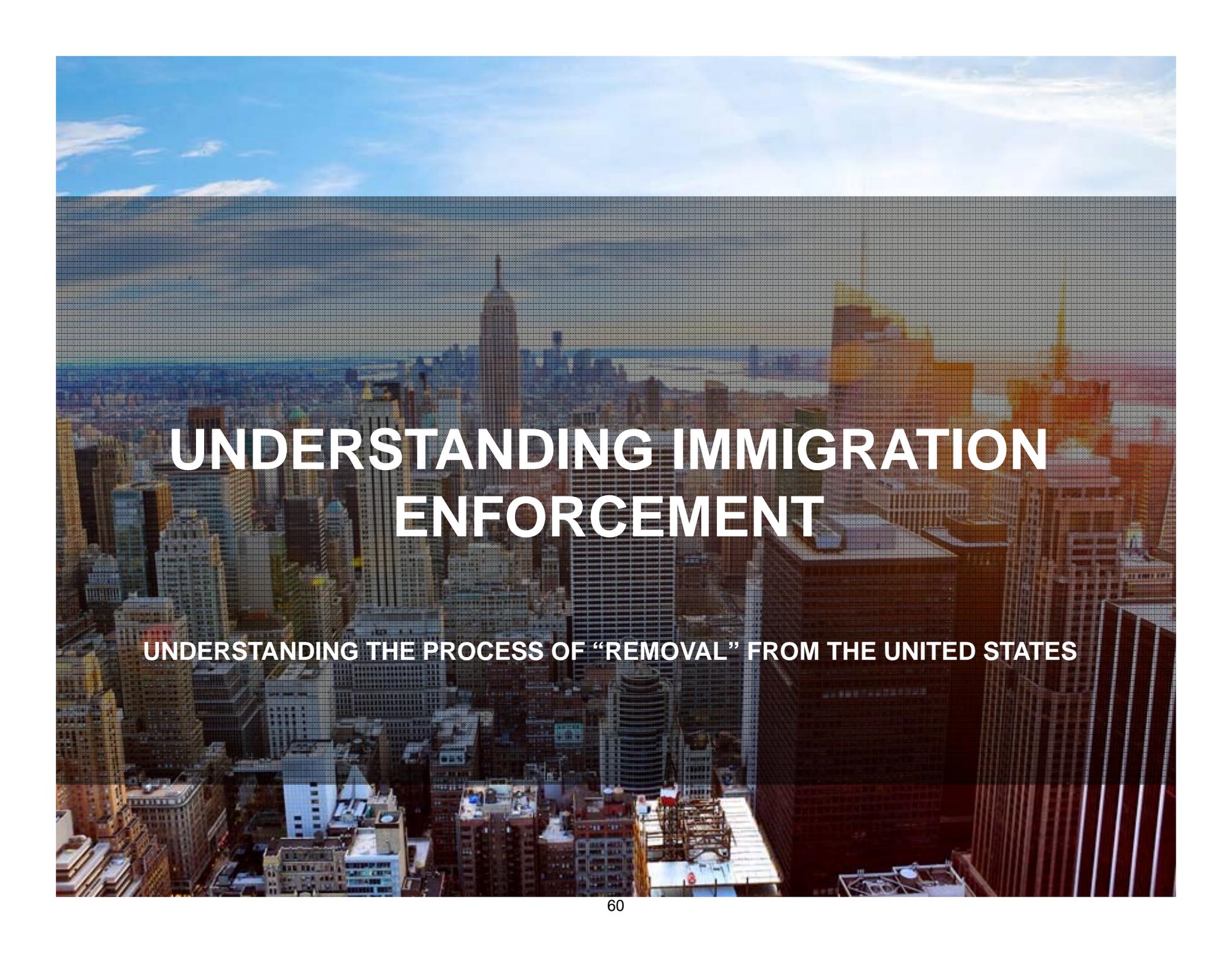
- INA §237(a)(4)(A) **In General**
- INA §237(a)(4)(B) **Terrorist Activities**
- INA §237(a)(4)(C) **Foreign Policy**
- INA §237(a)(4)(D) **Participated in Nazi Persecution, Genocide, or the Commission of any Act of Torture or Extrajudicial Killing**
- INA §237(a)(4)(E) **Participated in the Commission of Severe Violations of Religious Freedom**
- INA §237(a)(4)(F) **Recruitment or Use of Child Soldiers**

Public Charge & Unlawful Voters

INA § 237(a)(5) & INA § 237(a)(6)

- INA §237(a)(5) **Public Charge**
 - person is deportable, who, **within 5 years from date of entry**, becomes a public charge
- INA §237(a)(6) **Unlawful Voters**
 - voted in violation of **any** Federal, State, or local constitutional provision, statute, ordinance, or regulation

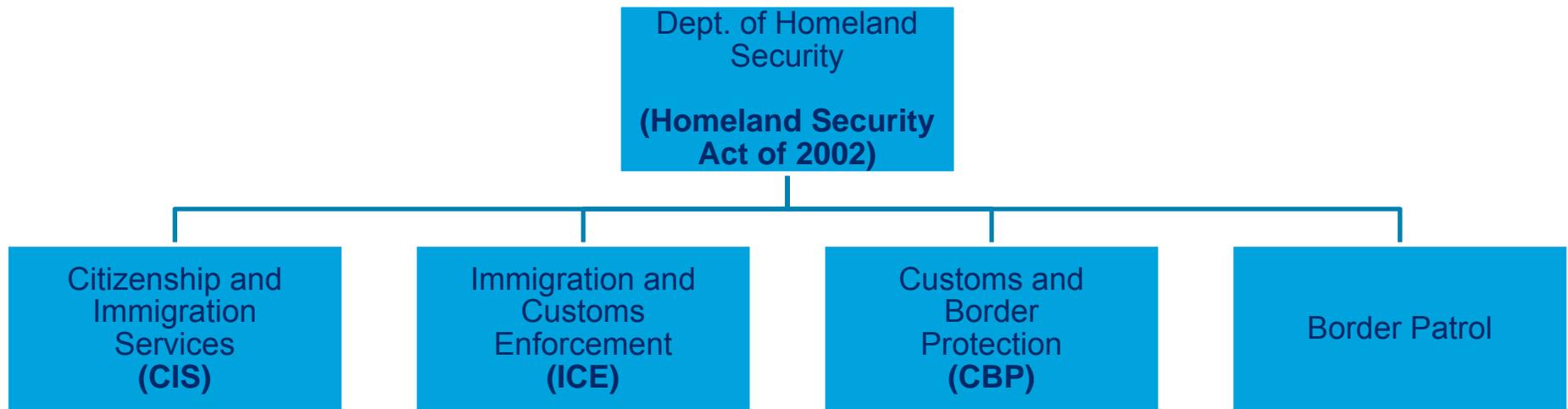
Exception: person has parents who are U.S. citizens & he/she resided in the US **prior to the age of 16 years**

An aerial photograph of a dense city skyline, likely New York City, featuring numerous skyscrapers and buildings. The sky is blue with some light clouds. The text is overlaid on the center of the image.

UNDERSTANDING IMMIGRATION ENFORCEMENT

UNDERSTANDING THE PROCESS OF “REMOVAL” FROM THE UNITED STATES

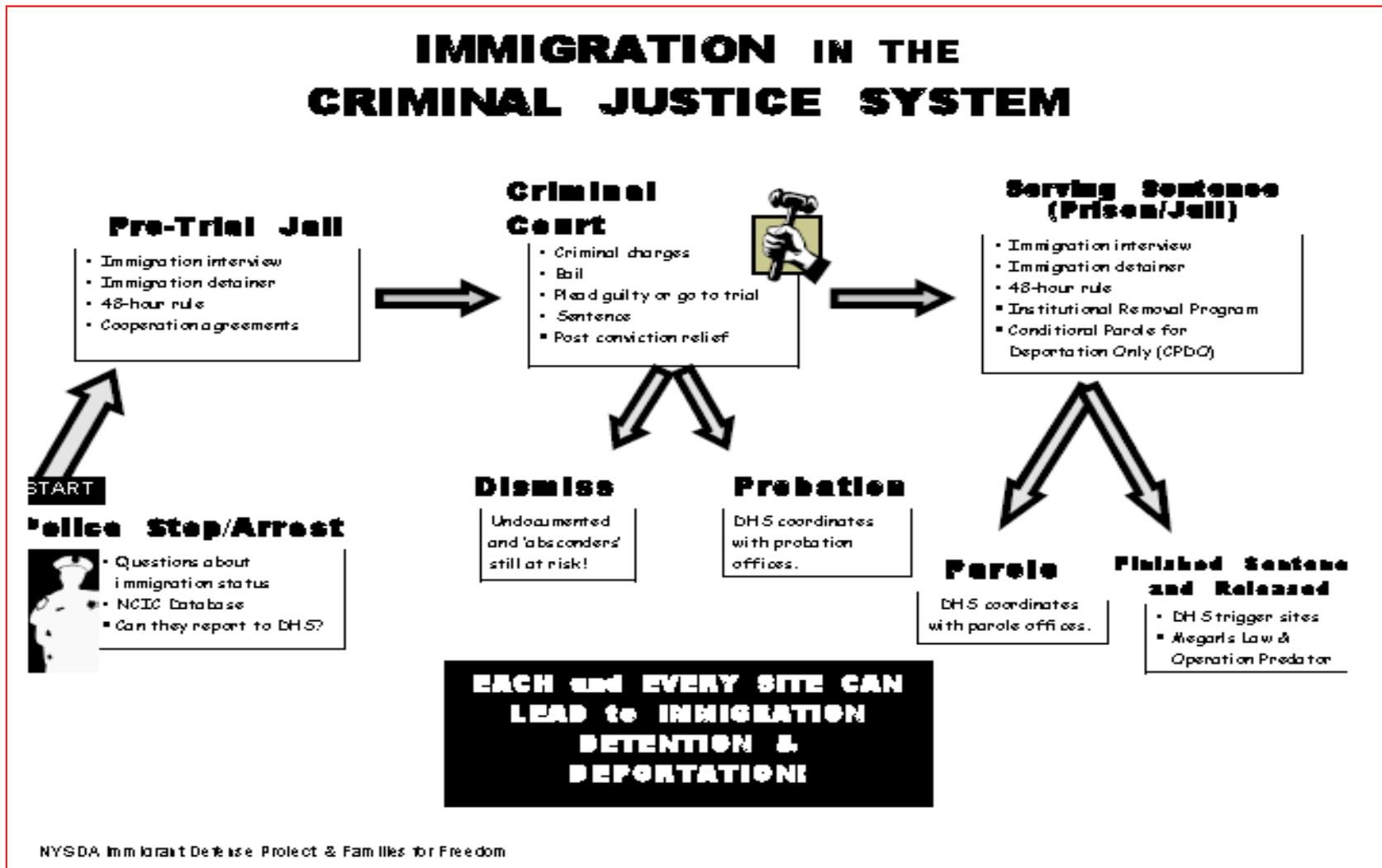
WHO IS AUTHORIZED TO ENFORCE US IMMIGRATION LAWS?



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-and-NY-COURTHOUSES2-1.pdf),
<http://moderncourts.org/wp-content/uploads/2017/12/Modern-Courts-Report-December-2017-ICE-and-NY-COURTHOUSES2-1.pdf>

IMMIGRATION WITHIN THE CRIMINAL JUSTICE SYSTEM



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

- **IMMIGRATION DETAINER** is a “hold” that will prevent a client’s release.
- 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)

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>)

ICE “HOLDS” ARE NOT 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.)

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement
IMMIGRATION DETAINER - NOTICE OF ACTION

File No:		Date:
TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)		FROM: (Department of Homeland Security Office Address)

MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS

Name of Alien: _____ 

Date of Birth: _____ Nationality: _____ Sex: _____

THE U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) HAS TAKEN THE FOLLOWING ACTION RELATED TO THE PERSON IDENTIFIED ABOVE, CURRENTLY IN YOUR CUSTODY:

- Initiated an investigation to determine whether this person is subject to removal from the United States. 
- Initiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on _____ .
(Date)
- Served a warrant of arrest for removal proceedings. A copy of the warrant is attached and was served on _____ .
(Date)
- Obtained an order of deportation or removal from the United States for this person. 

(This action does not limit your discretion to make decisions related to this person's custody classification, work and quarter assignments, or other matters.)

IT IS REQUESTED THAT YOU:

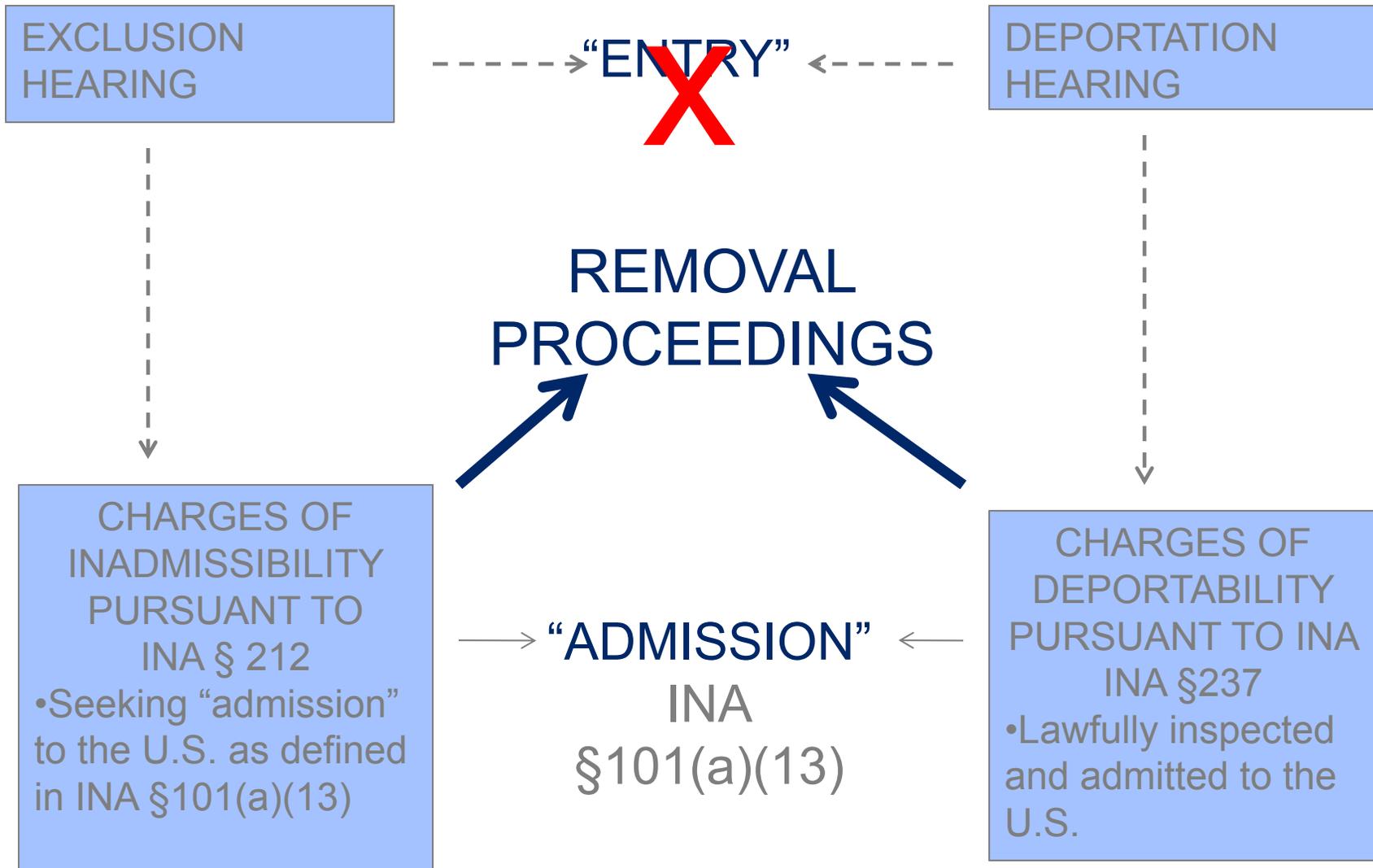
- Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency "shall maintain custody of an alien" once a detainer has been issued by DHS. **You are not authorized to hold the subject beyond these 48 hours.** As early as possible prior to the time you otherwise would release the subject, please notify the Department by calling _____ during business hours or _____ after hours or in an emergency. If you cannot reach a Department Official at these numbers, please contact the Immigration and Customs Enforcement (ICE) Law Enforcement Support Center in Burlington, Vermont at: (802) 872-6020.
- Provide a copy to the subject of this detainer.
- Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.
- Notify this office in the event of the inmate's death, hospitalization or transfer to another institution.
- Consider this request for a detainer operative only upon the subject's conviction.
- Cancel the detainer previously placed by this Office on _____.

(Date)

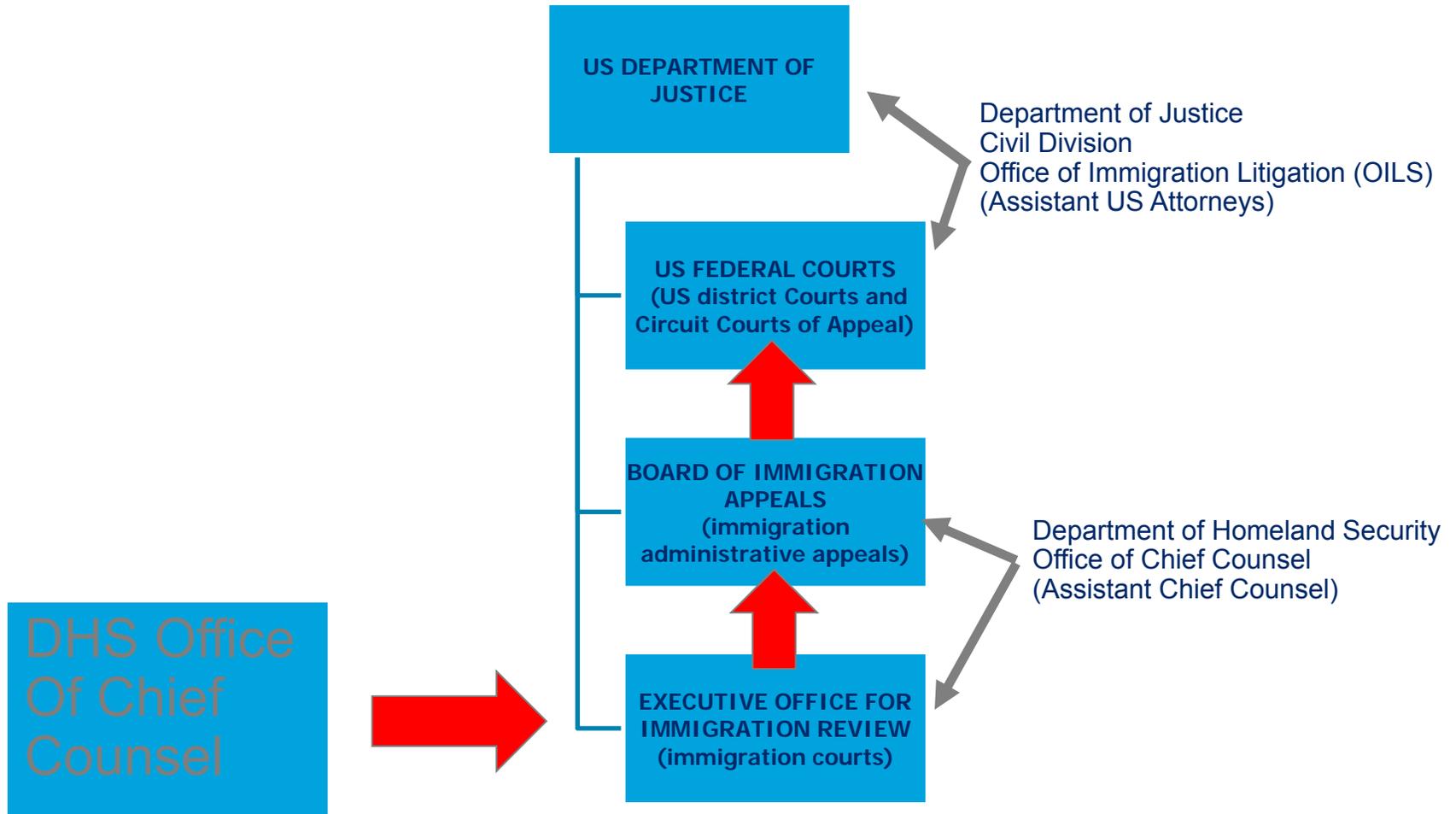
(Name and title of Immigration Officer)

(Signature of Immigration Officer)

POST- IIRIRA (1996 TO PRESENT): REMOVAL



IMMIGRATION COURT SYSTEM



SAMPLE "NOTICE TO APPEAR"

ALLEGATIONS:

- 4.) You are not a citizen or national of the United States;
- 5.) You are a native of the Dominican Republic and a citizen of the Dominican Republic;
- 6.) You were admitted to the United States at Champlain, New York on July 15, 1983 as a legal permanent resident;
- 7.) You were, on October 29, 1990, convicted in the Supreme Court, of the State of New York, County of New York, for the offense of Criminal Sale of a Controlled Substance, in the 2nd degree, to wit, cocaine, in violation of section 220.41 of the New York State Penal Law.

CHARGE:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act.

Section 237(a)(2)(B)(1) of the Immigration and Nationality Act (Act), as amended, in that, at anytime after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act [21 U.S.C. 8022]), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

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)).

COMMON FORMS OF RELIEF

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



**IMMIGRATION-RELATED
DEVELOPMENTS
&
POLICY CHANGES**

**DACA, TEMPORARY PROTECTED STATUS
AND UNIVERSAL ENFORCEMENT**

Executive Orders

Border Security and Immigration Enforcement Improvements (E.O. 13767)* January 25, 2017

- Building a wall on the Southwest Border
- Expanding expedited removal
- Changing unaccompanied minor children classification
- Detention of asylum seekers

**See also USCIS memo and FAQs re: implement of the E.O.*

Enhancing Public Safety in the Interior of the United States (E.O. 13768)* January 25, 2017

- Increasing interior enforcement and expanding enforcement priorities
- Focusing on Secure Communities, Sanctuary Cities, and immigration detainers
- Hiring an additional 10,000 enforcement and removal officers

**See also USCIS memo and FAQs re: implement of the E.O.*

Protecting the Nation From Foreign Terrorist Entry into the United States (E.O. 13769)

- 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

**Travel Ban Temporarily Suspended by Litigation in WD Washington*

Immigration Enforcement

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)
- DACA terminated by Executive Order on **September 5, 2017 with renewal applications accepted until October 5, 2017**. DACA phased out as of March 2018 (i.e., over 800,000 DACA recipients will be subject to removal) - Lawsuits pending.

Immigration Enforcement

TEMPORARY PROTECTED STATUS (TPS)

Secretary of Homeland Security Kirstjen M. Nielsen announced her decision to extend the Temporary Protected Status (TPS) designation for Somalia and Yemen for 18 months (until 2020).

[El Salvador](#)

[Haiti](#)

[Honduras](#)

[Nepal](#)

[Nicaragua](#)

[*Somalia](#)

[Sudan](#)

[South Sudan](#)

[Syria](#)

[*Yemen](#)

<https://www.uscis.gov/humanitarian/temporary-protected-status>

Immigration Enforcement Detention and Removal

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

Immigration Enforcement

INCREASED IMMIGRATION ENFORCEMENT & THE CRIMINAL JUSTICE SYSTEM

INDIVIDUALS WHO ARE IMMIGRATION ENFORCEMENT PRIORITIES

Those <i>IN VIOLATION</i> of U.S. immigration laws	Those who <i>MAY BE</i> 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.

Immigration Enforcement **REMOVAL PROCEEDINGS vs. EXPEDITED REMOVAL**

BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS

- **Expand Detention Capacity** (34,000 – at 41,000 beds as of January 2017)
- **Expand Expedited Removal** (i.e., currently, 8 U.S.C. §1228 - Expedited removal of aliens convicted of committing aggravated felonies and 8 U.S.C. §1225(b)(1)(A)(i) - alien who lacks proper documentation or has committed fraud or willful misrepresentation of facts may be removed from the United States without any further hearings or review, unless the alien indicates a fear of persecution.
- **Expand 287(g)**
- **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),⁸

Immigration Enforcement

INA §287(g) 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.

Immigration Enforcement

Additional Immigration Officers

- DHS to hire **10,000 immigration officers; 5,000 Border Patrol Agents; and 500 Air & Marine Agents/Officers**
- **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
- **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

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

Immigration Enforcement **SANCTUARY**

THE Key Federal Law: Section 1373

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

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**

ADDITIONAL RESOURCES

PRO BONO REPRESENTATION & Meeting the Needs of Immigrants

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



Kristen A. Wagner, Esq.

Director, Pro Bono Services

New York State Bar Association

One Elk Street, Albany, NY 12207

direct/fax: 518.487.5640

kwagner@nysba.org

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

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

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>

Reading Personal Tax Returns and Imputed Income

Rosalia Baiamonte, Esq.

TAX RETURNS & INCOME

*NYSBA
BRIDGING THE GAP
August 2018*

Rosalia Baiamonte, Esq.
Gassman Baiamonte Gruner, P.C.

SO TRUE!

- “...In this world nothing can be said to be certain, except death and taxes.”

- BENJAMIN FRANKLIN

- “The income tax has made more liars out of the American People than golf has.”

- WILL ROGERS

W-2 FORM

22222	a Employee's social security number 123-45-6789	OMB No. 1545-0008				
b Employer identification number (EIN) 55-5765489		1 Wages, tips, other compensation 48,500.00	2 Federal income tax withheld 6,835.00			
c Employer's name, address, and ZIP code The Big Company 12 Main Street Anywhere, NC 28111		3 Social security wages 50,000.00	4 Social security tax withheld 3,100.00			
		5 Medicare wages and tips 50,000.00	6 Medicare tax withheld 725.00			
		7 Social security tips	8 Allocated tips			
d Control number A1B2		9 Verification code	10 Dependent care benefits			
e Employee's first name and initial Last name Suff. Jane A. Doe 123 Elm Street Anywhere Else, PA 17111		11 Nonqualified plans		12a D 1,500.00		
		13 Statutory employee Retirement plan Third-party sick pay <input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	12b DD 1,000.00			
		14 Other		12c P 4,800.00		
				12d 		
f Employee's address and ZIP code						
15 State	Employer's state ID number PA 124578	16 State wages, tips, etc. 50,000.00	17 State income tax 1,535.00	18 Local wages, tips, etc. 50,000.00	19 Local income tax 750.00	20 Locality name AW

Form W-2 Wage and Tax Statement
 Copy 1 – For State, City, or Local Tax Department

2017

Department of the Treasury—Internal Revenue Service

W-2 FORM – BOX 12 CODES

A	Uncollected social security or RRTA tax on tips	P	Excludable moving expense reimbursements paid directly to employee
B	Uncollected Medicare tax on tips (but not Additional Medicare Tax)	Q	Nontaxable combat pay
C	Taxable cost of group-term life insurance over \$50,000	R	Employer contributions to Archer MSA
D	Elective deferrals under a section 403(b) salary reduction agreement	S	Employee salary reduction contributions under a section 408(p) SIMPLE plan
E	Elective deferrals under a section 403(b) salary reduction plan	T	Adoption benefits
F	Elective deferrals under a section 408(k)(6) salary reduction SEP	V	Income from exercise of nonstatutory stock options(s)
G	Elective deferrals and employer contributions to a section 457(b) deferred compensation plan	W	Employer contributions to health savings account (HSA); including cafeteria plan
H	Elective deferrals to a section 501(c)(18)(D) tax-exempt organization plan	Y	Deferrals under a section 409(A) nonqualified deferred compensation plan
J	Nontaxable sick pay	Z	Income under a nonqualified deferred compensation plan that fails to qualify as 409(a) plan
K	20% excise tax on excess golden parachute payments	AA	Designated Roth contributions under a section 401(k) plan
L	Substantial employee business expense reimbursements	BB	Designated Roth contributions under a section 403(b) plan
M	Uncollected social security OR RRTA tax on taxable cost of group-term life insurance over \$50,000 (former employee only)	DD	Cost of employer sponsored health coverage
N	Uncollected Medicare tax on taxable costs of group-term life insurance over \$50,000 insurance over \$50,000	EE	Designated Roth contribution under a governmental section 457(b) plan
		FF	Benefits under a qualified small employer health reimbursement arrangement

Statutory Employee

- IRS Code Designation
- Report income and expenses on Schedule “C”
- Examples
 - Full-time life insurance salesperson
 - Agent or commission drivers distributing certain food and beverages
- Employer still deducts FICA taxes

FORM 1040 - LAYOUT



- Total Income (22)
- Adjusted Gross Income (37)
- Taxable Income (43)
- AMT (45)
- Total Tax (63)

Total Income

- Wages
- Dividends & Interest
- Capital Gains
- Partnership &/or S Corporation Income
- Social Security Benefits

GROSS INCOME EXCLUSION EXAMPLES

- Life Insurance Proceeds
- Gifts and Inheritances
- State and Local Gov't Bond Interest
- Scholarships
- Qualified Employee Discounts

For the year Jan. 1st, 2014, or other tax year beginning , 2014, ending , 20

See separate instructions.

Your first name and initial BRIAN	Last name ARCHES	Your social security number 111 11 1111
If a joint return, spouse's first name and initial SHIRLEY	Last name FALLEN-ARCHES	Spouse's social security number 222 22 2222
Home address (number and street). If you have a P.O. box, see instructions. 545 YORK AVE		Apt. no. 4B
City, town or post office, state, and ZIP code. If you have a foreign address, also complete spaces below. NEW YORK, NY 10021		Presidential Election Campaign Check here if you, or your spouse if filing jointly, want \$3 to go to this fund. Checking a box below will not change your tax or refund. <input checked="" type="checkbox"/> You <input checked="" type="checkbox"/> Spouse
Foreign country name	Foreign province/state/county	Foreign postal code

Filing Status

1 **Single** **Married filing jointly** **Head of household** **Married filing separately**

2 **Widow(er) with dependent child**

3 **Qualifying widow(er) with dependent child**

4 **Surviving spouse of a decedent**

5 **Trust**

6 **Beneficiary of a trust**

7 **Beneficiary of an annuity**

8 **Beneficiary of a pension**

9 **Beneficiary of a profit-sharing plan**

10 **Beneficiary of an IRA**

11 **Beneficiary of a 529 plan**

12 **Beneficiary of a 527 plan**

13 **Beneficiary of a 529-ES plan**

14 **Beneficiary of a 529-ES plan**

15 **Beneficiary of a 529-ES plan**

16 **Beneficiary of a 529-ES plan**

17 **Beneficiary of a 529-ES plan**

18 **Beneficiary of a 529-ES plan**

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32 **Beneficiary of a 529-ES plan**

33 **Beneficiary of a 529-ES plan**

34 **Beneficiary of a 529-ES plan**

35 **Beneficiary of a 529-ES plan**

36 **Beneficiary of a 529-ES plan**

37 **Beneficiary of a 529-ES plan**

Exemptions

6a Yourself. If someone can claim you as a dependent, do not check box 6a

b Spouse

c Dependents:

(1) First name Last name	(2) Dependent's social security number	(3) Dependent's relationship to you	(4) If child under age 17 qualifying for child tax credit
DAVID ARCHES	333-33-3333	SON	<input checked="" type="checkbox"/>
BRIDGET ARCHES	444-44-3444	DAUGHTER	<input checked="" type="checkbox"/>

d Total number of exemptions claimed **4**

Income

7 Wages, salaries, tips, etc. Attach Form(s) W-2 **400,000.**

8a Taxable interest. Attach Schedule B if required **11,829.**

b Tax-exempt interest. Do not include on line 8a **9,359.**

9a Ordinary dividends. Attach Schedule B if required **8,991.**

b Qualified dividends **2,865.**

10 Taxable refunds, credits, or offsets of state and local income taxes **5,780.**

11 Alimony received **22,632.**

12 Business income or (loss). Attach Schedule C or C-EZ **-3,000.**

13 Capital gain or (loss). Attach Schedule D if required. If not required, check here **0.**

14 Other gains or (losses). Attach Form 4797 **318,850.**

15a IRA distributions **83,000.** b Taxable amount **0.**

16a Pensions and annuities **318,850.** b Taxable amount **0.**

17 Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E **25,000.**

18 Farm income or (loss). Attach Schedule F **25,000.**

19 Unemployment compensation **25,000.**

20a Social security benefits **25,000.** b Taxable amount **25,000.**

21 Other income. List type and amount **NYS LOTTO 25,000.**

22 Combine the amounts in the far right column for lines 7 through 21. This is your total income **790,082.**

Adjusted Gross Income

23 Educator expenses **303.**

24 Certain business expenses of reservists, performing artists, and fee-basis government officials. Attach Form 2106 or 2106-EZ

25 Health savings account deduction. Attach Form 8889

26 Moving expenses. Attach Form 3903

27 Deductible part of self-employment tax. Attach Schedule SE **303.**

28 Self-employed SEP, SIMPLE, and qualified plans

29 Self-employed health insurance deduction

30 Penalty on early withdrawal of savings **60,000.**

31a Alimony paid b Recipient's **60,000.**

32 RSN deduction **60,000.**

33 Student loan interest deduction

34 Tuition and fees. Attach Form 8917

35 Domestic production activities deduction. Attach Form 8903

36 Add lines 23 through 35 **60,303.**

37 Subtract line 36 from line 22. This is your adjusted gross income **729,779.**

FORM 1040 – PAGE 1

- Social security number – top right-hand corner of Form 1040
- Income from wages – Line 7
- Interest income – Line 8
- Dividend income – Line 9
- Taxable refunds of state and local taxes – Line 10
- Capital Gains – Line 13
- Social security benefits – Line 20
- Gambling – Line 21
- Retirement plan distributions – Lines 15 and 16
- Is there a HSA? – Line 25
- Self-employed SEP, SIMPLE and qualified plans – Line 28
- IRAs – Line 32
- AGI – Adjusted Gross Income- Line

Tax and Credits

38 Amount from line 37 (adjusted gross income) 38 7 2 9 , 7 7 9

39a Check You were born before January 2, 1950, Blind. Total boxes if: Spouse was born before January 2, 1950, Blind. checked **▶ 39a ▶** nr

b If your spouse itemizes on a separate return or you were a dual-status alien, check here 39b

40 Itemized deductions (from Schedule A) or your standard deduction (see left margin) Subtract line 40 from line 38 40 3 0 , 8 5 8

41 6 9 8 , 9 2 1

42 0

43 6 9 8 , 9 2 1

44 2 2 2 , 9 6 4

45

46

47 2 2 2 , 9 6 4

48

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51

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54

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56 2 2 2 , 9 6 4

57 6 0 6

58

59

60a

60b

61

62 1 4 , 3 3 1

63 2 3 7 , 9 0 1

64 1 3 8 ,

65 8 0 0 , 0 0 0

66a

67

68

69

70

71

72

73

74 1 4 7 , 8 0 0

75

76a

77 7 9 1 , 3 3 4

78

79

48	
49	
50	
51	
52	
53	
54	

Amount You Owe 78 Amount you owe. Subtract line 74 from line 63. For details on how to pay, see instructions **▶**

79 Estimated tax penalty (see instructions) **▶** 7 9 1 / 2 3 3

Third Party Do you want to allow another person to discuss this return with the IRS (see instructions)? Yes. Complete below. No

Designee Designees Yes No

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true and correct. Declaration of preparer (other than the taxpayer) is based on information which preparer has any knowledge of.

Print/Type preparer's name: **Paid Preparer** Preparer's signature: _____ Date: _____

My occupation: **BUSINESS OWNER**

Spouse's signature: _____ Date: _____

Spouse's occupation: **CONSULTANT**

Personal identification number (PIN): _____

Daytime phone number: _____

If the IRS sent you an Identity Protection PIN, enter it here: _____

Use Only Firm's name **▶**

FORM 1040 – PAGE 2

- ITEMIZE DEDUCTIONS – Line 40
- SUBJECT TO AMT? – LINE 45
- CLAIM CHILD CARE CREDIT – LINE 49
- CHILD TAX CREDITS – LINE 52
- WITHHOLDING v. ESTIMATED PAYMENTS – LINES 64-65
- REFUND – LINE 75 (see, Hymowitz v. Hymowitz, 119 AD3d 736 (2d Dept. 2014))

CASE LAW – DEPENDENCY EXEMPTIONS

- General Rule
- Authority of court to award dependency exemption to non-custodial parent
 - O'Halloran v. O'Halloran, 58 AD3d 704, 873 NYS2d 87 (2d Dept. 2009) - Where a noncustodial parent meets all or a substantial part of a child's financial needs, a court may determine that the noncustodial parent is entitled to declare the child as a dependent on the noncustodial parent's tax returns. As both of the parties are wage earners who each contribute toward the support of their two children, the defendant is entitled to claim one of the children as his dependent.
 - Zobgy, 158 AD2d 974, 551 NYS2d 126 (4th Dept., 1990); Ochoa, 159 AD2d 285, 552 NYS2d 289 (1st Dept., 1990); Sheehan, 543 NYS2d 827 (4th Dept., 1989)

PERSONAL EXEMPTIONS

Personal Exemption Phaseout “PEP” Thresholds

Filing Status	PEP Threshold Begins	PEP Threshold Ends
Individual	\$261,500	\$384,000
Married Filing Jointly	\$313,800	\$436,300
Head of Household	\$287,650	\$410,150
Married Filing Separately	\$156,900	\$218,150

**SCHEDULE A
(Form 1040)**

Department of the Treasury
Internal Revenue Service (99)

Itemized Deductions

► Information about Schedule A and its separate instructions is at www.irs.gov/schedulea.
► Attach to Form 1040.

OMB No. 1545-0074

2016

Attachment
Sequence No. **07**

Name(s) shown on Form 1040

Your social security number

Caution: Do not include expenses reimbursed or paid by others.				
Medical and Dental Expenses	1 Medical and dental expenses (see instructions)	1		
	2 Enter amount from Form 1040, line 38	2		
	3 If you were born before January 2, 1952, multiply line 2 by 7.5% (0.075) instead	3		
	4 Subtract line 3 from line 1. If line 3 is more than line 1, enter -0-			4
Taxes You Paid	5 State and local (check only one box):	5	26.850	
	a Income taxes, or			
	b General sales taxes	6	7.500	
	7 Real estate taxes (see instructions)	7		
	8 Personal property taxes	8		
	9 Add lines 5 through 8			9 34.350
Interest You Paid	10 Home mortgage interest and points reported to you on Form 1098	10	6.300	
	11 Home mortgage interest not reported to you on Form 1098. If paid to the person from whom you bought the home, see instructions and show that person's name, identifying no., and address ►	11		
	12 Points not reported to you on Form 1098. See instructions for special rules	12		
	13 Mortgage insurance premiums (see instructions)	13		
	14 Investment interest. Attach Form 4952 if required. (See instructions.)	14		
	15 Add lines 10 through 14			15 6.300
Gifts to Charity	16 Gifts by cash or check. If you made any gift of \$250 or more, see instructions	16	2.950	
	17 Other than by cash or check. If any gift of \$250 or more, see instructions. You must attach Form 8283 if over \$500	17		
	18 Carryover from prior year	18		
	19 Add lines 16 through 18			19 2.950
Casualty and Theft Losses	20 Casualty or theft loss(es). Attach Form 4684. (See instructions.)			20
Job Expenses and Certain Miscellaneous Deductions	21 Unreimbursed employee expenses—job travel, union dues, job education, etc. Attach Form 2106 or 2106-EZ if required. (See instructions.) ►	21		
	22 Tax preparation fees	22		
	23 Other expenses—investment, safe deposit box, etc. List type and amount ►	23		
	24 Add lines 21 through 23	24		
	25 Enter amount from Form 1040, line 38	25		
	26 Multiply line 25 by 2% (0.02)	26		
	27 Subtract line 26 from line 24. If line 26 is more than line 24, enter -0-			27
Other Miscellaneous Deductions	28 Other—from list in instructions. List type and amount ►			28
Total Itemized Deductions	29 Is Form 1040, line 38, over \$155,650?			
	No. Your deduction is not limited. Add the amounts in the far right column for lines 4 through 28. Also, enter this amount on Form 1040, line 40. Yes. Your deduction may be limited. See the Itemized Deductions Worksheet in the instructions to figure the amount to enter.			29 30.858
	30 If you elect to itemize deductions even though they are less than your standard deduction, check here ►			

Name(s) shown on Form 1040. Do not enter name and social security number if shown on page 1.

Your social security number

BRIAN ARCHES & SHIRLEY FALLEN-ARCHES

111 11 1111

Schedule B - Interest and Ordinary Dividends

Attachment Sequence No. **08**

Part I Interest

1 List name of payer. If any interest is from a seller-financed mortgage and the buyer used the property as a personal residence, see page B-1 and list this interest first. Also, show that buyer's social security number and address ▶

NORTHFORK BANK
BANK OF NY
CITIBANK
CITIBANK

Amount

3,222.
 777.
 2,298.
 5,532.

Note. If you received a Form 1099-INT, Form 1099-OID, or substitute statement from a brokerage firm, list the firm's name as the payer and enter the total interest shown on that form.

2 Add the amounts on line 1

2 11,829.

3 Excludable interest on series EE and I U.S. savings bonds issued after 1989. Attach Form 8815

3

4 Subtract line 3 from line 2. Enter the result here and on Form 1040, line 8a ▶

4 11,829.

Note. If line 4 is over \$1,500, you must complete Part III.

Part II Ordinary Dividends

5 List name of payer ▶

MERRILL LYNCH
UBS

Amount

3,001.
 5,990.

Note: If you received a Form 1099-DIV or substitute statement from a brokerage firm, list the firm's name as the payer and enter the ordinary dividends shown on that form.

6 Add the amounts on line 5. Enter the total here and on Form 1040, line 9a ▶

6 8,991.

Note. If line 6 is over \$1,500, you must complete Part III.

Part III Foreign Accounts and Trusts

You must complete this part if you (a) had over \$1,500 of taxable interest or ordinary dividends; or (b) had a foreign account; or (c) received a distribution from, or were a grantor of, or a transferor to, a foreign trust.

Yes No

7a At any time during 2006, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?

X

b If "Yes," enter the name of the foreign country ▶

8 During 2006, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust?

X

If "Yes," you may have to file Form 3520. See page B-2.

LHA For Paperwork Reduction Act Notice, see Form 1040 instructions.

Schedule B (Form 1040) 2006

8

10390220 789363 ARCHES

2006.04000 ARCHES, BRIAN

ARCHES_1

SCHEDULE B – INTEREST AND DIVIDENDS

Interest and dividend income –
Lines 1-3, 5

Discloses the existence of foreign
account –Lines 7-8

Caution: Spouse will not receive a
Form 1099 on investment
accounts held in joint names
with third party with spouse's
name listed second on the
accounts

INTEREST INCOME

- FORM 1099-INT
- IF YOU EARN IN EXCESS OF \$1,500 OF TAXABLE INTEREST, YOU MUST LIST THE PAYORS OF THE INTEREST
- TAX-EXEMPT INTEREST NOTED ON FORM 1040 (Line 8b) BUT NO SCHEDULE OF PAYORS REQUIRED ON SCHEDULE B.
- INTEREST ON A ROTH IRA ACCOUNT GENERALLY NOT TAXABLE. INTEREST ON A TRADITIONAL IRA ACCOUNT IS TAX DEFERRED, AND NOT INCLUDIBLE IN INCOME UNTIL WITHDRAWALS MADE FROM IRA.
- SERIES EE AND SERIES I BONDS – INTEREST ON THESE BONDS PAYABLE WHEN BONDS REDEEMED, AND IS THE DIFFERENCE BETWEEN THE PURCHASE PRICE AND THE REDEMPTION VALUE.

Dividend Income

- Form 1099DIV
- Ordinary v. Qualified Dividends
- Non-taxable distributions
 - Not from earnings
 - Partial return of capital
 - Reduces cost basis
- Stock dividends – generally not taxable

Depreciation - Generally

- Non-cash expenses
- Affects taxes and valuation
 - Increases expenses, thereby lowering taxable income
- Often, no loss in value and market value appreciates

Cash v. Accrual

- Cash Basis

- Income reported when received
- Expenses booked when paid

- Accrual Basis

- Income reported when earned
- Expenses booked when accrued

**SCHEDULE C
(Form 1040)**

Department of the Treasury
Internal Revenue Service (99)

Profit or Loss From Business
(Sole Proprietorship)

▶ **Information about Schedule C and its separate instructions is at www.irs.gov/schedulec.**
▶ **Attach to Form 1040, 1040NR, or 1041; partnerships generally must file Form 1065.**

OMB No. 1545-0074

2016
Attachment
Sequence No. **09**

Name of proprietor BRIAN ARCHES		Social security number (SSN) 111-11-1111
A Principal business or profession, including product or service (see instructions) COSMETIC SALES		B Enter code from instructions ▶ 4 5 4 3 9 0
C Business name. If no separate business name, leave blank. BODY BEAUTIFUL		D Employer ID number (EIN), (see instr.)
E Business address (including suite or room no.) ▶ 545 YOUK AVENUE City, town or post office, state, and ZIP code NEW YORK, NY 10021		
F Accounting method: (1) <input type="checkbox"/> Cash (2) <input type="checkbox"/> Accrual (3) <input type="checkbox"/> Other (specify) ▶		
G Did you "materially participate" in the operation of this business during 2016? If "No," see instructions for limit on losses		<input type="checkbox"/> Yes <input type="checkbox"/> No
H If you started or acquired this business during 2016, check here		<input type="checkbox"/>
I Did you make any payments in 2016 that would require you to file Form(s) 1099? (see instructions)		<input type="checkbox"/> Yes <input type="checkbox"/> No
J If "Yes," did you or will you file required Forms 1099?		<input type="checkbox"/> Yes <input type="checkbox"/> No

Part I Income

1	Gross receipts or sales. See instructions for line 1 and check the box if this income was reported to you on Form W-2 and the "Statutory employee" box on that form was checked	1	69,800
2	Returns and allowances	2	1,200
3	Subtract line 2 from line 1	3	68,600
4	Cost of goods sold (from line 42)	4	23,680
5	Gross profit. Subtract line 4 from line 3	5	44,920
6	Other income, including federal and state gasoline or fuel tax credit or refund (see instructions)	6	
7	Gross income. Add lines 5 and 6	7	44,920

Part II Expenses. Enter expenses for business use of your home **only** on line 30.

8	Advertising	8	890	18	Office expense (see instructions)	18	500
9	Car and truck expenses (see instructions)	9	2,625	19	Pension and profit-sharing plans	19	
10	Commissions and fees	10		20	Rent or lease (see instructions):		
11	Contract labor (see instructions)	11		20a	Vehicles, machinery, and equipment	20a	1,000
12	Depletion	12	3,100	20b	Other business property	20b	
13	Depreciation and section 179 expense deduction (not included in Part III) (see instructions)	13	3,100	21	Repairs and maintenance	21	
14	Employee benefit programs (other than on line 19)	14		22	Supplies (not included in Part III)	22	245
15	Insurance (other than health)	15	1,600	23	Taxes and licenses	23	
16	Interest:			24	Travel, meals, and entertainment:		
16a	Mortgage (paid to banks, etc.)	16a		24a	Travel	24a	245
16b	Other	16b		24b	Deductible meals and entertainment (see instructions)	24b	
17	Legal and professional services	17	1,300	25	Utilities	25	458
26				26	Wages (less employment credits)	26	
27a				27a	Other expenses (from line 48)	27a	1,100
27b				27b	Reserved for future use	27b	
28	Total expenses before expenses for business use of home. Add lines 8 through 27a	28	16,163	28		28	16,163
29	Tentative profit or (loss). Subtract line 28 from line 7	29	28,757	29		29	28,757
30	Expenses for business use of your home. Do not report these expenses elsewhere. Attach Form 8829 unless using the simplified method (see instructions). Simplified method filers only: enter the total square footage of: (a) your home: _____ and (b) the part of your home used for business: _____. Use the Simplified Method Worksheet in the instructions to figure the amount to enter on line 30	30	6,125	30		30	6,125
31	Net profit or (loss). Subtract line 30 from line 29. • If a profit, enter on both Form 1040, line 12 (or Form 1040NR, line 13) and on Schedule SE, line 2 . (If you checked the box on line 1, see instructions). Estates and trusts, enter on Form 1041, line 3 . • If a loss, you must go to line 32.	31	22,632	31		31	22,632
32	If you have a loss, check the box that describes your investment in this activity (see instructions). • If you checked 32a, enter the loss on both Form 1040, line 12 , (or Form 1040NR, line 13) and on Schedule SE, line 2 . (If you checked the box on line 1, see the line 31 instructions). Estates and trusts, enter on Form 1041, line 3 . • If you checked 32b, you must attach Form 6198 . Your loss may be limited.			32a	<input type="checkbox"/> All investment is at risk.		
				32b	<input type="checkbox"/> Some investment is not at risk.		

Part III Cost of Goods Sold (see instructions)

33 Method(s) used to value closing inventory: a Cost b Lower of cost or market c Other (attach explanation)

34 Was there any change in determining quantities, costs, or valuations between opening and closing inventory?

If "Yes," attach explanation

35 Inventory at beginning of year. If different from last year's closing inventory, attach explanation

36 Purchases less cost of items withdrawn for personal use

37 Cost of labor. Do not include any amounts paid to yourself

38 Materials and supplies

39 Other costs

40 Add lines 35 through 39

41 Inventory at end of year

42 Cost of goods sold. Subtract line 41 from line 40. Enter the result here and on line 42

Table with 2 columns: Description, Amount. Rows 35-42. Values: 11,000, 16,000, 8,700, 980, 36,680, 13,000, 23,680.

Part IV Information on Your Vehicle. Complete this part only if you are claiming car or truck expenses on line 9 and are not required to file Form 4562 for this business. See the instructions for line 13 to find out if you must file Form 4562.

43 When did you place your vehicle in service for business purposes? (month, day, year) 9/1

44 Of the total number of miles you drove your vehicle during 2014, enter the number of miles you used your vehicle for: a Business b Commuting c Other

45 Was your vehicle available for personal use during off-duty hours? Do Yes No

46 you (or your spouse) have another vehicle available for personal use? Yes No

47 a Do you have evidence to support your deduction? Yes No b If "Yes," is the evidence written? Yes No

Part V Other Expenses. List below business expenses not included on lines 8-26 or line 30.

Table with 2 columns: Description, Amount. Row 1: PRINTING, 1,100. Row 2: 48 Total other expenses, 1,100.

**SCHEDULE D
(Form 1040)**

Department of the Treasury
Internal Revenue Service (99)

Capital Gains and Losses

| Attach to Form 1040 or Form 1040NR.

| Information about Schedule D and its separate instructions is at www.irs.gov/scheduled.
| Use Form 8949 to list your transactions for lines 1b, 2, 3, 8b, 9, and 10.

OMB No. 1545-0074

2014

Attachment
Sequence No. 12

Name(s) shown on return

BRIAN ARCHES & SHIRLEY FALLEN-ARCHES

Your social security number

111 11 1111
V V

Part I Short-Term Capital Gains and Losses - Assets Held One Year or Less

See instructions for how to figure the amounts to enter on the lines below.

This form may be easier to complete if you round off cents to whole dollars.

	(d) Proceeds (sales price)	(e) Cost (or other basis)	(g) Adjustments to gain or loss from Form(s) 8949, Part I, line 2, column (g)	(h) Gain or (loss) Subtract column (e) from column (d) and combine the result with column (g)
1a Totals for all short-term transactions reported on Form 1099-B for which basis was reported to the IRS and for which you have no adjustments (see instructions). However, if you choose to report all these transactions on Form 8949, leave this line blank and go to line 1b DDDDDDDDDDDDDDDDD				
1b Totals for all transactions reported on Form(s) 8949 with Box A checked DDDDDDDDDDD				
2 Totals for all transactions reported on Form(s) 8949 with Box B checked DDDDDDDDDDD				
3 Totals for all transactions reported on Form(s) 8949 with Box C checked DDDDDDDDDDD				
4 Short-term gain from Form 6252 and short-term gain or (loss) from Forms 4684, 6781, and 8824 ~~~~~				
5 Net short-term gain or (loss) from partnerships, S corporations, estates, and trusts from Schedule(s) K-1 ~~~~~				
6 Short-term capital loss carryover. Enter the amount, if any, from line 8 of your Capital Loss Carryover Worksheet in the instructions ~~~~~				(56,999.)
7 Net short-term capital gain or (loss). Combine lines 1a through 6 in column (h). If you have any long-term capital gains or losses, go to Part II below. Otherwise, go to Part III on page 2 DDDDDDDDDDDDDDDDD				< 56,999. .

Part II Long-Term Capital Gains and Losses - Assets Held More Than One Year

See instructions for how to figure the amounts to enter on the lines below.

This form may be easier to complete if you round off cents to whole dollars.

	(d) Proceeds (sales price)	(e) Cost (or other basis)	(g) Adjustments to gain or loss from Form(s) 8949, Part II, line 2, column (g)	(h) Gain or (loss) Subtract column (e) from column (d) and combine the result with column (g)
8a Totals for all long-term transactions reported on Form 1099-B for which basis was reported to the IRS and for which you have no adjustments (see instructions). However, if you choose to report all these transactions on Form 8949, leave this line blank and go to line 8b DDDDDDDDDDDDDDDDD				
8b Totals for all transactions reported on Form(s) 8949 with Box D checked DDDDDDDDDDD	69,000. .	24,000. .		45,000. .
9 Totals for all transactions reported on Form(s) 8949 with Box E checked DDDDDDDDDDD				
10 Totals for all transactions reported on Form(s) 8949 with Box F checked DDDDDDDDDDD				
11 Gain from Form 4797, Part I; long-term gain from Forms 2439 and 6252, and long-term gain or (loss) from Forms 4684, 6781, and 8824 ~~~~~				
12 Net long-term gain or (loss) from partnerships, S corporations, estates, and trusts from Schedule(s) K-1 ~~~~~				
13 Capital gain distributions ~~~~~ <u>SEE STATEMENT 11</u>				812. .
14 Long-term capital loss carryover. Enter the amount, if any, from line 13 of your Capital Loss Carryover Worksheet in the instructions ~~~~~				(32,907.)
15 Net long-term capital gain or (loss). Combine lines 8a through 14 in column (h). Then go to Part III on page 2 DDD				12,905. .

LHA For Paperwork Reduction Act Notice, see your tax return instructions. Schedule D (Form 1040) 2014

420511
11-24-14

Part III Summary

<44,094.>

16 Combine lines 7 and 15 and enter the result

If line 16 is a **gain**, enter the amount from line 16 on Form 1040, line 13, or Form 1040NR, line 14. Then go to line 17 below.

If line 16 is a **loss**, skip lines 17 through 20 below. Then go to line 21. Also be sure to complete line 22.

If line 16 is **zero**, skip lines 17 through 21 below and enter -0- on Form 1040, line 13, or Form 1040NR, line 14. Then go to line 22.

16
18
19
21

17 Are lines 15 and 16 **both** gains?

Yes. Go to line 18.

No. Skip lines 18 through 21, and go to line 22.

18 Enter the amount, if any, from line 7 of the **28% Rate Gain Worksheet** in the instructions ~~~~~

19 Enter the amount, if any, from line 18 of the **Unrecaptured Section 1250 Gain Worksheet** in the instructions ~~~~~

20 Are lines 18 and 19 **both** zero or blank?

Yes. Complete the **Qualified Dividends and Capital Gain Tax Worksheet** in the instructions for Form 1040, line 44 (or in the instructions for Form 1040NR, line 42). **Do not** complete lines 21 and 22 below.

No. Complete the **Schedule D Tax Worksheet** in the instructions. **Do not** complete lines 21 and 22 below.

21 If line 16 is a loss, enter here and on Form 1040, line 13, or Form 1040NR, line 14, the **smaller** of:

The loss on line 16 or SEE STATEMENT 12 (3,000.)
 (\$3,000), or if married filing separately, (\$1,500)

Note. When figuring which amount is smaller, treat both amounts as positive numbers.

22 Do you have qualified dividends on Form 1040, line 9b, or Form 1040NR, line 10b?

Yes. Complete the **Qualified Dividends and Capital Gain Tax Worksheet** in the instructions for Form 1040, line 44 (or in the instructions for Form 1040NR, line 42).

No. Complete the rest of Form 1040 or Form 1040NR.

CARRY FORWARD LOSSES

- IRC §1211
- FINKELSTEIN v. FINKELSTEIN, 268 AD2d 273, 701 NYS2d 52 (1ST Dept. 2002)

Marital property, which is broadly construed to consist of “things of value arising out of the marital relationship”, is not a traditional property concept...We therefore conclude, as did the trial court, that a capital loss carry forward accumulated by the parties constitute a marital asset subject to distribution (but see, *Cerretani v Cerretani*, 221 AD2d 814, 816-817).

In *Braunstein v. Braunstein*, 132 A.D.3d 620, 624, 18 N.Y.S.3d 73, 78 (2d Dep't 2015), the court held that a wife who had filed for divorce in 2008 was entitled to a credit for a portion of a net operating loss carryover claimed by the husband on his 2009 return in proportion to her interest in the business in question.

Cf. *Cerretani v. Cerretani*, 221 AD2d 814 (3d Dept. 1995)

RENTAL INCOME & EXPENSES

- Include in tax return
- Exception – if rent your home less than 15 days/year
- Generally, passive activity, unless “materially” and “actively” participated
- Although passive, up to \$25,000 deduction for losses against nonpassive income – phase out provisions

PERMANENT MAINTENANCE NON-DEDUCTIBILITY

- IRC §71 presumes qualifying alimony [maintenance] payments are includible and deductible, unless designated otherwise and thereby excluded. Parties may designate in a written agreement that all or part of payments under IRC Sec. 71 are not includible and not allowable as a deduction under IRC Sec. 215
- Grumet, 37 AD3d 534, 829 NYS2d 682 (2d Dept. 2007)-
“Award of nondurational, nontaxable maintenance of \$16,000 per month reduced to award of nondurational, taxable maintenance of \$9,000 per month. The award of maintenance should be taxable to the wife and deductible to the husband as the decision of the trial court failed to set forth any rationale for a departure from the norm envisioned by current Internal Revenue Code provisions.”
- Maggi, 303 AD2d 650, 756 NYS2d 789 (2d Dept. 2003) – “...as the courts generally provide that maintenance payments are either taxable to the spouse receiving the payments and tax-deductible by the spouse making the payments, or not taxable to the spouse receiving the payments and not tax-deductible by the spouse making the payments (see Markopoulos v. Markopoulos, 274 A.D.2d 457, 710 N.Y.S.2d 636), the judgment is modified to reflect the latter option. [in addition to his declared income for the years in question, he earned over \$200,000 in undeclared income in payments from the corporations which he controlled.]

TAX RETURNS ON TRIAL

- “We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns.” Mahoney-Buntzman v. Buntzman, 12 NY3d 415, 422, 881 NYS2d 369, 373 (2009)
- Defendant denied summary judgment declaring certain property as her separate property where on joint returns she reported her interest in the properties as tax losses. Foti v. Foti, 114 AD3d 1207, 979 NYS2d 914 (4th Dept. 2014)
- See, Mikkelson v. Kessler, 50 AD3d 1443, 857 NYS2d 311 (2008) - “The underlying rationale of this doctrine [judicial estoppel] extends to prevent a party from asserting, without ample explanation, a factual position in a legal proceeding that is directly contradicted by his or her tax return. (Emphasis added)

NET OPERATING LOSS

- IRC §172
- Loss from operation of taxpayer's business when expenses exceed revenue
- NOL can be carried forward to future tax years (20 years) or back to the prior 2 years.
- Generally, carried back as will yield an immediate refund but taxpayer can elect to only carry the NOL forward.

TAX REFUNDS

- Marital property for the fraction of the year prior to commencement of the matrimonial action
- *Hymowitz v. Hymowitz*, 119 AD3d 737 (2d Dept. 2014)
- *Girgenti v. Girgenti*, 81 AD3d 886 (2d Dept. 2011)
- *Le Barre v. La Barre*, 251 AD2d 1008 (4th Dept. 1998)

SCHEDULE E

(Form 1040)

Department of the Treasury Internal Revenue Service (99)

Supplemental Income and Loss

(From rental real estate, royalties, partnerships, S corporations, estates, trusts, REMICs, etc.)

Attach to Form 1040, 1040NR, or Form 1041.

Information about Schedule E and its separate instructions is at www.irs.gov/schedulee.

OMB No. 1545-0074

2014

Attachment Sequence No. 13

Name(s) shown on return

Your social security number

BRIAN ARCHES & SHIRLEY FALLEN-ARCHES

111-11-1111

Part I Income or Loss From Rental Real Estate and Royalties Note. If you are in the business of renting personal property, use Schedule C or C-EZ (see instructions). If you are an individual, report farm rental income or loss from Form 4835 on page 2, line 40.

A Did you make any payments in 2014 that would require you to file Form(s) 1099? (see instructions) Yes X No
B If "Yes," did you or will you file required Forms 1099? Yes No

1a Physical address of each property (street, city, state, ZIP code)

A BOCA RATON, FL

B

C

1b Type of Property (from list below)

A 1

B

C

2 For each rental real estate property listed above, report the number of fair rental and personal use days. Check the QJV box only if you meet the requirements to file as a qualified joint venture. See instructions.

Table with columns: Fair Rental Days, Personal Use Days, QJV. Row A: 365, empty, empty.

Type of Property:

- 1 Single Family Residence 3 Vacation/Short-Term Rental 5 Land 7 Self-Rental
2 Multi-Family Residence 4 Commercial 6 Royalties 8 Other (describe)

Main table with columns: Income: Properties, A, B, C. Rows include Rents received (22,000), Expenses (16,242), and Total rental real estate and royalty income (5,758).

LHA For Paperwork Reduction Act Notice, see the separate instructions. Schedule E (Form 1040) 2014

IV, and line 40 on page 2 do not apply to you, also enter this amount on 18. Otherwise, include this amount in the total on line 41 on page 2

Name(s) shown on return. Do not enter name and social security number if shown on page 1. **Your social security number**
BRIAN ARCHES & SHIRLEY FALLEN-ARCHES 111-11-1111

Caution. The IRS compares amounts reported on your tax return with amounts shown on Schedule(s) K-1.

Part II Income or Loss From Partnerships and S Corporations Note. If you report a loss from an at risk activity for which any amount is not at risk, you must check column (e) on line 28 and attach Form 6198. See instructions.

27 Are you reporting any loss not allowed in a prior year due to the at risk, excess farm loss, or basis limitations, a prior year unallowed loss from a passive activity (if that loss was not reported on Form 8582), or unreimbursed partnership expenses? ~~~~~ If you answered **Yes** **No** "Yes," see instructions before completing this section.

28(a) Name	(b) P Partnership; S corporation	(c) Check if foreign partnership	(d) Employer identification number	(e) Check if any amount is not at risk
A BRIAN'S BUILDING LLP	P		14-1111111	
B ARCHES ARCHITECTS	S		14-1111112	
C				
D				

Passive Income and Loss		Nonpassive Income and Loss		
(f) Passive loss allowed (attach Form 8582 if required)	(g) Passive income from Schedule K-1	(h) Nonpassive loss from Schedule K-1	(i) Section 179 expense deduction from Form 4562	(j) Nonpassive income from Schedule K-1
A 7,908.				
B	321,000			
C				
D				
29a Totals ~~~~~		321,000		
b Totals ~~~~~		7,908.		
30 Add columns (g) and (j) of line 29a ~~~~~				30 321,000.
31 Add columns (f), (h), and (i) of line 29b ~~~~~				31 (7,908.)
32 Total partnership and S corporation income or (loss). Combine lines 30 and 31. Enter the result here and include in the total on line 41 below ~~~~~				32 313,092.

Part III Income or Loss From Estates and Trusts

33(a) Name	(b) Employer identification number		
A			
B			
Passive Income and Loss		Nonpassive Income and Loss	
(c) Passive deduction or loss allowed (attach Form 8582 if required)	(d) Passive income from Schedule K-1	(e) Deduction or loss from Schedule K-1	(f) Other income from Schedule K-1
A			
B			
34a Totals ~~~~~			
b Totals ~~~~~			
35 Add columns (d) and (f) of line 34a ~~~~~			35
36 Add columns (c) and (e) of line 34b ~~~~~			36 ()
37 Total estate and trust income or (loss). Combine lines 35 and 36. Enter the result here and include in the total on line 41 below ~~~~~			37

Part IV Income or Loss From Real Estate Mortgage Investment Conduits (REMICs) - Residual Holder

38(a) Name	(b) Employer identification number	(c) Excess inclusion from Schedules Q, line 2c (see instructions)	(d) Taxable income (net loss) from Schedules Q, line 1b	(e) Income from Schedules Q, line 3b
39 Combine columns (d) and (e) only. Enter the result here and include in the total on line 41 below ~~~~~				39

Part V Summary

40 Net farm rental income of (loss) from Form 4835. Also, complete line 42 below ~~~~~			
41 Total income or (loss). Combine lines 26, 32, 37, 39, and 40. Enter the result here and on Form 1040, line 17, or Form 1040NR, line 18 ~~~~~		9	41 318,850.
42 Reconciliation of farming and fishing income. Enter your gross farming and fishing income reported on Form 4835, line 7; Schedule K-1 (Form 1065), box 14, code B; Schedule K-1 (Form 1120S), box 17, code V; and Schedule K-1 (Form 1041), box 14, code F (see instructions)		42	Schedule E (Form 1040) 2014
43 Reconciliation for real estate professionals. If you were a real estate professional (see instructions), enter the net income or (loss) you reported anywhere on Form 1040 or Form 1040NR from all rental real estate activities in which you materially participated under the passive activity loss rules ~~~~~		43	
44 ~~~~~			

421501 10-22-14

S CORPORATIONS

Nature of S Corporation

Taxes on corporate profits a personal liability of the shareholder, regardless of whether distributions to the shareholder are sufficient to pay the taxes

Pass-through entity

Disadvantage - If corporation can distribute none or only some of its earnings, unfavorable result for investor (See illustration)

	ABC CORP.	XYZ CORP.
Pre-tax Income	\$600,000	\$600,000
Corporate Income Tax	0	0
Net Income	600,000	600,000
Distributions	600,000	200,000
Personal Income Tax (assume 40%)	240,000	240,000
Net Distribution	\$360,000	\$(40,000)

Schedule K-1 (Form 1065)

Department of the Treasury Internal Revenue Service

2016

For calendar year 2016, or tax year beginning ending 2016 ending 20

Final K-1 Amended K-1

Partner's Share of Income, Deductions, Credits, etc. See back of form and separate instructions.

Part I Information About the Partnership
Part II Information About the Partner
A Partnership's employer identification number
B Partnership's name, address, city, state, and ZIP code
C IRS Center where partnership filed return
D Check if this is a publicly traded partnership (PTP)
E Partner's identifying number
F Partner's name, address, city, state, and ZIP code
G General partner or LLC member-manager Limited partner or other LLC member
H Domestic partner Foreign partner
I1 What type of entity is this partner?
I2 If this partner is a retirement plan (IRA/SEP/Keogh/etc.), check here
J Partner's share of profit, loss, and capital (see instructions):
Beginning Ending
Profit % %
Loss % %
Capital % %
K Partner's share of liabilities at year end:
Nonrecourse \$
Qualified nonrecourse financing \$
Recourse \$
L Partner's capital account analysis:
Beginning capital account \$
Capital contributed during the year \$
Current year increase (decrease) \$
Withdrawals & distributions \$
Ending capital account \$
M Did the partner contribute property with a built-in gain or loss?
Yes No
If "Yes," attach statement (see instructions)

Part III Partner's Share of Current Year Income, Deductions, Credits, and Other Items
1 Ordinary business income (loss) 15 Credits
2 Net rental real estate income (loss)
3 Other net rental income (loss) 16 Foreign transactions
4 Guaranteed payments
5 Interest income
6a Ordinary dividends
6b Qualified dividends
7 Royalties
8 Net short-term capital gain (loss)
9a Net long-term capital gain (loss) 17 Alternative minimum tax (AMT) items
9b Collectibles (28%) gain (loss)
9c Unrecaptured section 1250 gain
10 Net section 1231 gain (loss) 18 Tax-exempt income and nondeductible expenses
11 Other income (loss)
12 Section 179 deduction
13 Other deductions
14 Self-employment earnings (loss)
19 Distributions
20 Other information
*See attached statement for additional information.
For IRS Use Only

Installment Sale Income

Department of the Treasury
Internal Revenue Service

▶ **Attach to your tax return.**
▶ **Use a separate form for each sale or other disposition of property on the installment method.**
▶ **Information about Form 6252 and its instructions is at www.irs.gov/form6252.**

2016
Attachment
Sequence No. **79**

Name(s) shown on return _____ Identifying number _____

- 1 Description of property ▶ _____
- 2a Date acquired (mm/dd/yyyy) ▶ _____ b Date sold (mm/dd/yyyy) ▶ _____
- 3 Was the property sold to a related party (see instructions) after May 14, 1980? If "No," skip line 4 Yes No
- 4 Was the property you sold to a related party a marketable security? If "Yes," complete Part III. If "No," complete Part III for the year of sale and the 2 years after the year of sale Yes No

Part I Gross Profit and Contract Price. Complete this part for the year of sale only.

5	Selling price including mortgages and other debts. Don't include interest, whether stated or unstated	5	
6	Mortgages, debts, and other liabilities the buyer assumed or took the property subject to (see instructions)	6	
7	Subtract line 6 from line 5	7	
8	Cost or other basis of property sold	8	
9	Depreciation allowed or allowable	9	
10	Adjusted basis. Subtract line 9 from line 8	10	
11	Commissions and other expenses of sale	11	
12	Income recapture from Form 4797, Part III (see instructions)	12	
13	Add lines 10, 11, and 12	13	
14	Subtract line 13 from line 5. If zero or less, don't complete the rest of this form (see instructions)	14	
15	If the property described on line 1 above was your main home, enter the amount of your excluded gain (see instructions). Otherwise, enter -0-	15	
16	Gross profit. Subtract line 15 from line 14	16	
17	Subtract line 13 from line 6. If zero or less, enter -0-	17	
18	Contract price. Add line 7 and line 17	18	

Part II Installment Sale Income. Complete this part for the year of sale **and** any year you receive a payment or have certain debts you must treat as a payment on installment obligations.

19	Gross profit percentage (expressed as a decimal amount). Divide line 16 by line 18. For years after the year of sale, see instructions	19	
20	If this is the year of sale, enter the amount from line 17. Otherwise, enter -0-	20	
21	Payments received during year (see instructions). Don't include interest, whether stated or unstated	21	
22	Add lines 20 and 21	22	
23	Payments received in prior years (see instructions). Don't include interest, whether stated or unstated	23	
24	Installment sale income. Multiply line 22 by line 19	24	
25	Enter the part of line 24 that is ordinary income under the recapture rules (see instructions)	25	
26	Subtract line 25 from line 24. Enter here and on Schedule D or Form 4797 (see instructions)	26	

Part III Related Party Installment Sale Income. **Don't** complete if you received the final payment this tax year.

- 27 Name, address, and taxpayer identifying number of related party _____
- 28 Did the related party resell or dispose of the property ("second disposition") during this tax year? Yes No
- 29 If the answer to question 28 is "Yes," complete lines 30 through 37 below unless one of the following conditions is met. Check the box that applies.
 - a The second disposition was more than 2 years after the first disposition (other than dispositions of marketable securities). If this box is checked, enter the date of disposition (mm/dd/yyyy) . . . ▶ _____
 - b The first disposition was a sale or exchange of stock to the issuing corporation.
 - c The second disposition was an involuntary conversion and the threat of conversion occurred after the first disposition.
 - d The second disposition occurred after the death of the original seller or buyer.
 - e It can be established to the satisfaction of the IRS that tax avoidance wasn't a principal purpose for either of the dispositions. If this box is checked, attach an explanation (see instructions).
- 30 Selling price of property sold by related party (see instructions) 30 | |- 31 Enter contract price from line 18 for year of first sale 31 | |- 32 Enter the **smaller** of line 30 or line 31 32 | |- 33 Total payments received by the end of your 2016 tax year (see instructions) 33 | |- 34 Subtract line 33 from line 32. If zero or less, enter -0- 34 | |- 35 Multiply line 34 by the gross profit percentage on line 19 for year of first sale 35 | |- 36 Enter the part of line 35 that is ordinary income under the recapture rules (see instructions) 36 | |- 37 Subtract line 36 from line 35. Enter here and on Schedule D or Form 4797 (see instructions) 37 | |

▶ **Attach to your tax return.**

▶ **Information about Form 8960 and its separate instructions is at www.irs.gov/form8960.**

Name(s) shown on your tax return
BRIAN ARCHES & SHIRLEY FALLEN-ARCHES

Your social security number or EIN
111-11-1111

Part I Investment Income

Section 6013(g) election (see instructions)
 Section 6013(h) election (see instructions)
 Regulations section 1.1411-10(g) election (see instructions)

1	Taxable interest (see instructions)		1	11,829.
2	Ordinary dividends (see instructions)		2	8,991.
3	Annuities (see instructions)		3	
4a	Rental real estate, royalties, partnerships, S corporations, trusts, etc. (see instructions)	4a		318,850.
b	Adjustment for net income or loss derived in the ordinary course of a non-section 1411 trade or business (see instructions)	4b		
c	Combine lines 4a and 4b		4c	318,850.
5a	Net gain or loss from disposition of property (see instructions)	5a		-3,000.
b	Net gain or loss from disposition of property that is not subject to net investment income tax (see instructions)	5b		
c	Adjustment from disposition of partnership interest or S corporation stock (see instructions)	5c		
d	Combine lines 5a through 5c		5d	-3,000.
6	Adjustments to investment income for certain CFCs and PFICs (see instructions)		6	
7	Other modifications to investment income (see instructions)		7	
8	Total investment income. Combine lines 1, 2, 3, 4c, 5d, 6, and 7		8	336,670.

Part II Investment Expenses Allocable to Investment Income and Modifications

9a	Investment interest expenses (see instructions)	9a		
b	State, local, and foreign income tax (see instructions)	9b		
c	Miscellaneous investment expenses (see instructions)	9c		
d	Add lines 9a, 9b, and 9c		9d	
10	Additional modifications (see instructions)		10	
11	Total deductions and modifications. Add lines 9d and 10		11	

Part III Tax Computation

12	Net investment income. Subtract Part II, line 11 from Part I, line 8. Individuals complete lines 13-17. Estates and trusts complete lines 18a-21. If zero or less, enter -0-		12	336,670.
Individuals:				
13	Modified adjusted gross income (see instructions)	13		729,779.
14	Threshold based on filing status (see instructions)	14		250,000.
15	Subtract line 14 from line 13. If zero or less, enter -0-	15		479,779.
16	Enter the smaller of line 12 or line 15		16	336,670.
17	Net investment income tax for individuals. Multiply line 16 by 3.8% (.038). Enter here and include on your tax return (see instructions)		17	12,793.
Estates and Trusts:				
18a	Net investment income (line 12 above)	18a		
b	Deductions for distributions of net investment income and deductions under section 642(c) (see instructions)	18b		
c	Undistributed net investment income. Subtract line 18b from 18a (see instructions). If zero or less, enter -0-	18c		
19a	Adjusted gross income (see instructions)	19a		
b	Highest tax bracket for estates and trusts for the year (see instructions)	19b		
c	Subtract line 19b from line 19a. If zero or less, enter -0-	19c		
20	Enter the smaller of line 18c or line 19c		20	
21	Net investment income tax for estates and trusts. Multiply line 20 by 3.8% (.038). Enter here and include on your tax return (see instructions)		21	

LHA For Paperwork Reduction Act Notice, see your tax return instructions.

Form **8960** (2014)

Name(s) shown on Form 1040 or Form 1040NR

Your social security number

Part I Alternative Minimum Taxable Income (See instructions for how to complete each line.)

1	If filing Schedule A (Form 1040), enter the amount from Form 1040, line 41, and go to line 2. Otherwise, enter the amount from Form 1040, line 38, and go to line 7. (If less than zero, enter as a negative amount.)		
2	Medical and dental. If you or your spouse was 65 or older, enter the smaller of Schedule A (Form 1040), line 4, or 2.5% (0.025) of Form 1040, line 38. If zero or less, enter -0-		
3	Taxes from Schedule A (Form 1040), line 9		
4	Enter the home mortgage interest adjustment, if any, from line 6 of the worksheet in the instructions for this line		
5	Miscellaneous deductions from Schedule A (Form 1040), line 27		
6	If Form 1040, line 38, is \$155,650 or less, enter -0-. Otherwise, see instructions	()
7	Tax refund from Form 1040, line 10 or line 21	()
8	Investment interest expense (difference between regular tax and AMT)		
9	Depletion (difference between regular tax and AMT)		
10	Net operating loss deduction from Form 1040, line 21. Enter as a positive amount		
11	Alternative tax net operating loss deduction	()
12	Interest from specified private activity bonds exempt from the regular tax		
13	Qualified small business stock, see instructions		
14	Exercise of incentive stock options (excess of AMT income over regular tax income)		
15	Estates and trusts (amount from Schedule K-1 (Form 1041), box 12, code A)		
16	Electing large partnerships (amount from Schedule K-1 (Form 1065-B), box 6)		
17	Disposition of property (difference between AMT and regular tax gain or loss)		
18	Depreciation on assets placed in service after 1986 (difference between regular tax and AMT)		
19	Passive activities (difference between AMT and regular tax income or loss)		
20	Loss limitations (difference between AMT and regular tax income or loss)		
21	Circulation costs (difference between regular tax and AMT)		
22	Long-term contracts (difference between AMT and regular tax income)		
23	Mining costs (difference between regular tax and AMT)		
24	Research and experimental costs (difference between regular tax and AMT)		
25	Income from certain installment sales before January 1, 1987	()
26	Intangible drilling costs preference		
27	Other adjustments, including income-based related adjustments		
28	Alternative minimum taxable income. Combine lines 1 through 27. (If married filing separately and line 28 is more than \$247,450, see instructions.)		

Part II Alternative Minimum Tax (AMT)

29	Exemption. (If you were under age 24 at the end of 2016, see instructions.) IF your filing status is . . . AND line 28 is not over . . . THEN enter on line 29 . . . Single or head of household . . . \$119,700 . . . \$53,900 Married filing jointly or qualifying widow(er) . . . 159,700 . . . 83,800 Married filing separately . . . 79,850 . . . 41,900 If line 28 is over the amount shown above for your filing status, see instructions.		
30	Subtract line 29 from line 28. If more than zero, go to line 31. If zero or less, enter -0- here and on lines 31, 33, and 35, and go to line 34		
31	• If you are filing Form 2555 or 2555-EZ, see instructions for the amount to enter. • If you reported capital gain distributions directly on Form 1040, line 13; you reported qualified dividends on Form 1040, line 9b; or you had a gain on both lines 15 and 16 of Schedule D (Form 1040) (as refigured for the AMT, if necessary), complete Part III on the back and enter the amount from line 64 here. • All others: If line 30 is \$186,300 or less (\$93,150 or less if married filing separately), multiply line 30 by 26% (0.26). Otherwise, multiply line 30 by 28% (0.28) and subtract \$3,726 (\$1,863 if married filing separately) from the result.		
32	Alternative minimum tax foreign tax credit (see instructions)		
33	Tentative minimum tax. Subtract line 32 from line 31		
34	Add Form 1040, line 44 (minus any tax from Form 4972), and Form 1040, line 46. Subtract from the result any foreign tax credit from Form 1040, line 48. If you used Schedule J to figure your tax on Form 1040, line 44, refigure that tax without using Schedule J before completing this line (see instructions)		
35	AMT. Subtract line 34 from line 33. If zero or less, enter -0-. Enter here and on Form 1040, line 45		



Child and Dependent Care Expenses



Department of the Treasury
Internal Revenue Service (99)

> Attach to Form 1040, Form 1040A, or Form 1040NR.
> Information about Form 2441 and its separate instructions is
www.irs.gov/form2441.

Attachment
Sequence No. **21**

Name(s) shown on return

Your social security number

Part I Persons or Organizations Who Provided the Care—You must complete this part.

(If you have more than two care providers, see the instructions.)

1	(a) Care provider's name	(b) Address (number, street, apt. no., city, state, and ZIP code)	(c) Identifying number (SSN or EIN)	(d) Amount paid (see instructions)
	JANE DOE	123 ORCHARD STREET WESTBURY, NY	99-8887777	2,000

Did you receive dependent care benefits? No Yes
 ≥ Complete only Part II below.
 ≥ Complete Part III on the back next.

Caution: If the care was provided in your home, you may owe employment taxes. If you do, you cannot file Form 1040A. For details, see the instructions for Form 1040, line 60a, or Form 1040NR, line 59a.

Part II Credit for Child and Dependent Care Expenses

2 Information about your qualifying person(s). If you have more than two qualifying persons, see the instructions.

(a) Qualifying person's name		(b) Qualifying person's social security number	(c) Qualified expenses you incurred and paid in 2016 for the person listed in column (a)
First	Last		
BRIDGET	ARCHES	444-44-3444	

3	Add the amounts in column (c) of line 2. Do not enter more than \$3,000 for one qualifying person or \$6,000 for two or more persons. If you completed Part III, enter the amount from line 31	2,000
4	Enter your earned income . See instructions	422,329
5	If married filing jointly, enter your spouse's earned income (if you or your spouse was a student or was disabled, see the instructions); all others , enter the amount from line 4	
6	Enter the smallest of line 3, 4, or 5	
7	Enter the amount from Form 1040, line 38; Form 1040A, line 22; or Form 1040NR, line 37	7 729,779
8	Enter on line 8 the decimal amount shown below that applies to the amount on line 7	
	If line 7 is:	
	But not Over over	Decimal amount is
	\$0—15,000	.35
	15,000—17,000	.34
	17,000—19,000	.33
	19,000—21,000	.32
	21,000—23,000	.31
	23,000—25,000	.30
	25,000—27,000	.29
	27,000—29,000	.28
	\$29,000—31,000	.27
	31,000—33,000	.26
	33,000—35,000	.25
	35,000—37,000	.24
	37,000—39,000	.23
	39,000—41,000	.22
	41,000—43,000	.21
	43,000—No limit	.20
8		X .20
9	Multiply line 6 by the decimal amount on line 8. If you paid 2015 expenses in 2016, see the instructions	
10	Tax liability limit. Enter the amount from the Credit Limit Worksheet in the instructions	10 222,964
11	Credit for child and dependent care expenses. Enter the smaller of line 9 or line 10 here and on Form 1040, line 49; Form 1040A, line 31; or Form 1040NR, line 47	0

Form **8829**

Expenses for business Use of Your Home

Department of the Treasury Internal Revenue Service (99)

OMB No. 1545-0074

▶ **File only with Schedule C (Form 1040). Use a separate Form 8829 for each home you used for business during the year.**
▶ **Information about Form 8829 and its separate instructions is at www.irs.gov/form8829.**

2014

Attachment
Sequence No. 176

Name(s) of proprietor(s)
BRIAN ARCHES

Your social security number
111-11-1111

Part I Part of Your Home Used for Business

1 Area used regularly and exclusively for business, regularly for daycare, or for storage or product samples	of inventory	1	1,000
2 Total area of home		2	4,000
3 Divide line 1 by line 2. Enter the result as a percentage		3	25.0000%
4 Multiply days used for daycare during year by hours used per day	go to line 7.	4	
5 Total hours available for use during the year (365 days x 24 hours)	hr.	5	8760 hr.
6 Divide line 4 by line 5. Enter the result as a decimal amount		6	
7 Business percentage. For daycare facilities not used exclusively for business, multiply (enter the result as a percentage). All others, enter the amount from line 3	lines by line 3	7	25.0000%

Part II Figure Your Allowable Deduction

8 Enter the amount from Schedule C, line 29, plus any gain derived from the business use of your home, minus any loss from the trade or business not derived from the business use of your home (see instructions)		8	28,757.
See instructions for columns (a) and (b) before completing lines 9-21.			
(a) Direct expenses			
9 Casualty losses		9	350.
10 Deductible mortgage interest		10	8,400.
11 Real estate taxes		11	10,000.
12 Add lines 9, 10, and 11		12	18,750.
13 Multiply line 12, column (b) by line 7		13	4,688.
14 Subtract line 14 from line 8. If zero or less, enter -0-		14	4,688.
15 Excess mortgage interest		15	24,069.
16 Insurance		16	1,600.
17 Rent		17	1,000.
18 Repairs and maintenance		18	3,000.
19 Utilities		19	500.
20 Other expenses SEE STATEMENT 18		20	6,100.
21 Add lines 16 through 20		21	1,525.
22 Multiply line 21, column (b) by line 7		22	1,525.
23 Carryover of prior year operating expenses (see instructions)		23	1,525.
24 Add line 22, column (a), line 23, and line 24		24	1,525.
25 Allowable operating expenses. Enter the smaller of line 15 or line 25		25	1,525.
26 Limit on excess casualty losses and depreciation. Subtract line 26 from line 15		26	22,544.
27 Excess casualty losses		27	
28 Depreciation of your home from line 41 below		28	
29 Carryover of prior year excess casualty losses and depreciation (see instructions)		29	
30 Add lines 28 through 30		30	0.
31 Allowable excess casualty losses and depreciation. Enter the smaller of line 27 or line 31		31	6,213.
32 Add lines 14, 26, and 32. Carry amount to Form 4684 (see instructions)		32	88.
33 Allowable expenses for business use of your home. Subtract line 34 from line 33. Enter here and on Schedule C, line 30. If your home was used for more than one business, see instructions		33	6,125.

Part III Depreciation of Your Home

34 Enter the smaller of your home's adjusted basis or its fair market value		34	
35 Value of land included on line 36		35	
36 Basis of building. Subtract line 37 from line 36		36	
37 Business basis of building. Multiply line 38 by line 7		37	
38 Depreciation percentage		38	%
39 Depreciation allowable. Multiply line 39 by line 40. Enter here and on line 29 above		39	

Part IV Carryover of Unallowed Expenses to 2015

40 Operating expenses. Subtract line 40 from line 22. If less than zero, enter -0-		40	
41 Excess casualty losses and depreciation. Subtract line 32 from line 31. If less than zero, enter -0-		41	

Stress, Alcohol and Substance Abuse in the Legal Profession

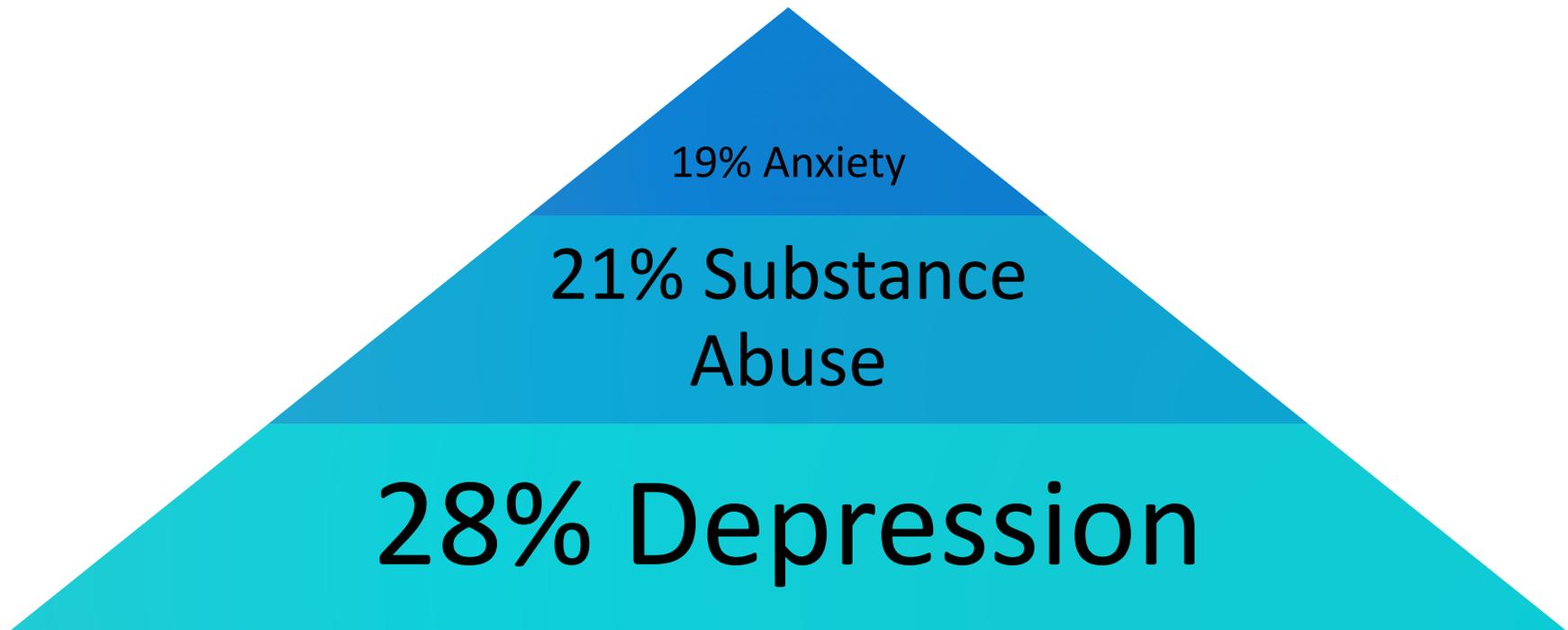
Kelleena Richards, Esq.
Thomas Schimmerling, Esq.

Substance Abuse Ethics: What All Attorneys Must Know

Meredith S. Heller, Esq.

Law Office of Meredith S. Heller PLLC

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, LL.M.; Johnson, Ryan MA; Albert, Linda MSSW.

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

Common Addiction Disorders Facing Attorneys

Alcohol
Use
Disorder

Substance
Use
Disorder

Gambling
Disorder

Alcoholism



DSM-5 Criteria for Alcohol Use Disorder:

In the past year have you ...

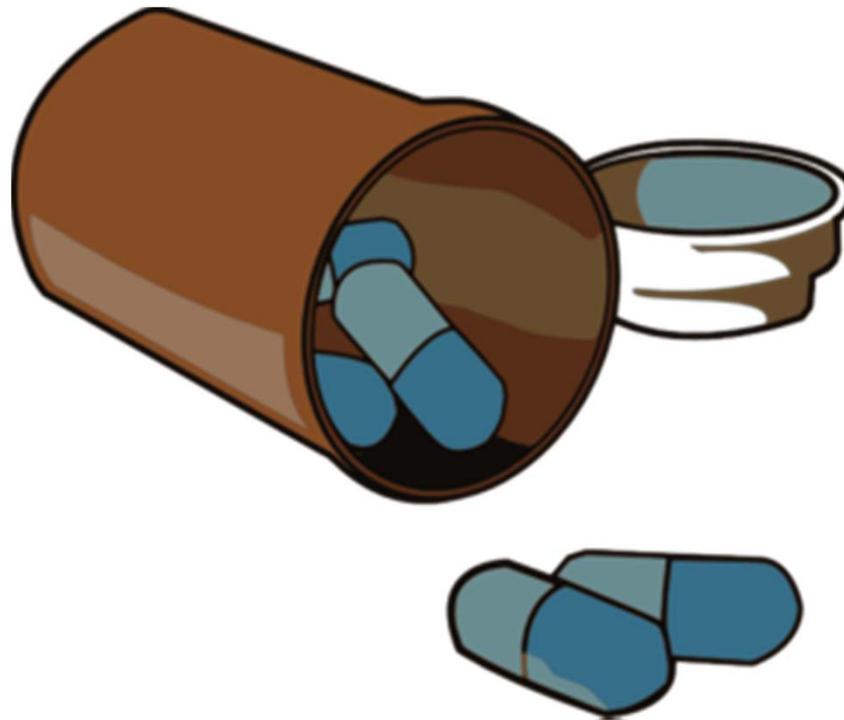
1. Had times when you ended up drinking more, or longer, than you intended?
2. More than once wanted to cut down or stop drinking, or tried to, but couldn't?
3. Spent a lot of time drinking? Or being sick or getting over the effects of drinking?
4. Wanted a drink so badly that you couldn't think of anything 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?

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?

Substance Use Disorder



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:

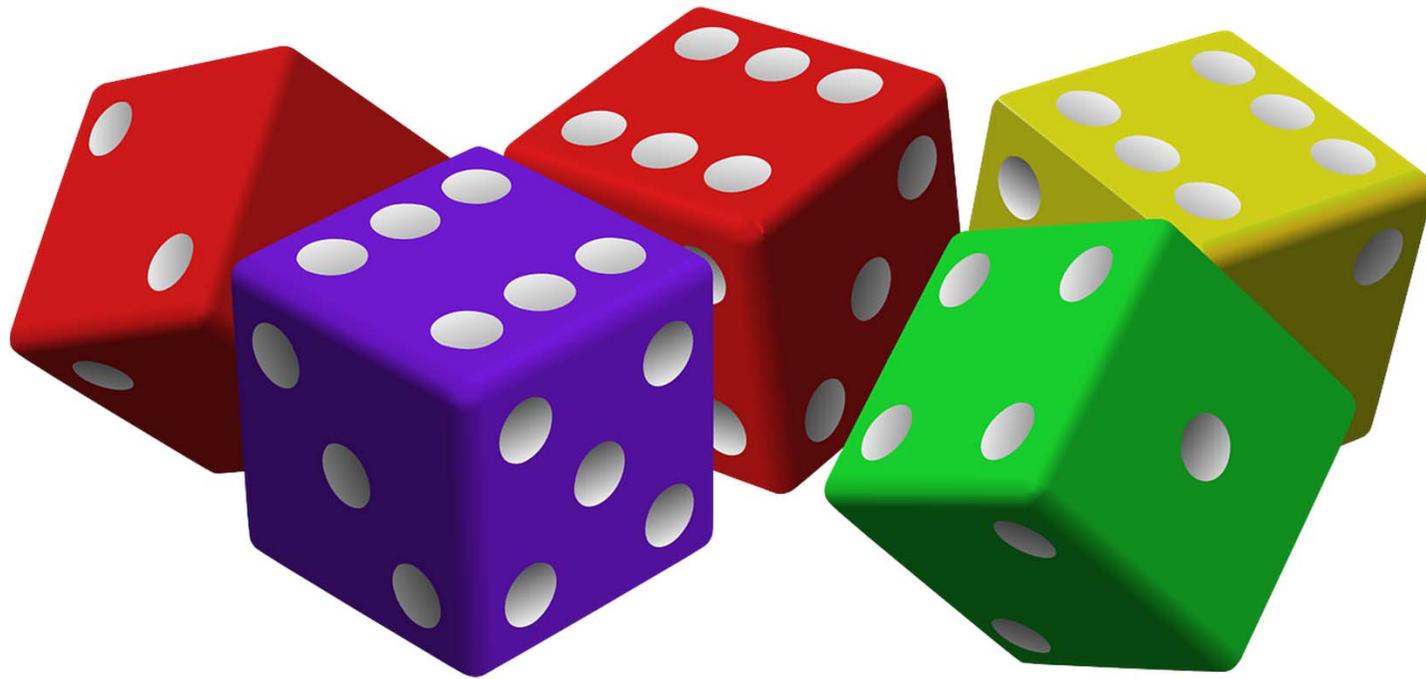
DSM-5 Criteria for Substance Use Disorder (“SUD”):

1. The substance is often taken in larger amounts or over a longer period than was intended.
2. There is a persistent 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.

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.

Gambling Disorder



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).

DSM-5 Diagnostic Criteria for Gambling Disorder:

5. Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed).
6. After losing money 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.

Feeding and Eating Disorders that Commonly Affect Lawyers:

Anorexia
Nervosa

Bulimia
Nervosa

Binge
Eating
Disorder

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.

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.

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 is 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.

Common Mental Health Issues That Frequently Affect Attorneys

Depression

Anxiety Disorders

Obsessive-Compulsive Disorders

Bi-Polar Disorder

Mania

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)

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.

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).

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 figures 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).

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.

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.

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.

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 of 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).

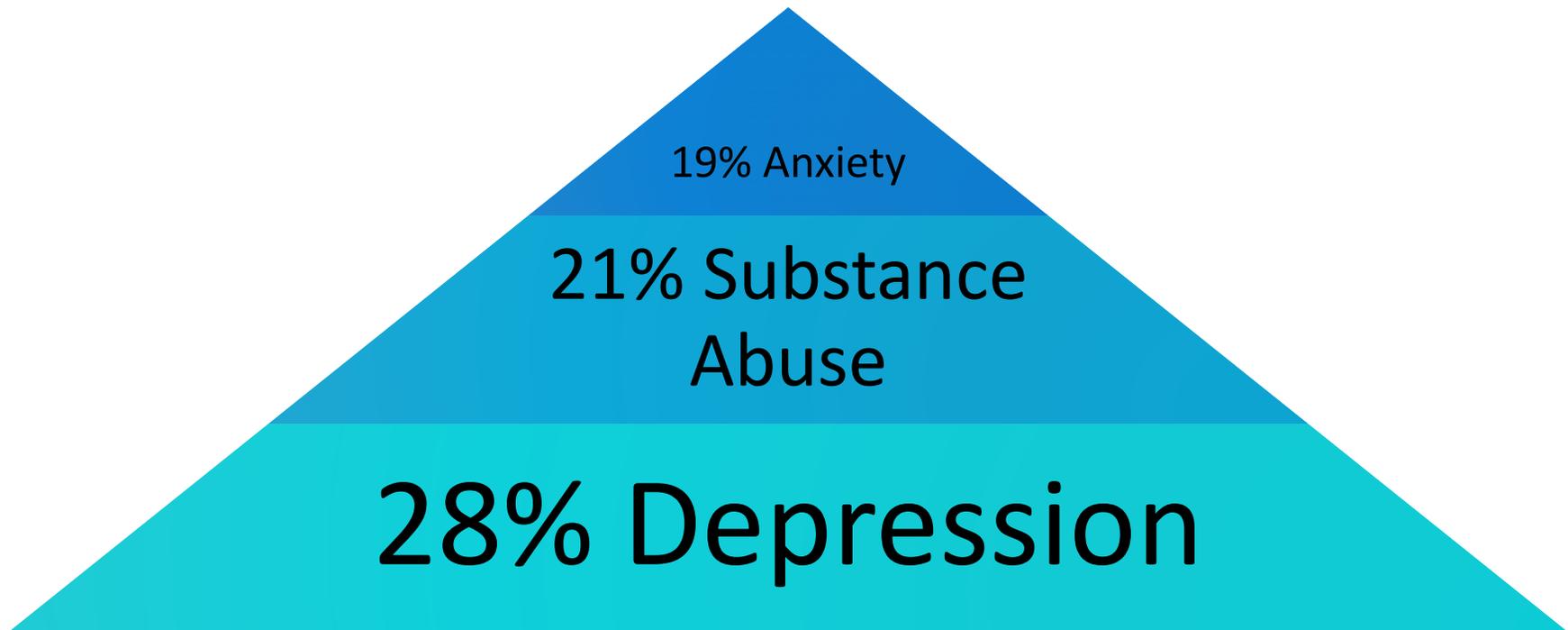
Mania, cont.:

- 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).

Why Lawyers?

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

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, LL.M.; Johnson, Ryan MA; Albert, Linda MSSW.

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

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.

Common Misconduct Resulting From Impairment

Neglect

Financial
Misconduct

Criminal/
Sexual
Misconduct

Bar
Violations

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

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.

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.

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.

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

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 and 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....

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.

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

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 empowered to investigate or act upon such conduct.
- (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.

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.

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

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

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

Some Examples of Impaired Attorneys:

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.

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.

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.

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?

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 is 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.

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)

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.

Hypothetical #4:

Debbie has also failed to keep her other clients informed about the status of their 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.

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.

Law Students



How To Get Help



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

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.

Depression and suicide resources:

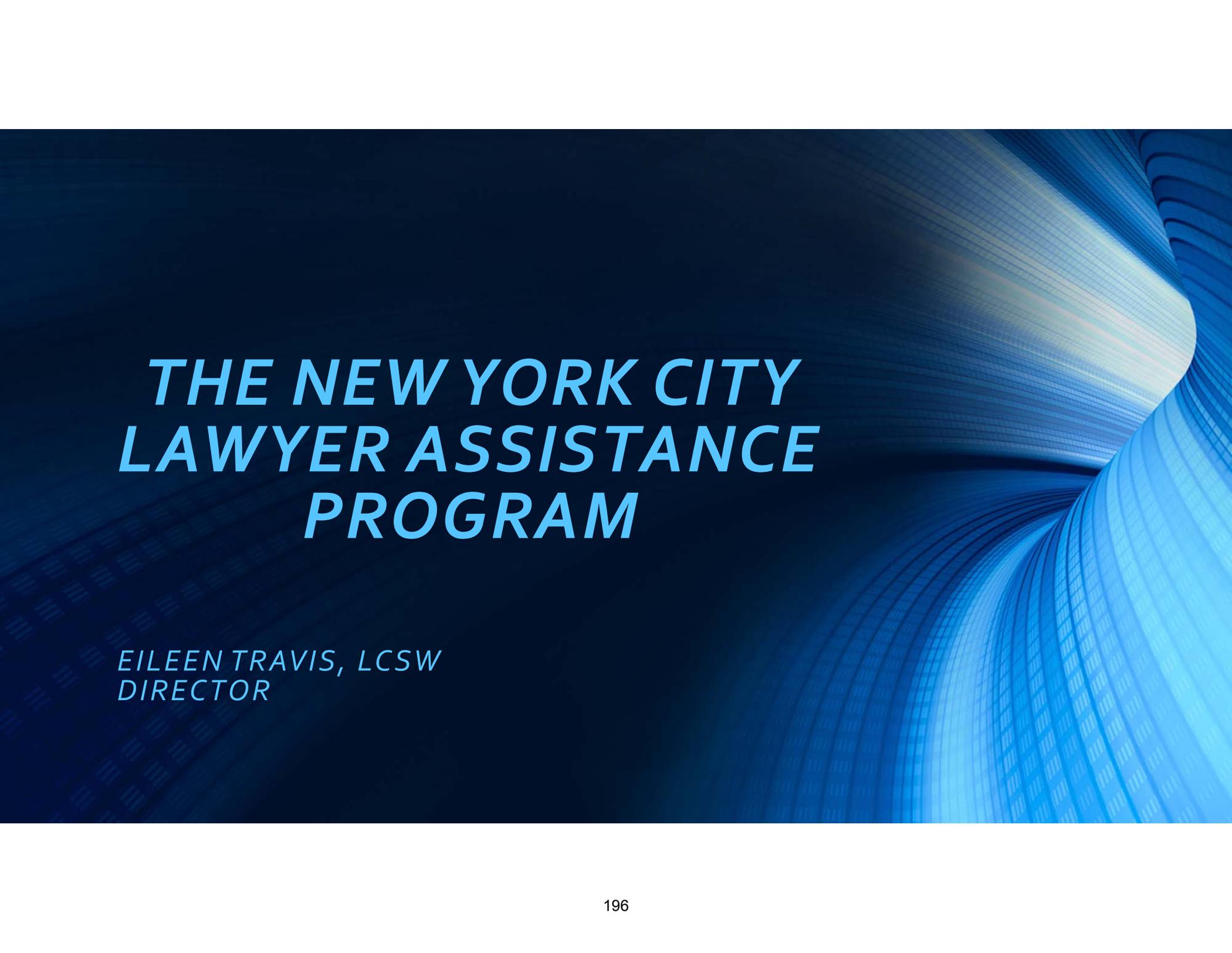
- US Suicide Hotline: 1-800-784-2433
- National Suicide Prevention Lifeline: 1-800-273-8255
- David Nee Foundation: www.daveneefoundation.org
- Depression and Bipolar Support Alliance: www.dbsalliance.org
- Substance Abuse and Mental Health Services Administration:
www.samhsa.gov

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

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.



THE NEW YORK CITY LAWYER ASSISTANCE PROGRAM

*EILEEN TRAVIS, LCSW
DIRECTOR*

*2016 Study of the Prevalence of
Substance Use and Other
Mental Health Concerns
Among American Attorneys*

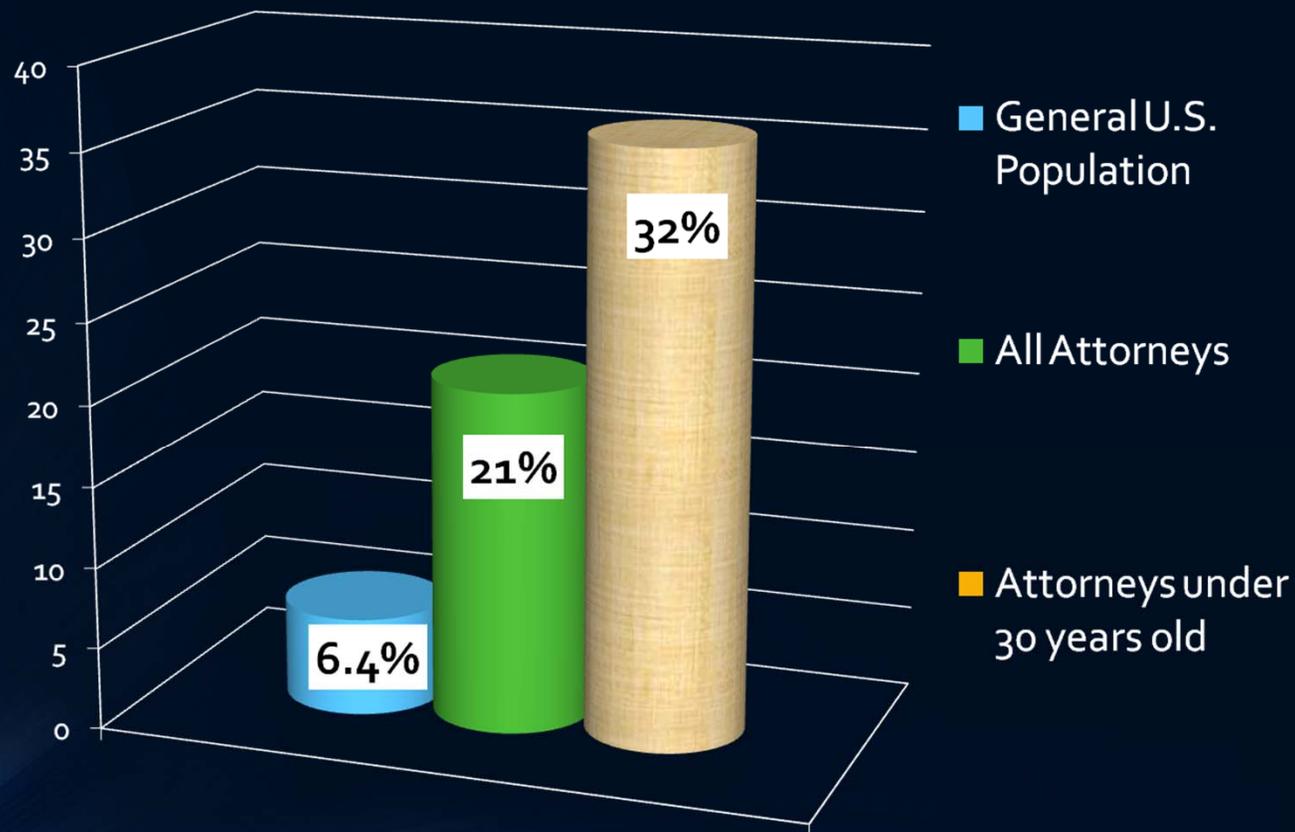
COLLABORATION BETWEEN ABA/HAZELDEN- BETTY FORD FOUNDATION

- 13,000 employed attorneys
- Work environment: private firms (50%) non-profit , government, public, solo, in-house, judicial chambers, law school, Bar Association
- Position: junior associates-senior partners
- Published in the Journal of Addiction Medicine, January/February 2016 issue

ALCOHOL AND SUBSTANCE ABUSE CONCERNS

- 21% screened positive for “hazardous, harmful drinking”
- 27% reported problematic use prior to law school
- **47.7% reported problematic use started within first 15 years of practice**
- 34% reported use of cocaine, stimulants, opioids, marijuana, and sedatives within prior 12 months

Lawyers-Alcohol and Drug Abuse



"Problematic Drinking" = hazardous,
possible dependence

Mental Health Concerns

- 28% depression (*males higher level than females*)
- 19% severe anxiety (*higher rates in females*)
- 23% severe stress
- 16% ADHD/ADD
- 8% panic disorder
- 2.4% bipolar disorder
- 11.5 % reported suicidal thoughts during their career

2016 LAW STUDENT STUDY

"SUFFERING IN SILENCE; THE SURVEY OF LAW STUDENT WELL-BEING AND THE RELUCTANCE OF LAW STUDENTS TO SEEK HELP FOR SUBSTANCE USE AND MENTAL HEALTH CONCERNS"

Survey of Law Student Well-Being

- Sponsored by the ABA
- 3,400 students from 15 law schools
- Published in the Autumn 2016 issue of the Journal of Legal Education

Law Student Alcohol and Drug concerns

- 50% reported high incidence of either periodic or regular binge drinking before and during law school
- 14% reported use of a prescription drug not from their own prescription (Adderall)
- Increase in marijuana and cocaine use since 1991 survey

Law Student Mental Health concerns

- 17% reported depression
- 14% reported severe anxiety
- 23% mild/moderate anxiety
- 7% reported first diagnosed in law school

WHAT HAVE WE LEARNED FROM THE STUDIES?

- Attorneys have significantly higher drinking and mental health problems than the general population
- Younger lawyers (under 30) have a higher incidence of problems (change from current perception)
- Law school research also demonstrates higher levels of substance abuse and mental health problems than the general population

Also learned about help-seeking attitudes in the profession: reluctance to seek help

- Lawyers:

- *fear others will find out, loss of status, job loss, affect on license*

- Students:

- *threat to bar admission, threat to academic status, threat to future employment*

LAWYERS AND LAW STUDENTS

- SHARED CONCERNS:
 - -STIGMA (unhealthy shame, lack of knowledge)
 - -CONFIDENTIALITY
 - -LABELING
 - -PERCEPTION OF OTHERS
 - -CAREER IS OVER

***BOTH STUDIES ARE THE GENESIS FOR THE
FORMATION OF THE***

***"NATIONAL TASK FORCE FOR LAWYER WELL-
BEING"***

"...seeking to create a MOVEMENT towards improving the health and well-being of the legal profession

Nine sections of the ABA and several experts collaborated:

- National Organization of Bar Counsel
- ABA Commission on Lawyer Assistance Programs
- Association of Professional Responsibility Lawyers
- ABA Standing Committee on Professionalism
- ABA Center for Professional Responsibility
- National Conference of Chief Justices
- National Conference of Bar Examiners
- ABA Young Lawyers Division
- ABA Law Practice Division Attorney Wellbeing Committee
- Co-author of ABA COLAP-Hazelden Betty Ford study of mental health and substance use disorders among lawyers; as well as a co-author of the Survey of Law Student Well-Being

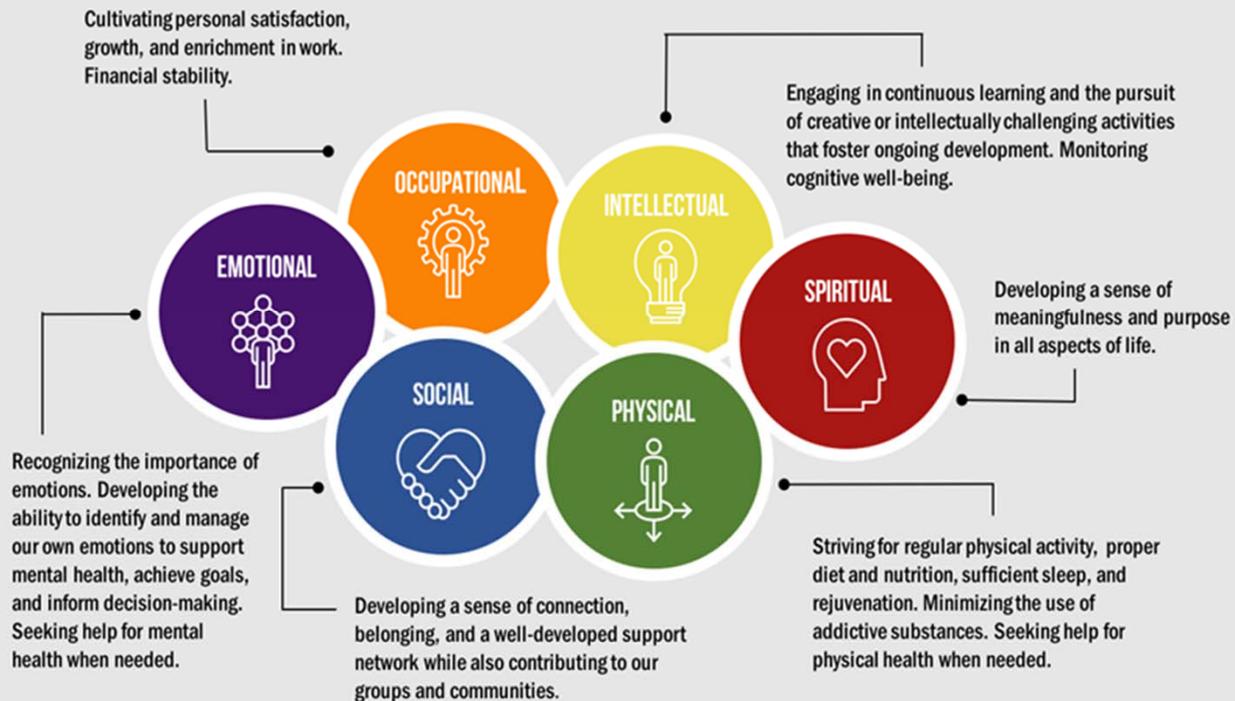
Task Force Released a Report in August 2017

- “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change”
 - Focuses on problems that can impair attorneys, judges and law students, as well as working toward well-being
 - Call to action of all legal stakeholders to work together to encourage change
 - Judges
 - Regulators
 - All Legal Employers/firms/in house/government agencies
 - Lawyers Assistance Programs
 - Law Schools
 - Bar Associations
 - Professional Liability Carriers

What is lawyer "well-being"?



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



Three Reasons to Take Action

- (1) Organizational success—in law firms, corporations, and government entities.
- (2) Well-being influences ethics and professionalism.
 - Rule 1.1 – competence
 - Rule 1.3 – diligence
 - Rules 4.1 through 4.4 – transactions with persons other than clients
- (3) Humanitarian reasons—untreated mental health and substance use disorders ruin lives and careers.

Task Force Report

- Core steps for a sustainable future for the legal profession:
 1. Diminish stigma associated with seeking help for disorders
 2. Emphasize that well-being is part of duty of competence
 3. Expand educational outreach on mental health and substance use disorders, as well as issues related to well-being
 4. Change the culture of legal profession to make health and well-being a top priority

Why do it ?

The New York Times

- Eilene Zimmerman, *The Lawyer, the Addict*, N.Y. TIMES, July 15, 2017, <https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html?ref=business>

Miami Herald

- David Ovalle & Jay Weaver, *Top Miami Civil Lawyer Ervin Gonzalez Found Dead at His Home*, MIAMI HERALD, June 9, 2017, <http://www.miamiherald.com/news/local/community/miami-dade/article155258389.html>

LAWYERS

PETER

- *HIGH POWERED SILICON VALLEY ATTORNEY. HIGH FUNCTIONING. CHEMIST BEFORE BECOMING A LAWYER. FOUND DEAD OF DRUG OVERDOSE. FRIENDS AND COLLEAGUES THOUGHT HE WAS ILL, BUT NEVER CONSIDERED DRUG ADDICTION*

ERVIN

- *HIGH FUNCTIONING, BRILLIANT, HEIGHT OF HIS CAREER, TOP OF HIS GAME, QUIETLY BATTLED DEPRESSION FOR YEARS, MASTERFUL, WARM, RESPECTED IN HIS COMMUNITY, COMMITTED SUICIDE*

CONSPIRACY OF SILENCE

- HIGHLY INTELLIGENT, AMBITIOUS, HARD-WORKING, RESPECTED, AT THE HEIGHT OF THEIR CAREERS
- HIGH FUNCTIONING
- EASY TO AVOID DISCUSSING

Partner with the Lawyer Assistance Program

- Work together to reduce the incidence of substance abuse and mental health problems in the profession
- Reduce the stigma associated with seeking help
- Encourage legal employers to provide support to lawyers who need time off to address problems the same as if they needed time to treat a physical illness

LAWYER ASSISTANCE PROGRAM (LAP)

- *MISSION:*

LAP IS EXCLUSIVELY DEDICATED TO HELPING THE LEGAL PROFESSION

- LAWYERS

- JUDGES

- LAW STUDENTS

- STAFF

- FAMILY MEMBERS

- COLLEAGUES, FRIENDS

FACING PERSONAL AND/OR PROFESSIONAL CHALLENGES

CONFIDENTIALITY IS OUR CORNERSTONE

- ***CONFIDENTIALITY IS PROTECTED UNDER:***

Judiciary Law Section 499,

Chapter 327 of the Laws of 1993

Granting us the same protection as lawyer- client privilege

Our only goal is to provide help and support

LAP PROVIDES *FREE AND COMPLETELY CONFIDENTIAL* HELP FOR:

- STRESS, ANXIETY, DEPRESSION, ADD, TRAUMA, OTHER MENTAL HEALTH PROBLEMS
- ALCOHOL, SUBSTANCE ABUSE, GAMBLING, EATING DISORDERS
- FAMILY, MARITAL, RELATIONSHIP ISSUES
- CAREER AND WORK CONCERNS; TRANSITIONING
- FINANCIAL PROBLEMS
- PHYSICAL PROBLEMS
- CAREGIVING
- **ANY PROBLEM IMPACTING A LAWYER'S LIFE**

WHEN YOU CALL LAP...

- ON OUR CONFIDENTIAL HELPLINE OR EMAIL US ON OUR SECURE WEBSITE
 - ABOUT A PROBLEM YOU ARE HAVING OR ABOUT SOMEONE YOU ARE CONCERNED ABOUT, WE:
 - DISCUSS THE PROBLEM
 - IDENTIFY SOLUTIONS
 - DISCUSS A PLAN TO REMEDY THE PROBLEM
 - PROVIDE CONSULTATION, COUNSELING AND RESOURCES

LAP SERVICES:

- COMPREHENSIVE EVALUATION/ASSESSMENT
- CONSULTATION AND GUIDANCE
- SUPPORTIVE COUNSELING
- CRISIS INTERVENTION
- REFERRALS TO EXPERT PROFESSIONALS
- PEER SUPPORT
- OUTREACH AND EDUCATION AT LAW SCHOOLS, FIRMS, GOVERNMENT AGENCIES, BAR ASSOCIATIONS, THE JUDICIARY

AT THE NYC BAR

- WEEKLY LAWYER AA MEETING, THURSDAYS AT 6:30
- WEEKLY LAWYERS GAMBLERS ANONYMOUS MEETING, THURSDAYS AT 12:30

NYC BAR LAWYER ASSISTANCE COMMITTEE

- LAP WORKS WITH THE NYC BAR LAWYER ASSISTANCE COMMITTEE AND VOLUNTEER ATTORNEYS AND JUDGES
- PROVIDE PEER SUPPORT, MENTORING, MONITORING
- CONFIDENTIALITY IS PROTECTED UNDER 499

REFERRALS

- INDIVIDUALS
- FAMILY MEMBERS
- LEGAL EMPLOYERS
- JUDGES
- DISCIPLINARY COMMITTEES
- CHARACTER & FITNESS COMMITTEES
- LAW SCHOOLS
- ATTORNEYS REPRESENTING ATTORNEYS AND BAR APPLICANTS
- OTHER LAPS

ACCESSING LAP

- IN PERSON MEETING
- BY EMAIL OR PHONE
- CONFIDENTIALLY/ANONYMOUSLY

HELPING A COLLEAGUE, FAMILY MEMBER, FRIEND: SIGNS AND SYMPTOMS

- Any change in a person's behavior may be a red flag
- Changes in appearance, weight loss/gain, disheveled
- Looks tired all the time-lack of sleep
- Changes in mood, sad, negative
- Irritable, impatient, over reacts to comments
- Isolating
- Lateness, cancels or misses appointments/meetings

Signs and symptoms

- Avoids speaking with clients (#1 disciplinary complaint)
- Difficulty focusing, lack of attention
- Makes excuses, blames others, hostile
- Complaints from clients

How you can intervene....

- Show empathy, be non judgmental
- Express your concern; “I am concerned because you missed an important meeting, cancelled dinner plans
- Share your observations...any changes you’ve noticed, physical and behavioral
- Listen if the person is willing to talk
- Offer help, refer to LAP

Intervening

- If you are rebuffed, because the individual may not be ready to accept help or think they need it, remember you have planted a seed... the issue is no longer a secret
- This helps to break down denial
- Take care of yourself. Interventions, even with family members or friends take courage and a good amount of physical and emotional energy
- Contact LAP at any time for guidance and support

GOOD NEWS!!

- *LAW JOURNAL 3/29*

JOSEPH MILOWIC, PARTNER AT QUINN EMANUAL SPOKE CANDIDLY ABOUT HIS BATTLE WITH DEPRESSION AND HIS INITIAL FEAR OF DISCLOSURE AND DECISION TO COME FORWARD TO HELP OTHER LAWYERS

- *LAW JOURNAL 4/2*

ABA PRESIDENT HILARIE BASS RESPONDED STRESSING THE IMPORTANCE OF MENTAL HEALTH AS AN IDESPENSABLE PART OF A LAWYER'S COMPETENCE AND THE NEED TO DO AWAY WITH STIGMA TO ALLOW OTHERS TO COME FORWARD

Remember LAP can help...

- *If you have a problem, you are not alone.*
- *These problems are progressive and if not addressed can worsen over time*
- *Early intervention is the best way to prevent future problems*
- *Lap is free and completely confidential*
- *Feel free to call for information*

LAWYER ASSISTANCE PROGRAM

THE NEW YORK CITY BAR ASSOCIATION

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

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**

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**

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**

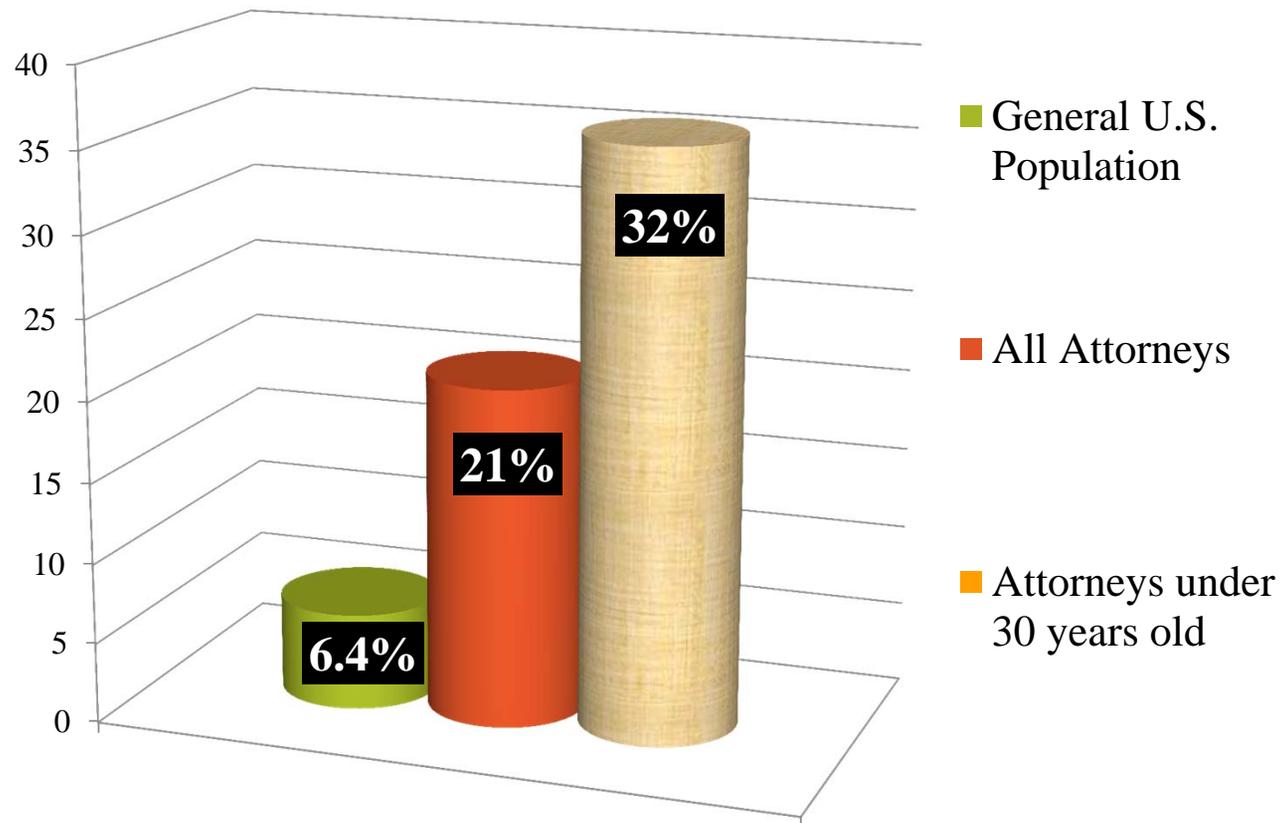
ABA HAZELDEN BETTY FORD STUDY 2016

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

LEGAL PROFESSION

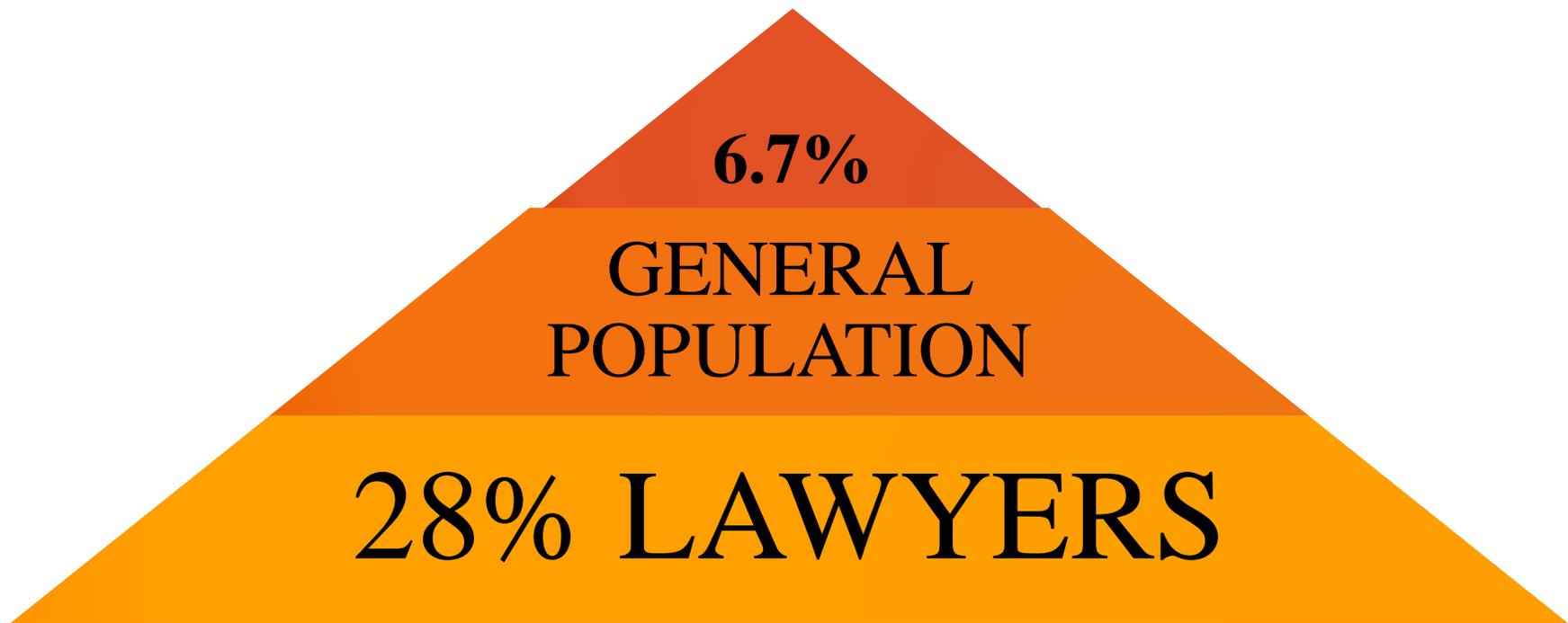
- 21% SERIOUS/HAZARDESS DRINKING
- 28% SYMPTOMS OF DEPRESSION
- 19% SYMPTOMS OF ANXIETY
- 23% SYMPTOMS OF CHRONIC STRESS
- 11.5% SUICIDAL THOUGHTS DURING CAREER

ALCOHOL ABUSE

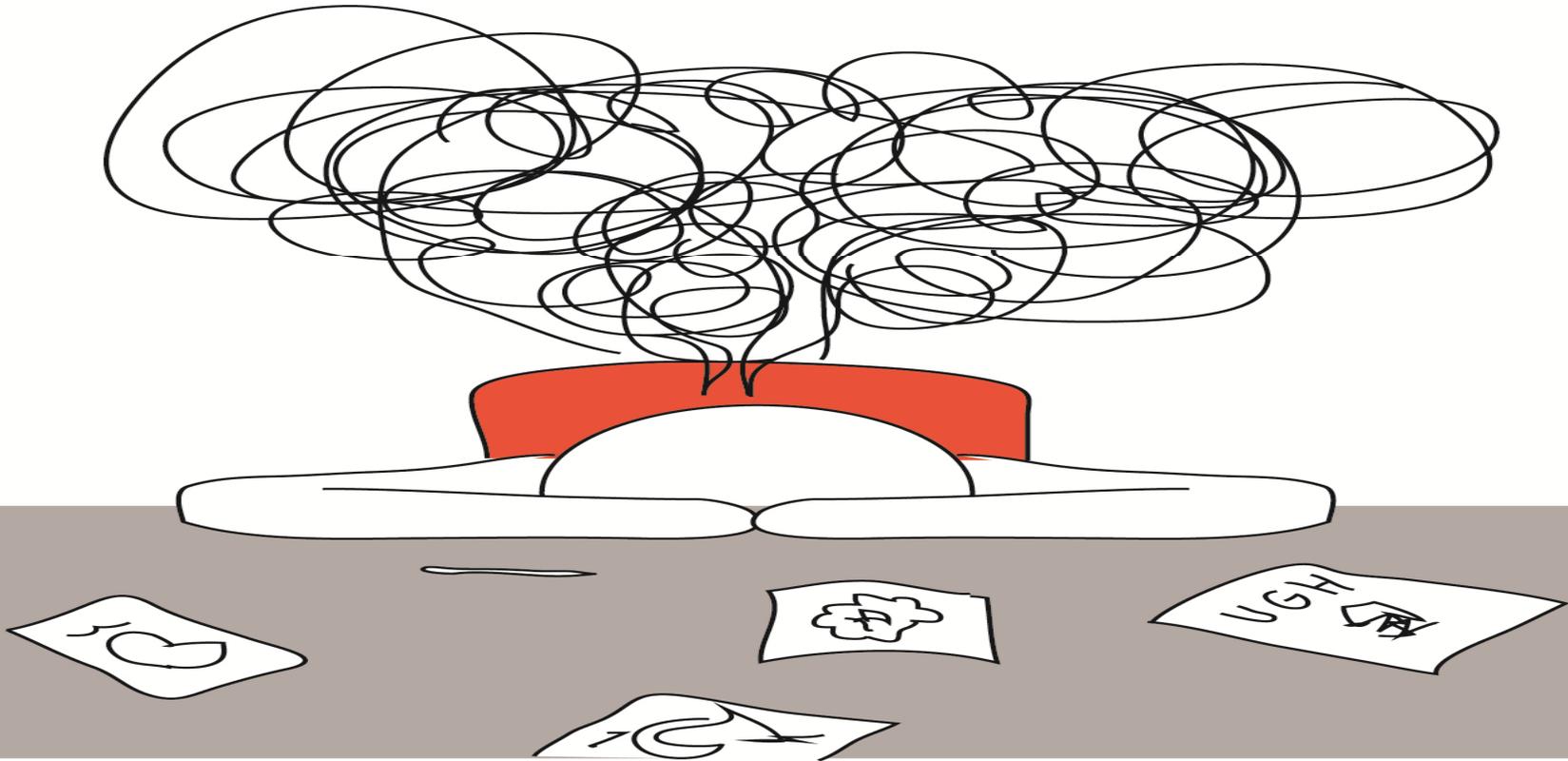


"Problematic Drinking" = hazardous,
possible dependence

DEPRESSION



CHRONIC STRESS-23%



IMPACT

- **WORK**

PROCRASTINATION

CONCENTRATION

PRODUCTIVITY

RELATIONSHIPS

COMPETENCY

- **LIFE**

POOR SELF-CARE

RELATIONSHIPS

HEALTH

PHYSICAL

MENTAL

WHY?

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

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**

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....**

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**

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**

LAWYERS SPEAKING OUT

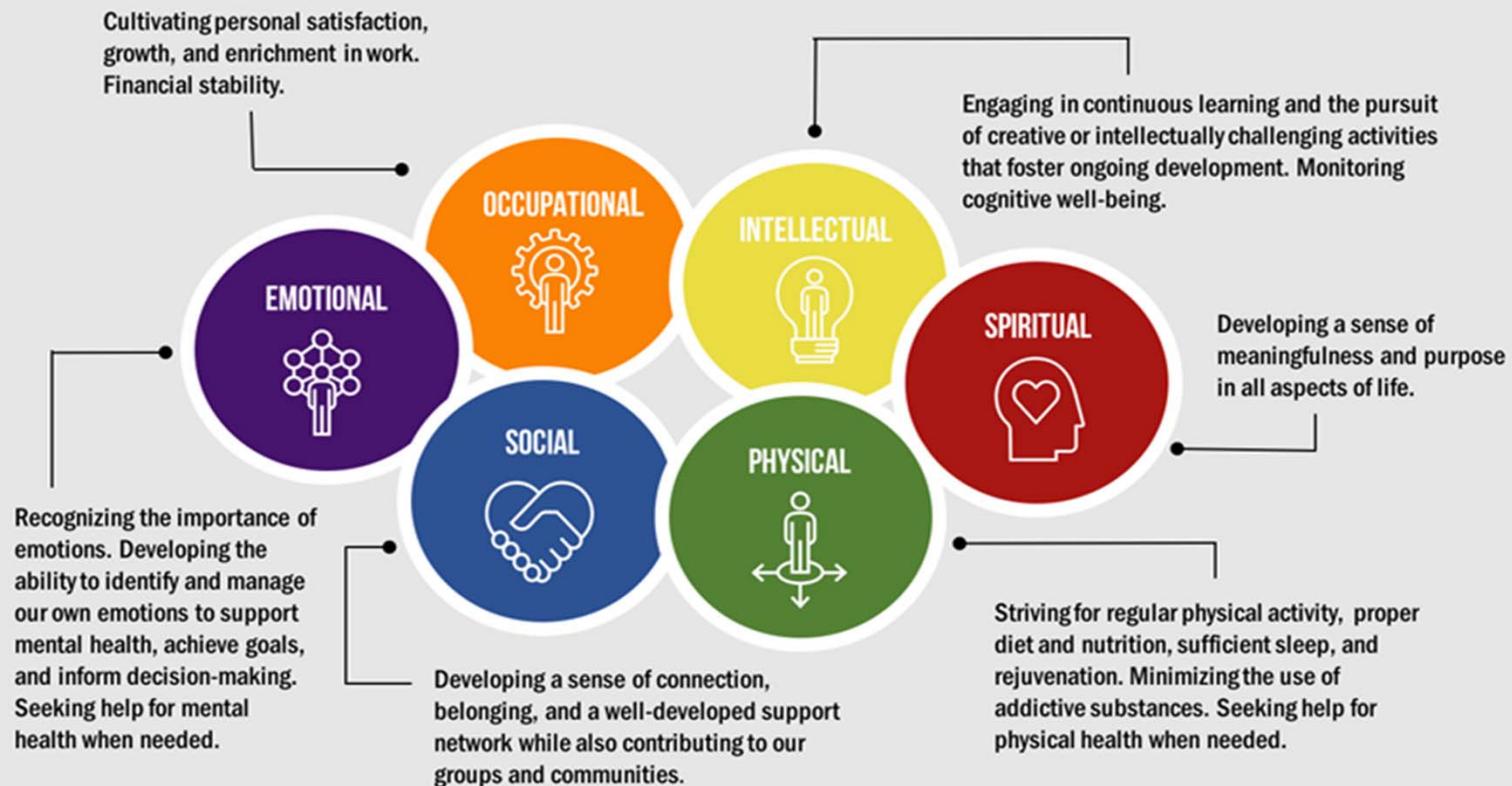
- **LISA SMITH-"Girl Walks Out of a Bar"**
- **BRIAN CUBAN-"The Addicted Lawyer"**
- **JOSEPH MILOWIC- LAW JOURNAL-DEPRESSION**
- **LAW 360-"Mental Health Stigma in Biglaw Shows Signs of Fading"**

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**

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**

GOOD NEWS!!

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

Intellectual Property 101

David Miranda, Esq.

**New York State
Bar Association
Young Lawyers Section**

***OVERVIEW OF INTELLECTUAL
PROPERTY LAW***

September 2018

David P. Miranda, Esq.

hrfm

heslin rothenberg
farley mesiti

ALL IP. ALL THE TIME.

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Partner

david.miranda@hrfmlaw.com

David P. Miranda, 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. 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. He has successfully argued before the Federal Circuit, Second Circuit, Ninth Circuit and New York Court of Appeals.

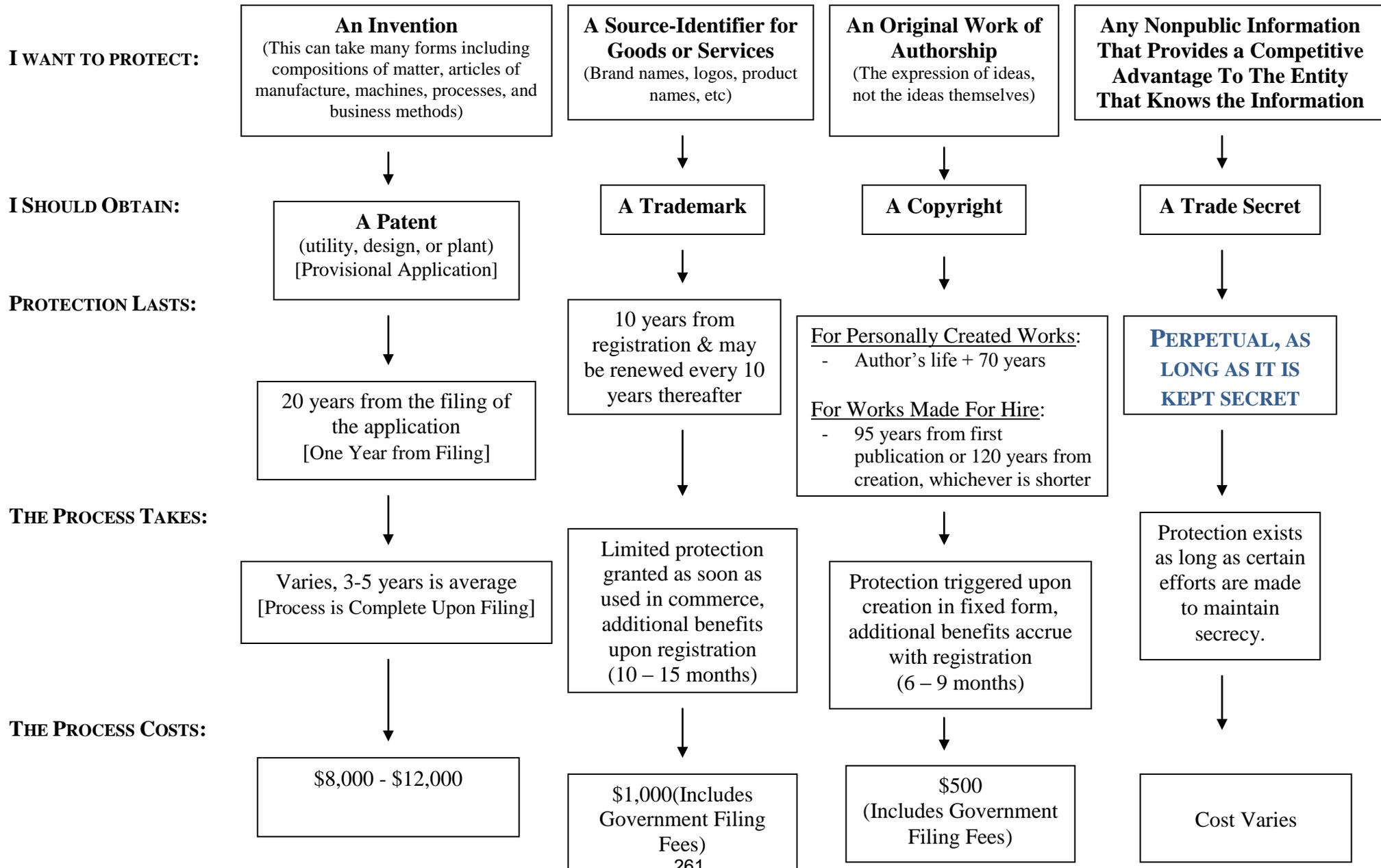
Mr. Miranda has served as mediator, arbitrator and early neutral evaluator for the U.S. District Court for the Northern District of New York, and as arbitrator of intellectual property law disputes with the American Arbitration Association, and National Arbitration Forum rendering decisions regarding disputes involving such famous trademarks as McDonald's, Amazon.com, Bausch & Lomb, Target, 3M, US News, Citigroup, and ChevronTexaco. 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. 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." He has 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. He is a recipient of the Capital District Business Review's "40 Under Forty" award for community service and professional achievement. Since 2007, Mr. Miranda has been selected by his peers as a "Super Lawyer" by *Thompson Reuters*, in the area of Intellectual Property Litigation. 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.

Mr. Miranda received his Juris Doctor degree from Albany Law School and Bachelor's degree from the State University of New York at Buffalo. He is admitted to practice in New York State, U.S. District Courts for New York's Northern, Southern, Eastern and Western Districts, Massachusetts, the Federal Circuit, Second Circuit and Ninth Circuit Court of Appeals, and the U.S. Supreme Court.

Heslin Rothenberg Farley & Mesiti P.C. is the largest law firm in upstate New York dedicated exclusively to the protection and commercialization of intellectual property such as patents, trademarks, copyrights, unfair competition, trade dress, and related litigation and trials. Its professionals have expertise in numerous technical disciplines including physics, electrical engineering, computer science, chemistry, pharmaceuticals, mechanical engineering, business methods and biotechnology.

What Type of Intellectual Property Do I Have?



COPYRIGHT

In order to bring a lawsuit, copyright owner must have a valid copyright registration, or have been refused a registration. 17 U.S.C. § 411 (“[N]o action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.”)

- Some courts have allowed party to bring infringement even without a certificate of copyright registration – as long as an application for registration and deposit have been submitted to the Copyright Office, with the appropriate fee and Copyright Office has received. *See, e.g., Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 621 (9th Cir. 2010) cert. denied, 131 S. Ct. 686, 178 L. Ed. 2d 479 (U.S. 2010) (holding that “receipt by the Copyright Office of a complete application satisfies the registration requirement of § 411(a)”); *see also Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386-87 (5th Cir.1984); *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir.2003).
- Other courts have been critical of allowing a plaintiff to bring suit in the absence of a certificate of registration. The statute clearly requires a registration. *See, e.g., See Brooks-Ngwenya v. Thompson*, 202 Fed. Appx. 125, 126-27 (7th Cir. 2006) (unpublished) (“The statute makes registration or preregistration necessary. That's all there is to it. Registration is not complex (it is no harder than filing a lawsuit), and distractions must be overcome if authors want to litigate.”).

Second Circuit Rule: “Courts in this Circuit have therefore required that a plaintiff either hold a valid copyright registration outright or have applied and been refused a registration prior to filing a civil claim.” *Muench Photography, Inc. v. Houghton Mifflin Harcourt Pub. Co.*, Civ. No. 09-2669, 2012 WL 1021535 (S.D.N.Y. Mar. 26, 2012). A pending application does not suffice.

Pre-Litigation:

Cease and Desist Letter

Prior to filing a lawsuit, a copyright owner may opt to send a cease and desist letter to the infringer with specific demands. Some may demand that the accused infringer stop the infringing activities and demand compensation. Some may even offer a license and outline the terms for such a license. *See, e.g., Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 579, 83 U.S.P.Q.2d 1331 (6th Cir. 2007) (cease-and-desist letter specified the terms upon which copyright owner would be willing to grant a license). Many accused infringers will respond with an offer to settle the matter.

CAVEAT: The copyright owner will want to be cautious with sending a cease and desist letter, especially to infringers in distant forums because there is always the risk of the accused infringer bringing a declaratory judgment action against the copyright owner in their local jurisdiction. *See Capitol Records, Inc. v. MP3tunes, LLC*, 611 F. Supp. 2d 342, 344–345 (S.D. N.Y. 2009)

(potential infringer had responded to a takedown notice alleging copyright infringement by filing a declaratory judgment action in Southern California).

Commencing Litigation

Federal courts have exclusive jurisdiction over copyright claims. See 28 U.S.C. §1338(a).

Copyright Infringement

Copyright infringement is essentially the unauthorized exercise of one of the exclusive rights of the copyright holder under Section 106 of the Copyright Act, i.e., to reproduce, to distribute copies, to perform/display publicly, and prepare derivative works.

Statutory authority: Section 501 of the Copyright Act, authorizes the copyright owner to commence a lawsuit against infringers.

The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.

17 U.S.C. § 501(b).

An action for a copyright infringement must be brought within three (3) years after the claim has accrued. 17 U.S.C. § 507(b). In most jurisdictions, copyright cause of action accrues when a plaintiff knows or has reason to know of the injury upon which the claim is premised.

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.

Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 361, 111 S. Ct. 1282, 1296 (1991). Basically, the owner must show that they have a valid copyright and that the infringer copied protected elements of the copyrighted work.

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. 17 U.S.C. § 410(c); *see Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992).

Copying can be proven as either:

- (1) Direct proof, which is difficult. This would be like eyewitness testimony or an admission by the infringer; 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.

See Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988).

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, not merely a bare possibility, that an alleged infringer had the chance to view the protected work. *See Gaste*, 863 F.2d at 1066.

Substantial Similarity – “The standard test for substantial similarity between two items is whether an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal as the same.” *Latimore v. NBC Universal Television Studio*, Civ. No. 11-1202, 2012 WL 1863787 (2d Cir. May 23, 2012), *quoting*, *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2011). 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. *Yurman Design, Inc.*, 262 F.3d at 111.

- Copyright infringement may be inferred “if the two works are so strikingly similar as to preclude the possibility of independent creation.” *CJ Products LLC v. BTC Enterprises LLC*, Civ. No. 10-5878, 2012 WL 1999829 (S.D.N.Y. June 1, 2012), *quoting*, *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995).

Not all copying results in infringement. Copyright owner must also prove that the copying was improper, i.e., copying of the protected elements of the work. No amount of similarity between uncopyrightable elements can create an infringement, even if the similarity is striking.

When analyzing works with both protectable and unprotectable elements, the analysis must be “more discerning” and the court must look to see whether the protectable elements are substantially similar, without dissecting the works. *Latimore*, 2012 WL 1863787 at *1.

In *Latimore v. NBC Universal Television Studio*, Plaintiff sued for copyright infringement that NBC reality program called The Biggest Loser infringes on her copyrighted treatment for a television show entitled Phat Farm. *Latimore*, 2012 WL 1863787. “After undertaking a detailed examination of the works themselves, the district court properly found that The Biggest Loser is not substantially similar to Latimore's idea. Although both ideas take advantage of staples of reality television such as team-based competition, elimination, and communal living, the way in which The Biggest Loser combines and supplements these common elements results in a concept and overall feel that is entirely different than Latimore's proposal.” *Id.* at *1 (internal quotes and citations omitted).

Contributory Liability: “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

Vicarious Liability: To impose vicarious liability on a defendant for copyright infringement, “a plaintiff must establish that the defendant exercises the requisite control over the direct infringer and that the defendant derives a direct financial benefit from the direct infringement.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir.2007). A defendant “exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.” *Id.* at 730.

In *Range Rd. Music, Inc. v. East Coast Foods, Inc.*, the Ninth Circuit upheld infringement liability against a restaurant that allowed live rendition of jazz songs, and also played jazz record, without appropriate licenses. *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148 (9th Cir. 2012), *cert. denied*, 11-1494, 2012 WL 2116542 (U.S. Oct. 1, 2012). Defendants own and operate the Roscoe's House of Chicken and Waffles chain of restaurants in Southern California. *Range Rd. Music, Inc.*, 668 F.3d at 1151. The restaurant located in Long Beach had an attached bar and lounge area, where live jazz was performed and where songs were played over the lounge's sound system. *Id.* at 1151-52. Despite offers from ASCAP to obtain a license, the Long Beach Roscoe did not purchase a license and did not pay any licensing fees for the performance of any songs. *Id.* at 1151. First, it was determined that copyright infringement occurred at the Long Beach Roscoe restaurant. *Id.* at 1154. Although the Defendants argued that another entity was the proper defendant in this action, "overwhelming evidence" showed that the Defendants exercised control over the Long Beach Roscoe restaurant and the attached lounge, where infringement took place, and the Defendants "derived a financial benefits from the musical performances in the lounge." *Id.* at 1155. For example, the lounge displayed on its premises a liquor license owned and signed by the Defendants; Defendants had managerial authority over the restaurant, as well as the power to hire and fire employees and power to prevents acts from appearing at the lounge; and Long Beach restaurant's manager received his paycheck from Defendants. *Id.*

Willful infringement

One who defaults will be deemed to be willful infringer. *See Adobe Sys. Inc. v. Feather*, Civ. No. 11-1513, 2012 WL 4748861 (D. Conn. Sept. 18, 2012).

In *Adobe Sys. Inc. v. Feather*, Plaintiffs brought action against the Defendant for violation of the Copyright Act and the Digital Millennium Copyright Act (DMCA). *Adobe Sys. Inc. v. Feather*, Civ. No. 11-1513, 2012 WL 4748861 (D. Conn. Sept. 18, 2012). Although duly served with the summons and complaint, the Defendant did not appear or take any action in the case. *Adobe Sys. Inc.*, 2012 WL 4748861 at *1. Plaintiffs were granted its motion for default entry and moved for default judgment, seeking statutory damages, a permanent injunction, and attorneys' fees and costs. *Id.* Here, Plaintiffs established that Defendant is liable for copyright infringement by establishing that: (1) the Plaintiffs possessed valid copyrights for the twenty-eight works asserted in the complaint; and (2) Defendant infringed on those copyrights by marketing, selling, and distributing unauthorized copies of the works. *Id.* at *2. Plaintiffs further established willfulness based on Defendant's conduct, but the court further noted that "even in the absence of such testimony, the willfulness of [Defendant's] infringement may be established by virtue of his default." *Id.* at *2.

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.

Generally, infringer is liable for either (1) copyright owner's actual damages and any additional profits, or (2) statutory damages. 17 U.S.C. § 504. The copyright owner has the right to elect which to seek and such election can be made at any time before the final judgment. Proving actual damages can be difficult. Thus a copyright owner who has timely registered the works at issue, will likely seek statutory damages. Furthermore, statutory damages are available even in the absence of proof of actual damages.

Statutory Damages

Pursuant to Section 504 of the Copyright Act, award of statutory damages ranges from \$750 to \$30,000. 17 U.S.C. § 504(c)(1). Willful infringement increases the maximum amount to \$150,000. 17 U.S.C. § 504(c)(2). Innocent infringement may result in a reduction of statutory damages to \$200. *Id.*

The copyright owner is entitled to statutory damages and attorneys' fees only if application to register the work was filed with the Copyright Office before the infringement commenced or within three (3) months of first publication of the work. 17 U.S.C. §§ 412, 504, 505. The receipt by Copyright Office constitutes "effective date" of registration. 17 U.S.C. § 410(d). No statutory damages or attorney's fees are available for infringements of an unpublished work which occur prior to the effective date of registration. 17 U.S.C. § 412.

In *Capitol Records, Inc. v. Thomas-Rasset*, the Eighth Circuit concluded that statutory damages of at least \$222,000 was constitutional. *Capitol Records, Inc. v. Thomas-Rasset*, Civ. No. 11-2820, 2012 WL 3930988 (8th Cir. Sept. 11, 2012). This action was brought by several recording companies and involves a complicated procedural history. For purposes of the appeal, it is not disputed that Defendant willfully infringed copyrights of 24 sound recordings by participating in unauthorized file sharing on the peer-to-peer network KaZaA. *Capitol Records, Inc.*, 2012 WL 3930988. In the first jury trial, the jury found the Defendant liable for willful infringement and awarded compensatory damages of \$9,250 per work, for a total of \$222,000. *Id.* at 903. A second trial resulted in the jury again finding for willful infringement and an award of \$80,000 per work, for a total of \$1,920,000. *Id.* at 904. The court remitted damages to \$2250 per work for total of \$54,000. *Id.* Third trial, on the issue of damages only, the jury awarded the recording companies statutory damages of \$62,500 per work, for a total of \$1.5M. *Id.* The Court however granted Defendant's motion to alter and/or amend judgment and reduced damages to \$2250 per work for total of \$54,000, reasoning that this amount was the maximum award permitted by Due Process Clause. *Id.* at 904-05. On appeal, the recording companies sought to reinstate the first jury's verdict and the Eighth Circuit determined that statutory award of at least \$222,000 was constitutional. *Id.* at 906.

The Defendant sought for the court to consider the "guideposts" announced by Supreme Court for review of punitive damages award under the Due Process Clause. *Id.* at 907. The Eighth Circuit, however, explained that "[t]he Supreme Court never has held that the punitive damages guideposts are applicable in the context of statutory damages." *Id.* While the Due Process Clause prohibits excessive punitive damages because notions of fairness dictate that a person receive fair notice of conduct that will subject him to punishment and of the severity of the penalty that State may impose. *Id.* "This concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute." *Id.* The Copyright Act provides for a broad range of damages, setting statutory damages range for

willful copyright infringement to be from \$750 to \$150,000 per infringed work. *Id.* at 908; 17 U.S.C. § 504(c). Such a broad range “allows courts and juries to calibrate the award based on the nature of the violation.” *Id.*

In *Adobe Sys. Inc. v. Feather*, in light of willful infringement, award of statutory damages of \$90,000 for each of the 28 copyright identified, for a total of \$2,520,000, was determined to be an appropriate award. *Adobe Sys. Inc. v. Feather*, Civ. No. 11-1513, 2012 WL 4748861 (D. Conn. Sept. 18, 2012).

Attorneys’ Fees

Section 505 of the Copyright Act states as follows:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.

17 U.S.C. § 505.

As provided in this section, an award of reasonable attorneys’ fees is available to the prevailing party, not just the copyright owner who commenced the action against an infringer. In fact, it has been recognized that Section 505 can be helpful in deterring “overly aggressive litigation tactics”. *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 669 F.3d 59 (1st Cir. 2012).

In *T-Peg, Inc. v. Vermont Timber Works, Inc.*, the First Circuit upheld the award of defendant’s attorneys’ fees despite the fact that the copyright infringement action was not brought in bad faith. *T-Peg, Inc.*, 669 F.3d at 64. At trial, the jury rejected Plaintiff T-Peg’s infringement claims and found in favor of Vermont Timber Works, Inc. (VTW). As the prevailing party, VTW sought \$200,000 in fees and the district court granted a fee award of \$35,000. *Id.* at 61. Acknowledging the district court’s broad discretion in fashioning an appropriate award, the First Circuit referenced the non-exclusive list of essentially equitable factors provided by the Supreme Court to “guide the lower courts in deciding whether or not to award attorney’s fees, and if so how much.” *Id.* “Specifically, these factors are frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.* (internal quotation marks omitted). As the district court provided thoughtful explanation and analysis in coming up with the \$35,000 award, as well as properly applying the factor of whether a fee award would “deter plaintiffs with reasonable claims, and defendants with meritorious defenses, from litigating in a manner greatly disproportional to the matter at stake,” the district court did not abuse its discretion. *Id.* at 62-64.

Defenses

Generally, innocent or accidental infringement not a valid defense. Thus, a defendant can be liable even for “innocent” or “accidental” infringements, and a plaintiff need not demonstrate intent or even knowledge of infringement to prove a copyright claim.

Laches

Even with valid copyrights, laches may bar infringement claims against an infringer. *Lego A/S v. Best-Lock Constructions Toys Inc.*, Civ. No. 11-01586, 2012 WL 2829454 (D. Conn. July 11, 2012).

In *Lego A/S v. Best-Lock Constructions Toys Inc.*, Plaintiff Lego brought an action against one of its competitors alleging, among other things, copyright infringement. *Lego A/S*, 2012 WL 2829454. Lego had been manufacturing toys called “minifigures” since 1978 that depict people, all having same shape but varying two-dimension representations of facial features and clothing styles. *Id.* at *1. Lego registered two copyrights for the minifigures in 1994. *Id.* Competitor-Defendant Best-Lock Construction Toys, Inc., had been selling its own minifigures since 1998. *Id.* On July 14, 2011, the U.S. Customs and Border Protection (CBP) carried out the first of a series of seizures of Best-Lock’s toys coming from abroad and alerted Best-Lock that the minifigures infringe Lego’s copyright. *Id.* Best-Lock was unsuccessful in ceasing the seizures. *Id.* On October 14, 2011, Lego filed its action against Best-Lock. *Id.*

Best-Lock pled laches as an affirmative defense to Lego’s infringement action. “To sustain a laches defense, only two elements need appear: the plaintiff delayed an unreasonable amount of time in filing suit against the defendant; and the defendant suffered prejudice as the result of that delay.” *Id.* at *9. Generally, laches defense is available in a copyright infringement action. *Id.* Taking into account the 3 year statute of limitations, “Lego’s action for damages is timely for any act of infringement between October 14, 2008 and October 14, 2011.” *Id.* at *12. Yet here, Best-Lock argued that the laches doctrine operates to bar an action for copyright damages that was timely filed. *Id.* at *13. Due to the split in authorities and the absence of guidance from the Second Circuit, the district court declined to rule that “laches can *never* be a bar to a copyright infringement claim for damages filed within the Act’s three-year limitations period.” *Id.* at *15. The court noted, however, that “[e]verything hinges on when Lego knew about Best-Lock’s infringement and what it did after it found out,” because if Lego knew from 1998, then waiting until 2011 to file suit would be considered unreasonable delay and it would seem to be unfairly prejudicial to enjoin Best-Lock. *Id.* at *16.

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. The statute lists the following as illustrative basis for supporting fair use – for purposes of criticism, comment, news reporting, teaching, scholarship, or research.

With this defense, there is a presumption that unauthorized copying has occurred, but the focus is on whether the use was fair. *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1169 (9th Cir. 2012).

In *Monge v. Maya Magazines, Inc.*, the Ninth Circuit held that a gossip magazine's publication of celebrities' secret wedding photographs was not fair use. *Monge*, 688 F.3d 1164. Plaintiffs are a young pop singer and model, and her husband and manager, who secretly wedded at a wedding chapel in Las Vegas. *Id.* at 1168. Only few photos were taken and kept private for the couple's use. Using Monge's camera, a chapel employee took 3 photos of the wedding and 3 more photos were taken later in their nuptial garb. *Id.* at 1169. For 2 years, the couple kept the wedding a secret, even from families. *Id.* The couples' driver and bodyguard found a memory chip having the wedding photos, as well as 400 other photos and 3 videos. When the driver's attempt to extort money from the couple failed, he sold the photos to Defendant, a gossip magazine, for \$1500. *Id.* Defendant then published the 6 photos relating to the couple's wedding. *Id.* Soon after the publication, the couple registered copyrights in 5 of the 6 published photos and brought an action against the magazine. *Id.* at 1170. Despite its claim that it purchased the photos in good faith, "the innocent intent of the defendant constitutes no defense to liability." *Id.* Providing an analysis of each of the fair use factors, the Ninth Circuit held that none of the factors supported fair use.

The first factor, the purpose and character of the use, was at best neutral. Although the secret wedding may be potentially news-worthy, gossip magazines cannot "take fair use refuge under the umbrella of news reporting". *Id.* at 1173. Further, the magazine did not transform the photos in to a new work (i.e., copied the works in their entirety "sprinkled with written commentary" and did not incorporate the photos as a part of a broader work.) and the use was undisputedly commercial use, and "commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly of privilege that belongs to the owner of the copyright." *Id.* at 1174-76. Here, the gossip magazine was motivated by profits and did profit from the publication.

The second factor, the nature of the copyrighted work, weighs against supporting fair use. Generally, photos tend to be regarded as creative work. Here, even though the photos were not particularly artistic, they were unpublished and an author of work has the right to control the first public appearance. *Id.* at 1177-78.

The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, also weighs against fair use. The gossip magazine used all of the wedding photos and all of the wedding night photos. *Id.* at 1178. The gossip magazine could have reported the news in a different manner, for example, by publishing the marriage certificate or using other sources other than copyrighted photos. *Id.* at 1179. The story/news could also have been corroborated with a single photo, but the gossip magazine used far more than was necessary. *Id.*

The fourth factor, the effect upon the potential market, weighs against supporting fair use. "[T]his last factor is undoubtedly the single most important element of fair use." *Id.* at 1180. Due to the gossip magazine's publication, the demand for the couple's photos dropped significantly. "[T]he bottom literally dropped out of the market – neither [the defendant] nor anybody else is likely to purchase these pictures from the couple." *Id.* at 1182.

First Sale Doctrine

“The ‘first sale doctrine’ in copyright law permits the owner of a lawfully purchased copy of a copyrighted work to resell it without limitations imposed by the copyright holder.” *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 211-12 (2d Cir. 2011) *cert. granted*, 132 S. Ct. 1905, 182 L. Ed. 2d 770 (U.S. 2012).

In *John Wiley & Sons, Inc. v. Kirtsaeng*, the Second Circuit court considered the question of first impression of whether the first sale doctrine applies to a work that was produced outside of the United States, legally acquired abroad, and then later imported and resold within the United States. *John Wiley & Sons, Inc.*, 654 F.3d at 212. Petitioner Kirtsaeng, a Thai national, was a mathematics student at Cornell University. *Id.* at 213. While at Cornell, Kirtsaeng realized that the cost of international editions of textbooks in Thailand was far lower than the cost of the textbooks in the United States. *Id.* Kirtsaeng therefore began to lawfully purchase copies of textbooks in Thailand, through his family and friends, imported these textbooks into the United States, and sold them on the Internet auction site eBay. *Id.* The international editions of the textbook differed materially from the U.S. editions, in that they used different bindings, thinner paper, lower quality photographs, had different covers, and specifically noted that they were only for sale outside the United States. *Id.* Through his eBay sales, Kirtsaeng earned approximately \$37,000. John Wiley, the textbook publisher sued Kirtsaeng and argued that the first sale doctrine was unavailable as a defense. The jury found Kirtsaeng liable for willful copyright infringement and imposed damages of \$75,000 for each of the eight works at issue, for a total of \$600,000. *Id.* at 215. In affirming the lower court’s decision, after engaging in statutory interpretation of the Copyright Act, § 109 (a) and § 602(a)(1), the Second Circuit concluded that “the phrase ‘lawfully made under this Title’ in § 109(a) refers specifically and exclusively to copies that are made in territories in which the Copyright Act is law, and not to foreign-manufactured works.” *Id.* at 222.

The Supreme Court is scheduled to hear oral arguments in this case on October 29, 2012.

Termination of Grant of Copyright Rights

The Copyright Act includes provisions that are designed to safeguard authors against unremunerative transfers. Such provisions are deemed necessary due to “the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.” The House Report on the Copyright Act of 1976.

The Copyright Act of 1976, the current act in effect, includes two provisions relating to the termination of a grant of copyright. Under these provisions, certain prior transfers of copyrights could be terminated and the rights be recaptured by the transferor. This allows the initial transferees – such as publishers – to reap the initial rewards from investing in an unknown talent, but also provides an opportunity for the authors to renegotiate the terms of the earlier grants of rights once the long-term success of their works has been established.

Thus far, Section 304(c) has been the basis for copyright termination litigation. Yet in the upcoming years, a flurry of new copyright termination litigation is expected. The year 2013 marks the first year that authors can take advantage of the termination provision under Section 203 of the Copyright Act.

Section 203 governs transfers and licenses executed on or after January 1, 1978, including works that were created under the previous Act but where the transfer was made after January 1, 1978. The Copyright Act in Section 203 also provides for a five (5) year window during when an author may terminate the prior grant of rights, which is measured from the point at which the transfer or license was entered into, not the time at which the work was created. Under Section 203, an author can terminate a previous grant within a 5 year window that begins 35 years after the rights transferred. Thus, theoretically, termination under Section 203 could actually take place as early as 2013. For example, if an author transferred her rights in a work in 1978, the author could terminate the grant of those rights 35 years later, beginning in 2013 and ending in 2018.

In *Scorpio Music S.A. v. Willis*, Plaintiffs' complaint was dismissed for failure to state a claim. *Scorpio Music S.A. v. Willis*, Civ. No. 11-1557, 2012 WL 1598043 (S.D. Cal. May 7, 2012). Defendant Victor Willis is the original lead singer of the Village People. *Scorpio Music S.A.*, 2012 WL 1598043 at *1. In January 2011, Willis served on Plaintiffs a "Notice of Termination of Post-1977 Grants of Copyright on Certain Works of Victor Willis" with respect to his interests in the 33 Compositions, including the hit songs, "YMCA," "In the Navy," and "Go West." *Id.*

Plaintiffs, several companies engaged in the business of publishing or otherwise exploiting musical compositions, "challenge the validity of the termination and [sought] a declaratory judgment that Willis has no right, title, or interest in the copyrights to the Compositions, requiring withdrawal of notice of termination, and enjoining Willis from making any claims to the copyrights in the Compositions." *Id.*

The Plaintiffs argued that the Willis's Notice of Termination was invalid because he is the only author (of the several authors in the works at issue) who served the notice. *Id.* Yet Willis was also the only one who executed the grants of his copyright interests in the musical compositions at issue. *Id.* Thus the issue here is "whether, in a case where joint authors of a work transfer their respective copyright interests through separate agreements, a single author may alone terminate his separate grant of his copyright interest in the joint work or whether a majority of all the authors is necessary to terminate that grant." *Id.* at *2. The Court concluded that "a joint author who separately transfers his copyright interest may unilaterally terminate that grant." *Id.* Willis granted his copyright interests in the Compositions separately from the other co-authors, and accordingly, Willis may unilaterally terminate his grants under 17 U.S.C. § 203. *Id.* at *5. "Thus, Plaintiffs' declaratory relief claim fails to the extent it is based on the inability of Willis to terminate his grants of copyright. To be clear, Willis's termination affects only the copyright interests that he previously transferred (his undivided interest in the joint work). The copyright interests transferred by the other co-authors will not be affected by Willis's termination." *Id.*

TRADEMARK

I. DEFINITION OF A TRADEMARK

A trademark is a symbol used in commerce to identify the source of goods or services. Such a symbol can be a word (MICROSOFT), a design (the Nike "swoosh"), a name (HUGO BOSS), a product design feature (the LEVI's red pocket tab), or a slogan ("THE REAL THING").

Trademark law was developed to protect consumers from confusion--to ensure that when they buy products sold under a particular mark, the quality will be the same regardless of the time or distance between purchases. As a byproduct, owners of trademarks are granted exclusive rights in their marks and can thus maintain monopoly control over the consumer goodwill associated with the marks. Trademark rights can become very valuable. Famous marks such as COKE, MARLBORO and McDONALD'S are valued at tens of billions of dollars.

Unlike patents and copyrights which can only be protected for a limited number of years, trademarks, if used correctly, can be protected forever.

II. HOW TRADEMARK RIGHTS ARE ACQUIRED

In the U.S. trademark rights are acquired when a mark is used on goods or services in commerce. The first user has superior rights to any later users. Trademark rights accrue with use on or in connection with specific goods or services. Similar marks may coexist if they are used to identify and distinguish completely unrelated types of goods. For example, COSMO COBBLERY could probably be used as a trademark both by a manufacturer of shoes and by a manufacturer of cookies. It probably could not be used, however, by a manufacturer of shoes and a different manufacturer of boots.

III. WHAT MAKES A GOOD TRADEMARK?

- A. A good trademark is a distinctive trademark. The more distinctive the mark, the less likely it will infringe other marks or be infringed itself.
- B. There are five generally recognized levels on the trademark scale of distinctiveness:
 - 1. At the highest level are fanciful or coined marks, invented solely for the purpose of identifying particular goods or services. Examples are KODAK, POLAROID, CLOROX.
 - 2. At the second level are arbitrary marks. These are marks comprised of words that are in common use, but that are arbitrary as applied to the particular goods or services. Examples are APPLE for computers, CAMEL for cigarettes, or TARGET for retail stores.
 - 3. At the third level are suggestive marks. Suggestive marks do not precisely describe goods or services, but require some thought or "mental gymnastics" to connect the mark with particular goods or services. Examples are EVEREADY BATTERIES, COPPERTONE suntan lotion, or SNO-RAKE snow removal tool.

4. At the fourth level are descriptive marks. Descriptive marks are those that immediately describe a significant ingredient, quality, characteristic, function, feature, purpose or use of the particular goods or services. Geographic terms and surnames are treated in the same manner as descriptive terms. In the United States and most foreign countries, descriptive marks are not registrable on the primary federal trademark register, the Principal Register, until they have built "secondary meaning." In the British Commonwealth countries, descriptive marks are entirely unprotectable.

* Secondary Meaning. Secondary meaning exists when, through extensive use, a previously descriptive or nondistinctive mark has come to be associated in the minds of the consuming public with the goods of a particular provider. Examples of descriptive marks that have gained secondary meaning through extensive use are PHILADELPHIA CREAM CHEESE, AMERICAN AIRLINES, HOLIDAY INN. Generally, secondary meaning is presumed upon proof that a mark has been used in commerce for five years.

5. At the bottom of the trademark scale are generic terms. These are terms that are so highly descriptive that they ARE the product name and are therefore incapable of denoting origin, such as CAR for automobiles or CAP for a type of hat. Generic terms are in the public domain and may be used by anyone to describe goods or services. Some marks start out as protectable, arbitrary or fanciful marks, but because their owners allow them to be used as common names for their products rather than as brand names describing products, they become unprotectable, generic terms. Examples of "genericide" are BRASSIERE, ASPIRIN, ZIPPER, and THERMOS.

IV. SELECTING AND CLEARING A TRADEMARK.

The first step in selecting a successful trademark is to select a distinctive term. A trademark search should then be conducted to determine whether the exact or a confusingly similar mark is already being used in connection with the same or related goods or services.

A. Trademark Searches

There are two levels of U.S. trademark searches. The first level, which searches the U.S. Patent and Trademark Office federal register and state registers, makes it possible to determine whether the selected mark is already being used for the exact goods or services. This first level search identifies "direct hits," and is used to eliminate potential trademark candidates.

If no direct hits appear at the first level search, a full search should be conducted. A full search covers the exact mark, phonetic equivalents and other confusingly similar marks. It covers federal and state registrations, plus registered common law marks. Once a full search is conducted, the trademark owner has a good a sense as is practically possible whether the selected mark is available for use and whether it raises a likelihood of confusion with any other marks.

For marks that will be used internationally, similar searches can be conducted in foreign jurisdictions. For marks that will be used on the Internet, domain name searches are also advisable.

B. Acquiring and Negotiating Rights

If the trademark search reveals a mark that is the same or similar to the proposed mark, further investigation may be advised to determine whether the conflicting mark is in active use and, if so, the exact nature of the owner's rights in it. If the mark is in active use on goods or services that are closely related but not exactly the same as the goods or services for which the proposed mark will be used, it may be possible to reach agreement with the owner for the coexistence of the two marks.

In most countries, such "consent agreements" must meet certain criteria established by the relevant Trademark Office in order for both marks to be registered. These criteria generally assure that the channels of trade in which the two marks will be used and advertised, the consumer groups to which the goods or services will be marketed or the geographic territories in which the marks will be used are distant enough so that the public will not confuse the goods or services of one provider with those of another provider.

Alternatively, it may be possible to buy the owner's rights in a conflicting mark.

V. REGISTERING A TRADEMARK

In most foreign countries, trademark rights are obtained by registering a trademark. In the U.S. and some foreign countries, registration is not a prerequisite to trademark protection. Rather, rights are accrued by using a trademark. Nevertheless, a U.S. trademark registration does provide certain advantages:

A. Advantages of U.S. Federal Registration:

1. Federal registration provides notice that a term has been appropriated as a trademark and is not available for use by others.
2. Federally-registered marks may be designated with the symbol®.
3. Five years after federal registration, a trademark owner's rights in a mark may become incontestable.
4. A federally-registered mark owned by a United States owner can be recorded with the U. S. Customs Service to prevent infringing goods from coming into the country.
5. Federal registration provides federal jurisdiction for infringement actions.

B. The PTO Supplemental Register

A mark that does not meet the standards of distinctiveness necessary for the federal Principal Register but that is "capable" of distinguishing the user's goods or services may be registered on the federal Supplemental Register. Marks initially entered on the Supplemental Register may be converted to the Principal Register when distinctiveness can be shown.

1. Registration on the Supplemental Register entitles the registrant to use [®] with the mark, signifying that the term serves as a trademark.
2. Registration on the Supplemental Register provides federal jurisdiction for infringement actions.
3. Until "secondary meaning" can be shown, however, registration on the Supplemental Register does not imply exclusive rights in the holder of the descriptive mark.

VI. THE U.S. REGISTRATION PROCESS

A. Federal Registration

While a federal trademark registration will not issue until a mark actually has been used in commerce in connection with the goods or services sought to be covered, federal trademark applications may be filed either on the basis of actual use or on the basis of intent to use. Federal trademark registration is for a period of ten years. A registration may be renewed for an infinite number of ten-year terms if the mark continues to be used on the goods and services covered by the initial registration.

B. Actual Use Applications

An applicant may apply to register a mark that actually has been used on goods or service "in commerce," that is between two or more states or in foreign commerce.

1. The mark is examined by Patent and Trademark Office examiners who determine whether the mark is descriptive or otherwise inappropriate for registration, and whether there are any conflicting registered marks.
2. If a mark successfully passes the examination stage and if no opposition to the registration is filed after a thirty-day notice period, a registration issues.

C. Intent to Use Applications

Alternatively, an applicant may file an application based on the applicant's bona fide "intent to use" the mark in commerce in the future.

1. Once the mark successfully passes the examination and opposition stages, a Notice of Allowance will issue.

2. The applicant then has six consecutive periods of six months each, upon a showing of good cause for delay, in which to show that the mark has been used on goods or services in commerce.
3. When the mark is actually used, the registration issues, with the registration date relating back to the filing date of the intent to use application.
4. When an intent-to-use applicant makes use of the proposed mark within the established time period, the applicant's rights are superior to any third party which uses the same or a confusingly similar mark after the filing.

VII. PROTECTING AND MAINTAINING TRADEMARK RIGHTS

Trademarks are valuable assets of a company that must be protected. Trademark rights can be lost if a company fails to police use of its marks, both internally and externally. A company should develop an internal program to prevent misuse of its marks and to police use of its marks by others.

- A. In the U.S., a mark can be lost if it is not used for a period of two years and the owner intends to abandon the mark.
- B. In some countries, a mark can be lost if it is not used for an extended period, even if the owner does not intend to abandon the mark.
- C. A mark can be lost if an owner allows its use by others, but fails to establish and maintain sufficient controls to ensure that the quality of the goods or services produced by the licensee meets the established standards of the owner.
- D. A mark can be lost when it becomes a generic term for the goods or services it refers to, and loses its significance as a trademark.

Patents

What is a Patent?

A patent is a grant given by the federal government to the first inventor to file his or her application with the United States Patent and Trademark Office (USPTO) and allows the inventor to exclude others from performing certain activities involving the patented invention for the life of the patent. There are two categories of patent applications: provisional and non-provisional. A *provisional* patent application is essentially a “placeholder.” Unless a provisional application is converted into a non-provisional application, it will lapse one year after it is filed and provisional applications are not examined by the USPTO. Provisional applications are useful to maintain the earliest possible priority date while allowing an extra year for development, though it is important to note that the provisional application’s disclosure must be sufficient to meet the written description requirement of any subsequent dependent non-provisional applications. If a non-provisional application is filed within the twelve month pendency of the provisional application, the elapsed portion of the twelve months of the provisional application’s life do not count against the 20 year term any dependent non-provisional patents will receive upon issuance. *Non-provisional* applications *can* eventually mature into a patent, are examined by the USPTO, and trigger the 20-year term clock upon filing.

There are three types of patents: utility, design, and plant. *Utility* patent protection is appropriate for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” Essentially, this covers anything “made by man,” subject to meeting the statutory requirements of novelty, non-obviousness and certain technical requirements. Utility patent protection lasts for 20 years from the date of filing a patent application in most cases, though there are exceptions where the term can be longer. *Design* patents are appropriate for “a new, original, and ornamental design for an article of manufacture” and last for 15 years from the date of issue (not from the filing date). In order to qualify for a design patent, the design cannot be functional in any way. If it is, then utility patent protection is appropriate. A *plant* patent is appropriate for “anyone who invents or discovers and asexually reproduces any distinct and new variety of plant” and protection lasts for 20 years from the filing of the application, just as with utility patents.

What Does Having a Patent Do For Me?

Patents are considered the strongest form of protection available for intellectual property and a patent gives an inventor the right to exclude others from “making, using, offering to sell, importing or selling any patented invention, within the United States or importing into the United States any patented invention during the term of the patent.” Depending upon the industry to which the invention applies, patents can be anything from a bargaining chip, a revenue generator, or even a requirement to operate effectively in the industry (for example, by blocking competitors). Having a patent assures an inventor that no one else can profit from your invention without paying you in some way.

How Do I Get a Patent?

Because the protection offered by a patent is so strong, the government ensures that very specific requirements are met before granting a patent. In essence, the government wants an inventor to disclose his invention fully in the application and to provide enough information that someone skilled in the art in which the invention applies could make or practice the invention just by reading the patent. The requirements for each type of patent vary, and an inventor thinking of applying for a patent should retain a patent attorney to guide him or her through the process to ensure the best results possible.

Patents

1.) Protects new inventions or ideas

- Must be: useful, new/novel and non-obvious

2.) What is Patentable?

- Processes
- Articles of Manufacture
- Machines
- Composition of Matter

3.) What is not patentable?

- Laws of Nature
- Physical Phenomena
- Abstract Ideas (math solutions)
- Scientific Principles
- Mental Process Only

4.) Rights of a Patent

- Right to exclude others from making, using, selling and importing

5.) Types of Patent Applications

a.) Provision Applications (utility)

- only a place holder for one year
- establishes priority date
- not reviewed

b.) Non-Provisional Application (utility)

- inventor must disclose and describe the “best mode” contemplated to carry out invention
- claims – define the “metes and bounds” of the parcel of IP the inventor seeks to own

6.) Types of Patents

a.) Utility – Protects how invention works or is made

- multiple claims
- describes functionality
- cost - \$5,000 - \$13,000 to file
- term – 20 years from date of filing
- damages – reasonable royalty or lost profits

b. Design – Protects how it looks

- single claim (“ornamental” design)
- can not be functional
- costs - \$1,500 - \$2,500
- term – 15 years from date of issue
- damages – reasonable Royalty, lost profits, or infringer’s profits

7.) Anatomy of Utility Patent

A. Abstract – Brief technical description of the invention. (150 words)

B. Specification – A written description that references drawings and explains the invention to enable a person “skilled in the art” to make or use the invention.

Specification – Drawings, Field of the Invention, Background, Summary, Description of the Drawings, and Detailed Description of the Invention

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 part of the invention that is protected by the patent.

8.) Anatomy of Design Patent

- Design aspects claimed are shown as solid lines
- Unclaimed aspects or environmental structures are shown as broken lines

Trial Practice: Views from the Bench

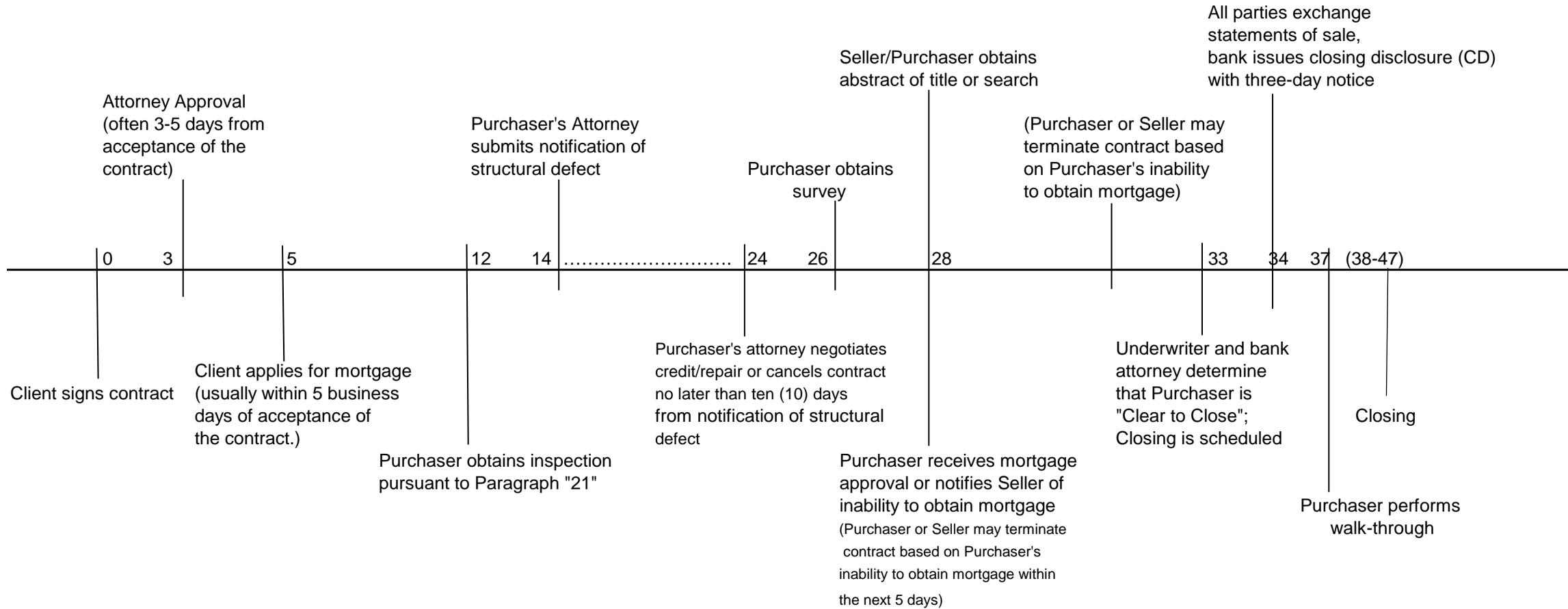
Hon. Mae A. D'Agostino

Materials available online at:
www.nysba.org/SeptemberBTG2018Materials

Real Estate Closings 101

Alice M. Breeding, Esq.
Michelle H. Wildgrube, Esq.

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.
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 Schenectady, New York 12305

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.
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Schenectady, NY 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 40-year abstract of title, tax search and any continuations thereof, or a fee title insurance policy, shall be obtained at the expense of Purchaser or 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.

Page 2 of 4 Purchaser's Initials _____ Seller's Initials _____

For Use Beginning 1/1/2010

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)

**Drafting 101 |
Wills, Trusts and POA's**

Patricia J. Shevy, Esq.



Estate Planning Basics

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

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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
-

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!



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;

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).

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.



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.



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** as a single instrument.



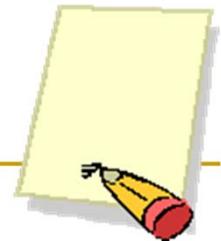
Statutory Gifts Rider (SGR)

- Document supplementing statutory short form POA to authorize certain major gift transactions other than those authorized by § 5-1520 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.



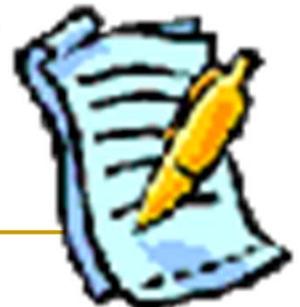
Statutory Gifts Rider

- 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.



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.



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).

Executing a Power of Attorney

- Statutory short form must be written, typed or printed in at least 12 point font.
- 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.



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 Attorney.

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.**

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.



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.

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).
- Choosing the right person- pick someone who will be able to stand up to the rest of the family.



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.



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.



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.



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.

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.

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.



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.

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.)



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).

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

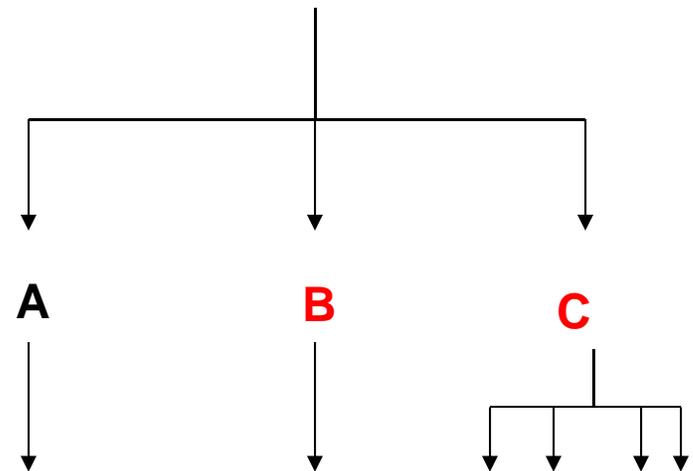
- **"ISSUE"** means: the descendants in any degree from a common ancestor, i.e. the person's children, grandchildren, great-grandchildren, great-great-grandchildren, and on down in a straight line of kinship.
- Intestacy provisions use “BY REPRESENTATION”, not “PER STIRPES” as default of distribution (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).

“BY REPRESENTATION” or “PER STIRPES”

Client had 3 children- A, B & C.

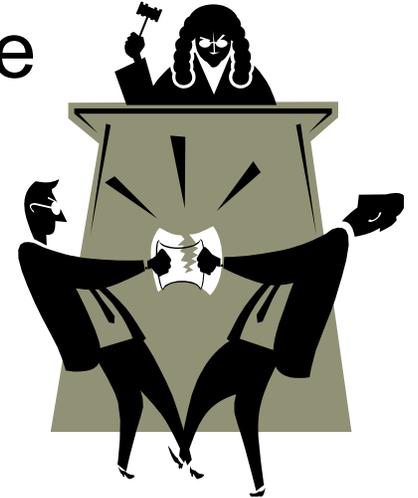
At Client's death, A is living, and B & C predeceased. All 3 had children: A has 1, B has 1, and C has 4.

- “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.



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).



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.



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)



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?



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 *place where executed*; or
 - The laws of the *place where testator was domiciled*, either when Will executed or at time of death.

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).

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.**

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.
-

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

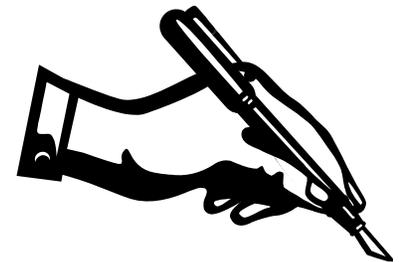
- Affidavit states that:
 - the testator requested the signature of the witnesses to the Will,
 - Testator signed in their presence and they signed in each other's presence (or other acceptable alternative per execution statute),
 - the testator was competent, of full age, and not under any undue influence.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

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)
 - Convicted felons
 - Those disqualified due to substance abuse, dishonesty, improvidence, want of understanding, or otherwise unfit
 - Persons unable to read/write English, in Court's discretion

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



Other Common Provisions

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

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.”



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.”



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.”

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.

Estate Tax Issues



□ **FEDERAL ESTATE TAX**

- \$11.2 Million exemption. 40% Tax Rate
- Portability- Unused exemption of first spouse to die passes to and can be used by the surviving spouse (\$22.4 Million total per couple). Consider whether wise to rely on portability availability.

□ **NEW YORK STATE ESTATE TAX**

- \$5.25 Million through December 31, 2018; Increases in 2019 when it matches the federal exemption under 2014 law (currently \$5.6 Million).
- Graduated tax rates, top rate of 16%.
- No Portability.
- The Cliff- Estate 5% over exemption- **NO EXEMPTION!**

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

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).

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

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.

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.
- **EPTL §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.

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

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.

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.

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.

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.”)

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.

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.

THE END.
Questions?



**Advising Clients Charged with DWI
and Vehicle and Traffic Matters in
New York State**

Joseph M. Gerstenzang, Esq.

ADVISING CLIENTS
ON DWI AND VTL
MATTERS IN NY

Joseph M. Gerstenzang
Gerstenzang, Sills, Cohn
& Gerstenzang

SHOULD I TAKE THE TEST?



Agenda

- The penalties for VTL § 1192 offenses
- 20-day Order
- The Impaired Driver Program ("IDP")
- Ignition Interlock Device ("IID")
- Suspension pending prosecution
- Chemical test refusals

The first offender

- Assuming fairly low BAC and no aggravating factors -- DWAI
- 90-day suspension of driver's license (with certain exceptions)
- IDP/conditional license eligible
- Victim Impact Panel
- Alcohol screening/assessment
- \$300-\$500 fine + \$255/\$260 surcharge
- Driver responsibility assessment

The second offender

- If the prior conviction is fairly recent, the prosecutor will likely offer a plea to DWI
- 6-month license *revocation* -- no full re-licensing until the expiration of statutory revocation period
- Eligibility for the DDP and a conditional license?
- Ignition Interlock Device

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



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



New York State Department of Motor Vehicles

ORDER OF SUSPENSION OR REVOCATION

- Always give Part 2 to the motorist.
- Give Part 1 to the motorist ONLY if you are granting continuation of driving privileges.

PART 1 - CONTINUATION OF DRIVING PRIVILEGES

Motorist Name (Last, First, MI)	Date of Birth	Year License Expires	License Class	Restrictions
---------------------------------	---------------	----------------------	---------------	--------------

According to Section 1193 of the Vehicle and Traffic Law, your driver license will be suspended revoked on _____ / _____ / _____
(sentence date plus 20 days)

This order will allow you to drive, with the same limitations as your driver license, until your suspension/ revocation starts. **You must have both parts of this order with you when you drive.** If you do not have both parts of this order with you, you may be charged with a violation of the Vehicle and Traffic Law. When the suspension/revocation starts, you do not have the right to drive unless you receive a conditional license. This order must be turned in before a conditional license can be issued to you.

MV-1192 (4/11)

(Signature of Judge or Clerk of Court)



New York State Department of Motor Vehicles

ORDER OF SUSPENSION OR REVOCATION

PART 2

Motorist Name (Last, First, MI)	Date of Birth	<input type="checkbox"/> Male <input type="checkbox"/> Female
Number and Street Address	Apt. #	Ticket Number (if unavailable, enter Docket Number)
City	State	Zip Code
COURT/VIOLATION (Certificate of Conviction must be attached)		Driver License #
Judge Name	Violation Date	Conviction Date
Court Code	Vehicle Class (definitions are listed on the back of this form)	<input type="checkbox"/> Check if Youthful Offender
	<input type="checkbox"/> Commercial Motor Vehicle (DMV) <input type="checkbox"/> Special Vehicle <input type="checkbox"/> All Others	

SUSPENSION/REVOCATION

According to Section 1193-2 of the Vehicle and Traffic Law, your driver license/privilege is:

- Suspended for 90 days (conviction of 1192-1 first offense only if not operating a CMV or Special Vehicle).
- Revoked for at least _____

Duration (Enter ONLY one of the options listed on the back of this form)
Sentence date _____ / _____ / _____. This order will be effective on _____ / _____ / _____ because of your conviction of a violation of Subdivision _____ of Section 1192 of the Vehicle and Traffic Law.
(sentence date or sentence date plus 20 days)

PROBATION/CONDITIONAL DISCHARGE

A person convicted of a violation of VTL 1192(2-a)(a) or (b) **committed on or after 12/18/09** must be sentenced to a conditional discharge or probation and the installation and use of the interlock device.

A person convicted of a violation of VTL 1192(2) or (3) **committed on or after 11/18/09 and who is sentenced on or after 8/15/10** must be sentenced to a conditional discharge or probation and the installation and use of the interlock device.

Is motorist sentenced to: Probation - If sentenced to probation, how long is the sentence? 3 years 5 years
 Conditional Discharge - If sentenced to conditional discharge, how long is the sentence? 1 year 3 years

Must the motorist obtain permission before applying for a license? Only applies if motorist is sentenced to probation. Yes No
 If yes, do they need permission from: Court Probation Department Both

Must the motorist install an Ignition Interlock Device? Yes No

LICENSE SURRENDER - Has the motorist surrendered his/her license

Yes No - If you have not turned in your driver license to the court, you must turn it in to the Department of Motor Vehicles. If you turn in a temporary license, you must also turn in your photo license when you receive it.

Motorist Signature	Signature of Judge or Clerk of Court
--------------------	--------------------------------------

Copy 1: Motorist

MV-1192 (4/11)

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:
 - (1) charged with vehicular manslaughter/homicide, or
 - (2) prior conviction within past 5 years

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.

20-day Orders cont 'd

- If you appear at the refusal hearing and the officer(s) no-show, the temporary suspension is lifted = 20-day Order becomes effective
- If your client is revoked at the refusal hearing, the 20-day Order is a nullity

The Impaired Driver Program

- 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

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 DDP)

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

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

Scope of Conditional License

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

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

Ignition Interlock Device

- 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



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

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)

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

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

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

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

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 sentencing
 - DPCA-500IID-FDR
 - 9 NYCRR § 358.8
 - Submit 3 copies

Blowing into the IID

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



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

Lockout mode

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



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)

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

- IID condition lengthened
- Alcohol treatment
- Jail

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

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

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

Should a person refuse

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

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

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"

BASICS OF VEHICLE AND TRAFFIC LAW IN NYS



Joseph M. Gerstenzang
Gerstenzang, Sills, Cohn
& Gerstenzang

What information you need to know

- Client's driving history -- possibly lifetime record
- Accident
- Alcohol involvement
- Office policies

Courts outside of the 5 boroughs and Rochester

- Plea bargaining
- The goal is a non-moving, 0-point violation
- Know your jurisdiction (ask the most important person in the courthouse)
- Collect phone numbers of attorneys who you trust that can competently handle the case if you are uncomfortable

Contacting the Court

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

Negotiating with the prosecutor by mail

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

Negotiating in person

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

Waiver of appearance

I, -----, the above-named defendant, whose address is -----, New York -----, do 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, Sils, 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.

What is a supporting deposition?

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

Should you request a 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

Move to dismiss

- Failure to provide a timely supporting deposition
- Facially insufficient

The DMV Point System

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

How the DMV calculates points

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

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

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

Why 31 days?

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

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

3 speeds within 18 months

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

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

Negative units ("safety factors")

- Hidden DMV point system
- Only applies if revoked
- 25 or more negative units is bad
- Extends the time your client cannot drive

Junior license

- Class DJ or MJ license (16-18)
- 60-day suspension for "serious traffic violation" or 2 other violations
- 60-day *revocation* for another violation within 6 months
- 120-day suspension for texting or cell phone violation

Traffic Violations Bureau ("TVB")

- Non-criminal traffic cases handled administratively by the Department of Motor Vehicles
- New York City and Rochester

Plea bargaining at the TVB?

- Very different system from upstate system
- No plea bargaining
- Similar to a chemical test refusal hearing

Suspension v. revocation

- Significant difference
- Taken away for a period of time
- Cancelled, must reapply to the DMV

New regulations

- 2012 everything changed
- A traffic ticket can result in a *lifetime license revocation*

Revoked for a non-DWI related offense

- For example:
 - 3 speeds
 - Leaving the scene of PIAA
 - Speed contest
- 3 or 4 DWI-related incidents within 25 years
- Revocation period + 2 additional years + restricted use license for 2 years

Client convicted of a high-point driving violation

- For example: cell phone and texting infractions, reckless driving, failing to stop for school bus, high-point speed
- DMV will review your client's lifetime driving record

Within last 25 years

- 3 or 4 DWI-related convictions
- Serious driving offense ("SDO")
 - A fatal accident
 - A driving-related Penal Law conviction
 - Conviction of 2 or more high-point driving violations (5 or more points); or
 - 20 or more total points
- Permanent denial

Lifetime review

- 5 DWI-related convictions
- Permanent denial

Legal challenges

- Conflict with existing law addressing multiple offenders
- Separation of powers
- Applied retroactively

Insurance considerations

- Conviction date -- not violation
- Larger companies have 5-year window for new business/renewal
- Increase for basic tickets is approximately 36-39 months
- Surcharge for DWIs lasts for 39 months

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Landlord Tenant Practice in New York

John Gable, Esq.

Materials available online at:

www.nysba.org/SeptemberBTG2018Materials

Special Education Law 101

Jennifer Feeley, Esq.

Eligibility for Educational Supports: IDEA and Section 504

Jennifer Feeley, Esq.



Discussion Overview

- IDEA
 - Eligibility
 - IEP services
 - Due Process Rights and Requirements
- Section 504 of the Rehabilitation Act
 - Eligibility
 - Requesting Reasonable Accommodations
 - Due Process Requirements

Individuals with Disabilities Education Act (IDEA)

IDEA Purpose

To ensure that all children with disabilities:

- have available to them a *free appropriate public education (FAPE)*
- that emphasizes special education and related services designed to:
 - meet their *unique needs* and
 - prepare them for *employment, secondary education, and independent living,*
- and to ensure that the *rights* of children with disabilities and parents of such children are *protected.*

What is FAPE?

“Free” - No Exceptions

- Applies only to special education & related services (including those services received by students attending private schools at parent expense)
- “Public”
 - Meets state standards
 - Includes private facilities if student placed there by the home school district

“Appropriate” Education

- A District must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.
- An educational program reasonably calculated to enable a child to make progress in light of the child’s circumstances.
- See, *Board of Educ. v. Rowley*, 458 U.S. 176, 203-204 (1982); *R.E. v. New York City Dep't. of Educ.*, 694 F.3d 167, 189-90 (2d Cir. 2012); *M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 245 (2d Cir. 2012); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2d Cir. 2005); *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct 988 (2017)

Requirements of FAPE

- Procedural Requirements
 - These are requirements that the district must follow to comply with the IDEA's process based requirements. For example, re-evaluating a student within specific timeframes.
- Substantive Requirements
 - Individualized IEP
 - Educational Benefit
 - Progress toward IEP goals
- Least Restrictive Environment
 - Students with disabilities shall be educated with non-disabled peers to the *maximum* extent appropriate
 - 20 USC 1412(a)(5)(A); 8 NYCRR 200.6(a)(1); 8 NYCRR 200.1(cc)

Child Find Obligation 8 NYCRR 200.2(a)(7)

- Affirmative duty to identify, locate, and evaluate students suspected of having a disability and in need of special education and related services, but no determination of prior eligibility has been made.
- The "child find" requirements apply even though the student is advancing from grade to grade. 34 C.F.R. § 300.111(c)(1); see 8 NYCRR 200.2(a)(7)).
- Board of education must have procedures in place that will enable it to find such children.

What are the steps in the Special Education process?

1. Initial Referral for Special Education Services;
2. Individual Evaluation Process;
3. Determining Eligibility for Special Education Services;
4. Individualized Education Program (IEP);and
5. Annual Review/Reevaluation.

1. Initial Referral for Special Education Services

- Who may make a referral?
 - The student's parent or person in parental relationship;
 - A designee of the school district
 - Commissioner/designee with responsibility for the student
- NOTE: School staff, physicians, judicial officers, staff of public agencies responsible for the student, or the student (if over 18) can **request** that the district refer the student for an initial evaluation.
- Referrals & requests should be in **writing** and addressed to Chairperson of Committee on Special Education or Committee on Preschool Education.

Timelines

- School-Age
 - 60 school days to evaluate the student, determine eligibility and implement IEP from date of parental consent.
- Preschool only – services must be provided within 30 days of CPSE recommendations (if that time period is shorter than 60 days from consent)

2. Individual Evaluation Process

- Requires parent **consent** (consent triggers 60- school day clock)
- Must evaluate **all** areas of **suspected** disability
 - **Academic** (intelligence, memory, info processing, actual achievement/performance in core academic skills – reading, writing, math)
 - **Social** (e.g. pragmatic language, communication & speech)
 - **Physical** (e.g. fine & gross motor skills, articulation, sensory integration/processing)
 - **Behavior** (Behavior scales, Functional Behavior Assessment “FBA”, attention/distractibility)
- Social History
- Physical Exam
- Must include observation in setting where student is struggling
- Screening is not an evaluation

3. Eligibility Determination Made By Committee on Special Education (“CSE”)

- Makes all decisions related to classification and provision of special education
- Required Members:
 - Parents
 - District representative/administrator (CSE Chairperson)
 - School Psychologist (or someone who can interpret evals)
 - Regular ed teacher
 - Special ed teacher
 - Student (if appropriate)
 - Parent member (if requested by parent or school at least 72 hours in advance)
 - School physician (if requested by parent or school at least 72 hours in advance)
 - Other persons with knowledge/expertise relating to student (optional)

IDEA Eligibility Determination

- After consideration of comprehensive evaluation
- Student aged 3 – 21 (unless earns a high school diploma)
- Meets definition of 1 or more of the eligible disabilities.
- AND who by reason of their disability needs special education and/or related services in order to benefit from their education. 8 NYCRR 200.1(zz)
 - *“Education” includes academic, social, physical, & functional standards*
 - *Note: Lack of instruction in reading or math, or limited English proficiency are not disabilities 8 NYCRR 200.4(c)*

Qualifying Disability Qualifications

- Autism
- Deafness / HH
- Deaf-Blindness
- Hearing Impairment
- Intellectual Disability
- Multiple Disabilities
- Orthopedic Impairment
- Other Health Impairment
- Emotional Disturbance
- Learning Disability
- Speech or Language Impairment
- Traumatic Brain Injury
- Visual Impairment / Blindness

If Student Found Ineligible

8 NYCRR 200.4(d)(1)

- Committee will provide the family with information indicating why the child is ineligible;
- Notify Principal;
 - Work with professionals in the school or with the student's current teacher, guidance counselor, or another specialist to help the student.
- May make a referral under **Section 504 of the Rehabilitation Act of 1973**
- If the family disagrees with the decision of the Committee, they may request an Independent Educational Evaluation (IEE) and/or use other procedural safeguards.

4. Individualized Education Program (IEP) 8 NYCRR 200.4(d)(2)

- Written plan developed at time of classification and then at least once annually
- Based on student's unique needs
- Developed by Committee on Special Ed (CSE) – including parents
- Legally enforceable document
- Can be amended without CSE meeting if district obtains written consent from parent. 8 NYCRR 200.4(g).
- The amended IEP must be provided to the parent.

5. Annual Review/Reevaluation

- IEP reviewed at least annually
 - You may request a meeting sooner
- Reevaluation at least once every three years, but not more than 1 time year unless parent and district agree otherwise
 - Request by parent or teacher;
 - If conditions warrant (behavioral issues/new issues)
 - Consider new evaluations
 - Determine individual needs; educational progress and achievement;
 - Determine continuing eligibility for special education

Procedural Safeguards Under IDEA

- Independent Educational Evaluation (IEE) 8 NYCRR 200.5(g)
 - Triggered only after District completes an evaluation, and the parent disagrees with the evaluation obtained by the school district
 - The parents can request an IEE at public expense
 - The request should be made in writing
 - The District *may* ask why but the parent may not be required to provide the explanation
 - The District cannot unreasonably delay in providing the IEE or filing a due process complaint
 - The District must file the due process complaint if they refuse to provide the IEE and then must show their evaluation was appropriate.

Disagreement with CSE Recommendation

- Request an IEE
- Request mediation 8 NYCRR 200.5(h)
- File a Complaint with New York State Education Dept.
- Initiate a due process hearing 8 NYCRR 200.5(i)
 - Must include:
 - Name of the student
 - Address of the student
 - Name of the school student is attending
 - Description of the nature of the problem
 - A proposed resolution of the problem

Due Process Complaint Notice

- District can file allegation of insufficient due process complaint notice with impartial hearing officer in writing, and on notice to parent, within 15 days of receiving the due process complaint notice.
- District must provide response to parent if they have not previously sent a Prior Written Notice (PWN) within 10 days of receiving complaint.
 - PWN must be given to the parents of student in a reasonable time before the district proposes to or refuses to initiate or change the identification, evaluation, educational placement, or provision of FAPE. 8 NYCRR 200.5(a). PWN must also provide specific information

Impartial Due Process Hearings

- 8 NYCRR 200.5(j)
- Talks about specifics such as:
 - Timelines
 - Subject Matter of the hearing
 - Resolution Process
 - Prehearing conferences
 - Presenting evidence and disclosure
 - Appeal procedure
 - NYS has a State review officer

Pendency

- During the duration of an impartial hearing the student will remain in the last agreed upon placement 8 NYCRR 200.5(m)
- This can be from the last agreed upon IEP
- Can also be from a prior decision of an impartial hearing
- Prior settlement agreement

Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973

No otherwise qualified individual with a disability...shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Meaning: A district must accommodate a student with a disability so the student has equal access to school programs, events, and activities in the same way as his/her non-disabled peers.

Section 504 = Equal Access

- School programs, events and activities must be accessible to students with disabilities.
- School must provide supports and services (accommodations) necessary for a student to participate equally in the school program.
- Section 504 requirements extends to all individuals with disabilities who can join in a school program, event, or activity.

What are Sec. 504 Accommodations?

- Supports, services, and modifications that allow a student with a disability *equal access* to school programs.
 - Chromebook for notetaking
 - Speech-to-text software
 - Extended time for testing
- Accommodations
 - are based on the student's needs.
 - do not fundamentally change the school program, activity, or event.

504 Accommodation v. IEP Services

IDEA	§ 504
13 Disabilities	Physical or Mental Impairment
Adverse impact on educational performance	Substantial limitation on a major life activity
The student requires specialized instruction/ related services to benefit from instruction	The student requires accommodations, supports and/or services to gain comparable access to district programs or services as nondisabled peers
Appropriateness standard	Reasonableness standard

Examples of 504 Accommodations

- Services based on a student's medical needs
- CART services in an auditorium
- ASL interpreter services
- Wheelchair ramp into school building
- Effective Communication
- Access to a service animal

504 Accommodation Request Process

- Understand 504 Accommodation Process from District.
- Make the 504 request in writing to the principal or 504 Committee chairperson, or CSE chairperson.
- Support request with justification/evaluation reports from student's treating practitioner team.
- Meet with 504 Committee or CSE team to explore implementation.

Effective Communication Standard

- Communication with students with disabilities must be as effective as communication with students without disabilities.
- Public schools must provide auxiliary aids and services where necessary to provide effective communication
- These aids and services provide students with disabilities the equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of the public school district
- Public schools must give primary consideration to the auxiliary aid or service requested by the students with the disability

Interplay between Sec. 504 and IDEA

- Some services a student can access through IDEA as well as Sec. 504.
- Different legal standards
 - IDEA – Appropriateness standard to access services.
 - Sec. 504 – Equal access to District programs.

How to Appeal a denial of a 504 Accommodation

- IDEA Administrative Exhaustion may apply
 - Fry v. Napoleon Supreme Court analysis
- 504 Administrative Appeals Process set by District
- OCR Complaint
- Federal Litigation – only file after full exhaustion of administrative review process

Fry v. Napoleon – Exhaustion Requirements

- Fry likely expanded exhaustion requirements for students requesting services as reasonable accommodations that are necessary to get an education.
- Exhaustion of IDEA administrative procedures is unnecessary when the *gravamen* (purpose) of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a "free appropriate public education."

Fry v. Napoleon – Exhaustion Requirements

- One clue to whether the *gravamen* of a complaint against a school concerns the denial of a free appropriate public education (FAPE), such that the plaintiff is required to exhaust IDEA's remedies, or instead addresses disability-based discrimination, can come from asking a pair of hypothetical questions,
 - Whether the plaintiff could have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school; and,
 - Whether an adult at the school could have pressed essentially the same grievance.
- When the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so.

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Disability Rights New York (DRNY) is the Protection & Advocacy System and Client Assistance Program (P&A/CAP) for persons with disabilities in New York. As the P&A/CAP for New York, DRNY advocates for the civil and legal rights for New Yorkers with disabilities.

Faculty Biographies

(In Alphabetical Order)



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Ms. Baiamonte was admitted to the Bar in January, 1994. Since admission to the Bar, Ms. Baiamonte has been engaged exclusively in the practice of matrimonial and family law.

Ms. Baiamonte is a graduate of Brandeis University (B.S., *cum laude*, 1990) and Syracuse University College of Law (J.D., *magna cum laude*, 1993; Senior Notes and Comments Editor, Syracuse Law Review), where she received the Order of the Coif. After graduating law school, Ms. Baiamonte was an associate of the Garden City firm of DaSilva & Keidel from October 1993 through February 1996. During this time, she was Associate Editor of the Domestic Relations Reporter, a legal publication by Matthew Bender. In March, 1996, Ms. Baiamonte became an associate of Stephen Gassman, Esq., a renowned leader in the field of matrimonial and family law. Ms. Baiamonte was named a member of the firm on August 1, 2007, at which time the firm was renamed Gassman, Baiamonte, Betts & Tannenbaum, P.C. In April 2011, the firm became known as Gassman Baiamonte Betts, PC. In November 2016, the firm was renamed Gassman Baiamonte Gruner, P.C.

Since 1994, Ms. Baiamonte has been and remains an active member of the Nassau County Bar Association. She served on the Executive Committee of the Matrimonial Law Committee since July 2009; and she is the immediate past Chair of the Matrimonial Law Committee, serving a 2-year term July 2015 – June 2017. In June 2014, she received The Richard J. Keidel Memorial Award in recognition of her contributions as a skilled advocate, leader and her professionalism in the practice of Matrimonial Law. Ms. Baiamonte served on the NCBA Judiciary Committee from July 2009 through June 2015 (serving as Vice Chair from July 2013-June 2014, and as Chair from July 2014-June 2015). Ms. Baiamonte received the Bar Association's 2014-2015 Directors' Award for Outstanding Service as Chair of the Judiciary Committee. Ms. Baiamonte has served as a member of the NCBA Board of Directors (2013-2016), and was installed as Secretary of the Nassau County Bar Association in June 2018.

Ms. Baiamonte is also an active member of the New York State Bar Association. She was appointed to the Executive Committee of the Family Law Section in July 2011. She has served as NYSBA's Financial Officer (2014-2016), Secretary (2016-2018) and is currently the Vice Chair of the Family Law Section. Ms. Baiamonte also serves as a Co-



Chair of the Continuing Legal Education Committee, a position she has held since 2014, as well as Program Co-Chair of the Section's Annual and Summer Meetings.

Ms. Baiamonte was recently installed as a Fellow of the American Academy of Matrimonial Lawyers, New York Chapter.

Ms. Baiamonte has served as an Arbitrator in the Early Neutral Evaluation Program in the Nassau County Supreme Court, and currently serves as a Discovery Referee in the Matrimonial Center as well as a Part 137 Fee Arbitrator for the 10th Judicial District. Ms. Baiamonte is a frequent lecturer on various matrimonial topics for the New York State and Nassau County Bar Associations and Nassau Academy of Law. She has appeared as a guest lecturer at various law schools (C.W. Post and St. John's University School of Law) and other Bar groups; and she has been invited by Justices of the Nassau County Supreme Court to address Law Interns on the topic of legal research and writing.

Ms. Baiamonte is an Editor of *Library of New York Matrimonial Law Forms*, a 1,350+ page compendium of matrimonial law forms available through the New York Law Journal (©2012).

Ms. Baiamonte has extensive experience dealing with a full range of matrimonial issues, among them: agreements (pre-nuptial, post-nuptial, and separation), custody and visitation, equitable distribution, spousal and child support issues, license and professional practice valuations, enforcement and modification proceedings, awards of counsel fees and experts' fees. Ms. Baiamonte has extensive appellate advocacy experience, having prosecuted and defended dozens of appeals involving complex matrimonial and family law issues, most notably: *DeFilippis v. DeFilippis*, 2017 WL 99149, 2017 N.Y. Slip Op. 00147 (2nd Dept., 2017); *Barnes-Levitin v. Levitin*, 131 A.D.3d 98716 N.Y.S.3d 460 (Mem) (2nd Dept., 2015); *Beroza v. Hendler*, 109 A.D.3d 498, 970 N.Y.S.2d 313 (2nd Dept., 2013); *Goncalves v. Goncalves*, 105 A.D.3d 901, 963 N.Y.S.2d 686 (2nd Dept., 2013); *Chesner v. Chesner*, 95 A.D.3d 1252, 945 N.Y.S.2d 409 (2nd Dept., 2012); *Beroza v. Hendler*, 71 A.D.3d 615, 896 N.Y.S.2d 144 (2nd Dept., 2010); *Kriftcher v. Kriftcher*, 59 A.D.3d 392, 874 N.Y.S.2d 153 (2nd Dept., 2009); *DeMille v. DeMille*, 5 A.D.3d 428, 774 N.Y.S.2d 156 (2nd Dept., 2004); *DeMille v. DeMille*, 32 A.D.3d 411, 820 N.Y.S.2d 111 (2nd Dept., 2006); *Matter of Brim v. Combs*, 25 A.D.3d, 691, 808 N.Y.S.2d 735 (2nd Dept., 2006); *Matter of Brim v. Combs*, 17 A.D.3d 361, 792 N.Y.S.2d 568 (2nd Dept., 2005); *Klein v. Klein*, 296 A.D.2d 533, 745 N.Y.S.2d 569 (2nd Dept., 2002); *Rindos v. Rindos*, 264 A.D.2d 722, 694 N.Y.S.2d 735 (2nd Dept., 1999); and *Vigliotti v. Vigliotti*, 260 A.D.2d 470, 688 N.Y.S.2d 198 (2nd Dept., 1999).

Ms. Baiamonte was born in Palermo, Italy. She is married with two children, and resides in Bayside, New York.



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Alice M Breeding has been a practicing attorney in the Capital Region since 2004. After working as an associate for many years, she opened her own firm in 2013. She specializes in the representation of buyers, sellers and lenders in connection with residential real estate transactions. Guiding the first-time homebuyer through the process and transforming them into the well-informed homebuyer is a large focus for her practice. She is committed to making the home buying and home selling process as smooth and stress free as possible.

Ms. Breeding also issues title insurance through Westcor Land Title Insurance Company as her firm's title insurance underwriter and has previously worked with Stewart Title Insurance Company and Chicago Title Insurance Company.

Ms. Breeding lives and practices in Clifton Park, NY. She lives with her 2 dogs: Mister Arnie Palmer and Princess Tallulah Belle.

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Mae Avila D'Agostino is a United States District Judge for the Northern District of New York. At the time of her appointment in 2011, she was a trial attorney with the law firm of D'Agostino, Krackeler, Maguire & Cardona, PC. Judge D'Agostino is a 1977 magna cum laude graduate of Siena College in Loudonville, New York. At Siena College Judge D'Agostino was a member of the women's basketball team. After graduating from College, she attended Syracuse University College of Law, receiving her Juris Doctor degree in May of 1980. At Syracuse University College of Law, she was awarded the International Academy of Trial Lawyers award for distinguished achievement in the art and science of advocacy.

After graduating from Law School, Judge D'Agostino began her career as a trial attorney. She has tried numerous civil cases including medical malpractice, products liability, negligence, and civil assault.

Judge D'Agostino is a past chair of the Trial Lawyers Section of the New York State Bar Association and is a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers.

Judge D'Agostino has participated in numerous Continuing Legal Education programs. She is an Adjunct Professor at Albany Law School where she teaches Medical Malpractice. She is a past member of the Siena College Board of Trustees, and Albany Law School Board of Trustees. She is a member of the New York State Bar Association and Albany County Bar Association.



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Jennifer Feeley is a Staff Attorney in the Albany office of Disability Rights New York (DRNY). She is in the Protection and Advocacy for Individuals with Intellectual and Developmental Disabilities (PADD) Program. In her role Jennifer has represented and worked with children and adults with intellectual and developmental disabilities in a wide range of civil rights issues including special education, access to community based services, guardianship restorations, employment discrimination, and monitoring or investigating facilities and prisons under DRNY's access authority.

Jennifer began her legal career as an Assistant District Attorney in the Sex Crimes Bureau at the Brooklyn District Attorney's Office prosecuting sex crimes. After her time as an Assistant District Attorney she worked as an associate in private practice. In this position, she represented families in special education matters at IEP meetings, mediations, resolution sessions, impartial hearings and appeals. Then, prior to joining DRNY, Jennifer practiced in Manhattan Family Court representing the Administration for Children's Services on abuse and neglect cases.

Jennifer is a graduate of the CUNY School of Law, and is admitted to practice in New York State and the Southern and Eastern Districts.

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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, Joseph interned at the District Attorney's Offices in Rensselaer, Albany and Schenectady counties.

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

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

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Joanne Macri currently serves as the Statewide Chief Implementation Attorney for the New York State Office of Indigent Legal Services (ILS) where she is currently engaged in the statewide implementation of criminal defense reforms as proposed in the Hurrell-Harring v. New York settlement agreement. She previously served as the ILS Director of Regional Initiatives where she developed and implemented a network of statewide Regional Immigration Assistance Centers. Ms. Macri also currently serves as a member of the New York Office of Court Administration Advisory Council on Immigration Issues in Family Court, co-chair of the New York State Bar Association (NYSBA) Committee on Immigration Representation and NYSBA Committee on the Standards of Attorney Conduct.

Prior to joining ILS, Ms. Macri served as the director of the Criminal Defense Immigration Project (CDIP) and the Immigrant Defense Project of the New York State Defenders Association (NYSDA) where she has provided immigration support to criminal and family law attorneys across New York State and conducted numerous continuing legal education trainings on the immigration consequences of New York criminal convictions and family court dispositions. She was also an adjunct professor at Sage College and at the State of New York University at Buffalo Law School where she has taught courses on prisoners' rights law, U.S. immigration law, immigration law practice and criminal/immigration law for several years.

For her service, Ms. Macri was recognized by the New York State Bar Association (NYSBA) Criminal Justice Section for her Outstanding Contribution to Criminal Law Education, the NYSBA Committee to Ensure Mandated Quality Representation and Prisoners' Legal Services of New York for her commitment to providing support to indigent representation. She was also recognized by the Upstate New York Chapter of the American Immigration Lawyers Association (AILA) as the 2015 recipient of the Mark T. Kenmore Mentor of the Year Award. Most recently, Ms. Macri received the Unsung Hero Award for Government Services as an Albany Law School Alumni and was honored by the New York State Defenders Association as the first female attorney recipient of the Wilfred R. O'Connor award for her commitment to client-centered representation.



Ms. Macri also currently serves as a member on the Committee for Gender Fairness for the Third Judicial Department and has previously served on the NYSBA Immigration Litigation Committee, the New York City Bar Association Criminal Justice Operations Committee and the Upstate New York AILA Chapter Subcommittees for Immigration and Customs Enforcement and Customs and Border Protection. She is a graduate of Albany Law School.

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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 June 2015 Mr. Miranda began 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.

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.

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 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 has served as mediator, arbitrator and early neutral evaluator for the U.S. District Court for the Northern District of New York.

Mr. Miranda received his Juris Doctor degree from Albany Law School and Bachelor's degree from the State University of New York at Buffalo. He is admitted to practice in New York, U.S. District Courts for New York's Northern, Southern, Eastern and Western Districts, Massachusetts, the Federal Circuit, Second Circuit and Ninth Circuit Court of Appeals, and the U.S. Supreme Court.

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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.

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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.

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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 Section (Co-Chair of the Estates and Tax 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.

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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).