

# **Bridging the Gap**

**Fall 2013**

**Tuesday-Wednesday, October 1-2, 2013**

**9:00 a.m. – 5:00 p.m. each day**

**New York's Hotel Pennsylvania**

401 Seventh Avenue, New York, NY

**New York State Nurses Association**

11 Cornell Road, Latham, NY

**The Conference Center Niagara Falls**

101 Old Falls Street, Niagara Falls, NY

*CLE NotePad*<sup>©</sup>

*Complete course materials distributed in electronic format online  
in advance of the program.*

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Young Lawyers Section

Committee on Continuing Legal Education

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- NYSBA cannot guarantee that free or paid WI-FI access will be available for your use at your program location, even if you can see a connection.

## ATTENDANCE VERIFICATION FOR NEW YORK MCLE CREDIT AND PROGRAM EVALUATION PROCESS

**Attendance Verifications:** In order to receive your New York MCLE credit, you are required to complete and return the Verification of Attendance form. If you are attending a two-day program, you will receive a separate form on each day of the program.

- The bottom half of the form should be filled out and returned to the Registration Staff after the morning session has ended. The top half should be filled out and returned to the

Registration Staff at the end of the program. **Please be sure to turn in your form at the appropriate times – we cannot issue your New York MCLE credit without it.** Your MCLE Certificate will be emailed to you a few weeks after the program.

- **Please note: Partial credit for program segments not allowed.** Under the New York State Continuing Legal Education Board Regulations and Guidelines, attendees at CLE programs cannot receive MCLE credit for a program segment unless they are present for the **entire segment**. Persons who arrive late, depart early, or are absent for any portion of the segment will not receive credit for that segment.

**Evaluations:** Program evaluations are processed online. After the program is over, you will receive an email from NYSBA CLE with a link to the online evaluation form.

- To complete your registration process, click on the link in the email within the next 72 hours and fill out your confidential online program evaluation.
- If you are not able to access the evaluation form by clicking on the link in the email, you can copy and paste the URL into the address bar of your web browser to access the evaluation.

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Please be sure to fill out the online evaluation form after the program! Thank you for choosing NYSBA CLE programs.

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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, including all materials that may have been updated since the books were printed. Further, the statements made by the faculty during this program do not constitute legal advice.

# Lawyer Assistance Program 1.800.255.0569



## Q. What is LAP?

**A.** The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

## Q. What services does LAP provide?

**A.** Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

## Q. Are LAP services confidential?

**A.** Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

### Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

## Q. How do I access LAP services?

**A.** LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website [www.nysba.org/lap](http://www.nysba.org/lap)

## Q. What can I expect when I contact LAP?

**A.** You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

## Q. Can I expect resolution of my problem?

**A.** The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

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## Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?
2. Is it difficult for me to maintain a routine and stay on top of responsibilities?
3. Have I experienced memory problems or an inability to concentrate?
4. Am I having difficulty managing emotions such as anger and sadness?
5. Have I missed appointments or appearances or failed to return phone calls?  
Am I keeping up with correspondence?
6. Have my sleeping and eating habits changed?
7. Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?
8. Does my family have a history of alcoholism, substance abuse or depression?
9. Do I drink or take drugs to deal with my problems?
10. In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?
11. Is gambling making me careless of my financial responsibilities?
12. Do I feel so stressed, burned out and depressed that I have thoughts of suicide?

There Is Hope

**CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT**

The sooner the better!

**Patricia Spataro, LAP Director**

**1.800.255.0569**

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## **AGENDA**

### **TUESDAY, OCTOBER 1, 2013 – DAY ONE**

8:30-9:00      REGISTRATION

9:00-10:15 (1.5 skills)

1.    BASIC CONCEPTS IN DRAFTING CONTRACTS

Vincent R. Martorana, Esq. | Reed Smith LLP, New York, NY

10:15-10:25    BREAK

10:25-11:40 (1.5 professional practice)

2.    HOW TO HANDLE A DWI CASE IN NEW YORK STATE

Thomas J. O'Hern, Esq. | Gerstenzang, O'Hern, Hickey, Sills & Gerstenzang, Albany, NY

11:40-12:30 (1.0 professional practice)

3.    MATRIMONIAL ACTIONS

Jenifer M. Wharton, Esq. | Gordon, Tepper & DeCoursey, LLP, Schenectady, NY

12:30-1:30     LUNCH (on your own)

1:30-2:45 (1.5 ethics)

4.    ETHICAL ISSUES: FEES, RETAINERS, ESCROW ACCOUNTS, ADVERTISING AND WEBSITES

Deborah A. Scalise, Esq. | Scalise & Hamilton, LLP, Scarsdale, NY

2:45-2:55      BREAK

2:55-3:45 (1.0 professional practice)

5.    REAL ESTATE TRANSACTIONS

Mindy H. Stern, Esq. | Schoeman Updike Kaufman Stern & Ascher LLP, New York, NY

3:45-5:00 (1.5 skills)

6.    FUNDAMENTALS OF DEPOSITIONS

W. Russell Corker, Esq. | Law Offices of W. Russell Corker, PC, Huntington, NY

5:00    ADJOURNMENT

**WEDNESDAY, OCTOBER 2, 2013 – DAY TWO**

8:30-9:00 REGISTRATION

9:00-10:15 (1.5 professional practice)

7. AUTOMOBILE LITIGATION: NO-FAULT LAW & BODILY INJURY CLAIMS IN LIGHT OF SERIOUS INJURY THRESHOLD REQUIREMENTS

Robert A. Glick, Esq. | Brand, Glick & Brand, PC, Garden City, NY

10:15-10:25 BREAK

10:25-11:40 (1.5 skills)

8. ELDER LAW

Ellyn S. Kravitz, Esq. | Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, New York, NY

11:40-12:30 (1.0 professional practice)

9. BECOMING CONVERSANT WITH PATENT AND TRADEMARK ISSUES

George R. McGuire, Esq. | Bond, Schoeneck & King, PLLC, Syracuse, NY

12:30-1:30 LUNCH (on your own)

1:30-2:45 (1.5 skills)

10. HEALTH LAW FUNDAMENTALS

Alexander G. Bateman, Jr., Esq. | Ruskin Moscou & Faltischek PC, Uniondale, NY

2:45-2:55 BREAK

2:55-3:45 (1.0 professional practice)

11. AN OVERVIEW ON JUDGMENT ENFORCEMENT

Robert J. Ansell, Esq. | Silverman Acampora LLP, Jericho, NY

3:45-5:00 (1.5 ethics)

12. ETHICAL CONSIDERATIONS FOR BUSINESS AND TRANSACTIONAL LAWYERS

Clifford R. Ennico, Esq. | Law Offices of Clifford R. Ennico, Fairfield, CT

5:00 ADJOURNMENT



**IMPORTANT NOTICE:****PARTIAL CREDIT FOR PROGRAM SEGMENTS NOT ALLOWED.**

Under the New York State Continuing Legal Education Board Regulations and Guidelines, attendees at CLE programs cannot receive MCLE credit for a program segment unless they are present for the entire segment. Persons who arrive late, depart early, or are absent for any portion of the segment will not receive credit for that segment.

**PROGRAM DESCRIPTION**

All attorneys are eligible to attend this program! 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!

Program faculty will speak from the New York City location and will be broadcast live to other locations in an interactive video conference format, allowing “real time” interaction between all locations. **This program is approved for MCLE credit for newly admitted attorneys in all locations, regardless of format.** This two-day program will cover different topics in various areas of practice on each day.

**MCLE CREDITS****16.0 TOTAL CREDITS**

3.0 ethics, 6.0 skills, and 7.0 professional practice (each day)

This course has been approved for MCLE credit in New York for all attorneys, including newly admitted (less than 24 months).

**PROGRAM LOCATIONS**

**Tuesday – Wednesday, March 12 – 13, 2013**

**9:00 – 5:00 each day**

**New York City**

New York’s Hotel Pennsylvania | 18th Floor | 401 Seventh Avenue (between 33rd and 32nd St.) | New York, NY 10001 | (212) 736-5000

**Albany Video Conference**

New York State Nurses Association | 11 Cornell Road, Latham, NY 12110 | (518) 782-9400

**Buffalo Video Conference**

The Conference Center Niagara Falls | 101 Old Falls Street | Niagara Falls, NY 14303 | (716) 278-2103



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**TUESDAY, OCTOBER 1, 2013 – DAY ONE**



# **1. BASIC CONCEPTS IN DRAFTING CONTRACTS**







## Basic Concepts in Drafting Contracts

October 1, 2013

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presented by

**Vincent R. Martorana**

for the

**New York State Bar Association**

*This presentation and the supplemental materials related to this presentation (this presentation and such materials, collectively, the “Materials”) are intended to constitute a continuing legal education course and are intended for an audience of attorneys. Neither the Materials, nor any portion thereof, is intended for any other purpose or for anyone other than an attorney.*

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*Basic Concepts in Drafting Contracts*

Summary of Presentation: What this Presentation Covers

- Preliminary Matters
    - Legal Drafting vs. Conversation/Prose Writing
    - The Importance of Language
    - Preferences in Contract Drafting
    - Practical Considerations
  - The Framework of a Contract
    - Preamble
    - Recitals
    - \*\* Body
    - Signature Pages
  - Legal Archaisms
- Definitions
  - Language of Performance
  - Obligations and Prohibitions
  - Discretionary Language
  - Language of Declaration
  - Language of Policy

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*Basic Concepts in Drafting Contracts*

Summary of Presentation: What this Presentation does *NOT* Cover

- The law\*
- The structure of any agreement in particular (e.g., asset purchase agreements, stockholders' agreements, license agreements, etc.) – rather, it deals with *how* to express concepts in contracts generally
- The drafting process (e.g., integration of comments from multiple sources)
- Certain advanced/specifically nuanced drafting concepts.
- Using drafting skills in connection with negotiations (e.g., “negotiating through the document,” how to use vagueness and ambiguity to your advantage)

\* To the extent that this presentation is required to cover the law in order for attorneys to obtain CLE credit, this presentation is deemed to cover the law.

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*Basic Concepts in Drafting Contracts*

Preliminary Matters

- Legal Drafting vs. Conversation/Prose Writing
- The Importance of Language
- Preferences in Contract Drafting
- Practical Considerations

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*Basic Concepts in Drafting Contracts*

Preliminary Matters > Legal Drafting vs. Conversation/Prose Writing

### Forget common sense

Example: If my wife wants me to take out the garbage each week, “Vincent, you’re responsible for taking out the garbage” should do the trick. You get the idea – I take out the garbage each week, it gets picked up, I bring the garbage cans back in and I do it all over again in advance of the next scheduled pick-up.

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*Vincent, you're responsible for taking out the garbage.*

*But as an attorney, if I wanted to poke holes in the deal, I could ask:*

- What day and time during the week do I take out the garbage?
- Can I take out the garbage only once, or is this an ongoing obligation?
- Can I let the garbage pile up for a year and then take it out?
- Do I need to take out all of the garbage in the house, or just some of it?
- Does the garbage need to be bagged? Can I just throw a half-eaten chicken wing on the front porch?
- Can I sub-contract my garbage-taking-out responsibilities to my daughter?
- ...and what exactly constitutes "garbage" anyway?

*Vincent, you're responsible for taking out the garbage.*

*Written in lawyer speak...*

"No later than 6 a.m. New York time each Monday and Thursday (and no earlier than 7 p.m. each Sunday and Wednesday, respectively), Vincent shall: (i) place all Garbage on the interior of the house on the premises (the "House") in trash bags (any such trash bag into which Garbage has been placed, a "Trash Bag"); (ii) seal and place each Trash Bag in one of the garbage cans located on the exterior of the House (any such garbage can into which a Trash Bag has been placed, a "Garbage Can"); and (iii) thereafter place each Garbage Can no more than one inch south of the curb of the sidewalk relating to the premises and between one and seven feet west of the driveway on the premises. Vincent shall place all Garbage Cans on the east side of the House (and adjacent thereto) as of 6 a.m. New York time each Tuesday and Friday. Vincent's obligations under this paragraph are personal in nature and, as such, are not delegable in whole or in part. "Garbage" means rubbish, as determined by Christine in her sole discretion."

*Basic Concepts in Drafting Contracts*

Preliminary Matters > Legal Drafting vs. Conversation/Prose Writing

- The point is, forget “you-get-the-idea” drafting. Forget “contract-as-a-mere-guidebook” drafting. If you want to make a contract tight and less subject to uncertainty and multiple interpretations, ask the questions and plug the holes. Otherwise:
  - The law will plug the holes for you\*
  - Your adversary will plug the holes for you
  - It will be unclear what rule will apply, or whether different rules apply in different contexts

\* e.g., “public policy” and “fairness” doctrines.

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*Basic Concepts in Drafting Contracts*

Preliminary Matters > The Importance of Language

“A contract is only as good as your ability to successfully enforce it in court.”

*But let’s consider how “good” a contract might be in the context of a counterparty considering whether or not to comply with a term of the contract....*

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*Basic Concepts in Drafting Contracts*

Preliminary Matters > The Importance of Language

“A contract is only as good as **your counterparty’s perception of** your ability to successfully enforce it in court.”

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*Basic Concepts in Drafting Contracts*

Preliminary Matters > The Importance of Language

“A contract is only as good as your counterparty’s perception **that you will seek to and** successfully enforce it in court.”

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“A contract is only as good as your counterparty’s perception that you will seek to and successfully enforce it in court” **PLUS “your counterparty’s assessment of any damage to its reputation should you seek to [and successfully] enforce it in court.”**

“A contract is only as good as your counterparty’s perception that you will seek to and successfully enforce it in court” PLUS “your counterparty’s assessment of any damage to its reputation should you seek to [and successfully] enforce it in court.” **PLUS “any sense of moral obligation that your counterparty might have in performing its obligations under the contract.”**

The upshot: Language matters!\* (*ex ante* and *ex post*)

- Ambiguous vs. Clear
- Vague vs. Certain
- Straightforward vs. Complex
- Superfluous vs. Tight
- Burdensome vs. Easy-to-comply-with

\* Language matters even if it is unenforceable!

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Some general preferences in contract drafting are listed below. Note that an “improvement” in one characteristic might result in a “decline” in other characteristics.

- \* **Unambiguous** is better than **Ambiguous**
- **Concision** is better than **Redundancy**
- **Shorter** is better than **Longer**
- **Predictability** is better than **Uncertainty**
- **Plain English** is better than **Jargon**
- **Precision** might or might not be better than **Vagueness**
- **Consistency** is better than **Inconsistency**
- **Straightforward** is better than **Confusing**

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*Basic Concepts in Drafting Contracts*

Preliminary Matters > Practical Considerations

- Law as a backdrop/basis for provisions
- Reliance on forms (a blessing and a curse)
- Know your audience
  - For this presentation, we will assume that sophisticated business people and attorneys are your audience
- Detail vs. Generality (Will too much of good thing spoil the deal?)
- Holding the pen vs. reacting
- Integrating comments
- \* Universal drafting “rules” vs. good practice vs. your own style
- For more junior attorneys, start developing good drafting habits now so you can easily implement them going forward
  - Quickly draft a tight agreement when you’re holding the pen
  - Spot and exploit drafting weaknesses in opposing counsel's draft

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*Basic Concepts in Drafting Contracts*

Preliminary Matters > Practical Considerations

Useful Resources for Learning/Improving Drafting Skills

- *A Manual of Style for Contract Drafting (Third Edition)*, Kenneth A. Adams (2013)
- *The Structure of M&A Contracts*, Kenneth A. Adams (2011)
- *Garner on Language and Writing*, Bryan A. Garner (2009) – more generalized concepts (including writing skills for litigators)
- *Negotiating and Drafting Contract Boilerplate*, Tina L. Stark (Ed.) (2003) – For the intersection between law and contract language
- *Typography for Lawyers*, Matthew Butterick (2010) – This what happens when a font designer becomes an attorney. Great book on formatting legal documents – and more than just fonts!
- Annotated forms
- Successive “redlines” of a document
- Board resolutions
- Due diligence materials
- Experience

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract

- Preamble
- Recitals
- Body
  - Definitions
  - Language of Performance
  - Obligations and Prohibitions
  - Discretionary Language
  - Language of Declaration
    - ✓ Representations
    - ✓ Acknowledgements
  - Language of Policy
- Signature Pages

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Preamble

Example:

This ASSET PURCHASE AGREEMENT (this “Agreement”), dated as of October 1, 2013, is made between Big Bad Corporation, a Delaware corporation (the “Buyer”), and Little Guy, LLC, a New York limited liability company (the “Seller” and, collectively with the Buyer, the “Parties”).

- Type of agreement
- Date of agreement
- Parties to agreement (including jurisdiction of organization and entity type)
- Save descriptive relationships between the parties for the recitals or the body of the contract (e.g., the representations)

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Recitals

- Describe background; give the reader context
- Set up defined terms

Example:

A. The Seller is engaged as a going concern in the business of designing, manufacturing, marketing, distributing, and selling paper clips (such business, the “Business”);

- Can serve as evidence of intent and help to resolve ambiguity (but there’s not going to be any ambiguity in contracts that you draft, right?)

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Recitals

- Do not put operative provisions (e.g., language of performance, representations, or obligations) in recitals
  - ☺ A. The Parties desire to amend the Loan Agreement in order to, among other things, extend the maturity date of the Loan to December 31, 2013.
  - ☹ A. The Parties are hereby amending the Loan Agreement to extend the maturity date of the Loan to December 31, 2013.
  - ☹ A. The Parties shall take such actions as are necessary to implement the terms of this Agreement.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Recitals

- Immediately after the recitals, there is typically a lead-in stating that the parties are agreeing to what follows.
  - ⊗ NOW, THEREFORE, in consideration of the premises and the respective covenants, representations, warranties and undertakings of the parties hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:
  - ☺ The Parties hereby agree as follows:

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body

- Definitions
- Language of Performance
- Obligations and Prohibitions
- Discretionary Language
- Language of Declaration
  - Representations
  - Acknowledgements
- Language of Policy

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An Initial Thought:  
*The Who? What? When? Where?  
How? Why? Hierarchy*

|   |               |            |   |
|---|---------------|------------|---|
|  | Indispensable | Who? What? | The Associate shall deliver the memo to the Partner.  |
|   |               | When?      | ...promptly; no later than 3 p.m. on Tuesday...   |
|   |               | Where?     | ...at the meeting; at the Partner's office...   |
|   |               | How?       | ...by walking it to the Partner's office; by email...   |
|   | Irrelevant?   | Why?       | ...in order to "hit the ground running"; because the memo is really important...Does it matter? |

## Definitions

### Lots of power in defined terms!

1. A. The Seller is engaged as a going concern in the business of designing, manufacturing, marketing, distributing, and selling paper clips (such business, the "Business").
- 2(a). The Company shall not sell or distribute (each of the foregoing, a "Transfer") the Shares.
- 2(b). The Company shall not sell, **assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of** (each of the foregoing, a "Transfer") the Shares.
3. "Attorney" means an attorney, a legal assistant, a chef, or any individual residing in the state of New York.

## “Stacking” defined terms

This STOCKHOLDERS’ AGREEMENT (this “Agreement”) is made as of October 1, 2013, by and among Example & Co., Inc., an Idaho corporation (the “Company”), those holders of the Company’s Series A Preferred Stock listed on Exhibit A (the “Series A Holders”), those holders of the Company’s Series B Preferred Stock listed on Exhibit B (the “Series B Holders” **and, collectively with the Series A Holders, the “Preferred Stockholders**”), and those holders of the Company’s common stock that are listed on Exhibit C (the “Common Stockholders” **and, collectively with the Preferred Stockholders and those persons that become a party to this Agreement in accordance with the terms hereof, the “Holders**”). **The Holders and the Company are collectively referred to herein as the “Parties”.**



29

## Defining “on site” vs. Defining in a “Definitions” Provision

### Defining “On site”

“Transfer” has the meaning set forth in Section 2.3.

...

Section 2.3. The Company shall not sell, assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of (each of the foregoing, a “Transfer”) the Shares.

### Definitions Provision

“Transfer” means, with respect to a given asset, any sale, assignment, pledge, encumbrance, hypothecation, distribution (as a dividend or otherwise), transfer, or other disposition of such asset. When used as a verb, “Transfer” has a correlative meaning.

...

Section 2.3. The Company shall not Transfer the Shares.

30

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Definitions

If defining a term “on site,” make sure it is clear which text a definition relates to

- ⊗ Section 1.1. Johnny shall sell apples to Eve in accordance with Section 1.2 and shall sell oranges to Adam in accordance with Section 1.3 (any such sale, a “Required Sale”).
    - There’s ambiguity as to whether a Required Sale includes sales to Adam only, or includes sales to Eve and sales to Adam.
  - ⊙ Section 1.1. Johnny shall sell apples to Eve in accordance with Section 1.2 and shall sell oranges to Adam in accordance with Section 1.3 (any such sale to Eve or Adam, as the case might be, a “Required Sale”).
- OR**
- ⊙ Section 1.1. Johnny shall sell apples to Eve in accordance with Section 1.2 and shall sell oranges to Adam in accordance with Section 1.3. “Required Sale” means any sale described in this Section 1.1.

31

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Definitions

*It’s ok to.....*

- ...use the lowercase term as part of a definition
  - “Transfer” means any **transfer**, sale, pledge, hypothecation, encumbrance, or other disposition.
  - “Permitted Automobile” means any **automobile** that is permitted on the Long Island Expressway, including, without limitation, my old 1983 Pontiac Firebird.
- ...use other defined terms within a definition
  - “Law” means any constitution, law, statute, treaty, rule, directive, requirement, regulation, **Order**, or any rules or regulations of any self-regulatory organization.
  - “Order” means any order, writ, judgment, **injunction**, decree, determination, or award, in each case that is issued by a **Governmental Entity**.
  - “Governmental Entity” means any court, **administrative agency**, commission, or other governmental authority or instrumentality, domestic or **foreign**, federal, state, or local.

A “Law” therefore includes, e.g., any **injunction** issued by a **foreign administrative agency**.

32



*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Definitions

**...but do not...**

- ...embed obligations within a definition
  - ⊗ “Net Earnings Statement” means a statement of the Company’s net earnings during the Post-Closing Period in the form attached as Exhibit A, **which the Company shall provide to the Seller no later than 30 days after the last day of the Post-Closing Period.**

*BETTER TO BREAK IT UP AS FOLLOWS:*

- ⊗ “Net Earnings Statement” means a statement of the Company’s net earnings during the Post-Closing Period in the form attached as Exhibit A.

...

Section 2.4. No later than 30 days after the last day of the Post-Closing Period, the Company shall provide the Net Earnings Statement to the Seller.

33

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Definitions

**...and do not...**

- ...simply use “includes”
  - ⊗ “Permitted Automobile” includes, without limitation, my old 1983 Pontiac Firebird.
- ...use more than one term for the same definition
  - ⊗ Verbiage Co., a Delaware corporation (“Verbiage” or the “Company”), is a subsidiary of the Parent.
- ...use “shall” to define a term
  - ⊗ “Securities Act” shall mean the Securities Act of 1933, as amended.

34

## Language of Performance

- Deals with actions being taken by the parties **by virtue of** entering into a contract
- Think: “hereby”
- Use the active voice, not the passive voice
  - ☹ The License is **hereby granted** to the Licensee by the Licensor.
  - ☺ The Licensor **hereby grants** the License to the Licensee.

Some examples

*Language of Performance*

- The Licensor **hereby grants** to the Licensee a non-exclusive worldwide license to use the Product.
- The Buyer **hereby assumes** the Assumed Liabilities.

*Obligations*

- The Licensor **shall grant** to the Licensee a non-exclusive worldwide license to use the Product.
- The Buyer **shall assume** the Assumed Liabilities.

## Obligations and Prohibitions

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions

Obligations

- What a party **has to do** pursuant to a contract
- Think: “shall”

Prohibitions

- What a party **is prohibited from doing** pursuant to a contract
- Think: “shall not”

39

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions

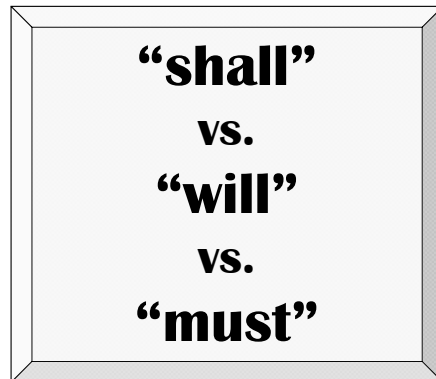
Examples:

- The Purchaser **shall pay** the Purchase Price to the Seller at the Closing.
- Each of Moses and his constituents **shall not** covet his respective neighbor’s wife.
- The Presenter **shall not** use any fancy visual effects when transitioning between slides.

40

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions > “shall” vs. “will” vs. “must”



41

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions > “shall” vs. “will” vs. “must”

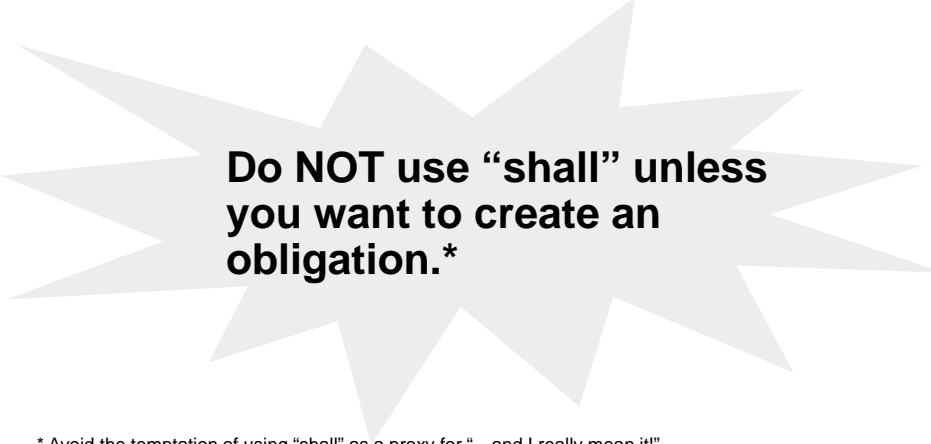
\* **“Shall” → “hereby has/have a duty to”**

*The Purchaser **shall** wire the Purchase Price to the Seller.*

=

*The Purchaser **hereby has a duty to** wire the Purchase Price to the Seller.*

42



**Do NOT use “shall” unless you want to create an obligation.\***

\* Avoid the temptation of using “shall” as a proxy for “...and I really mean it!”

- ☹ This Agreement shall constitute the entire agreement of the Parties with respect to the subject matter hereof.

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- “Will” is sometimes used to create an obligation.
  - ☹ The Purchaser **will** wire the Purchase Price to the Seller.
- But “will” can also convey futurity, whereas “shall” (in ordinary parlance) is an awkward choice (unless you’re King Arthur).
  - ☺ Davey hereby bets Lou that the Mets **will** win the World Series this year.
  - ☹ Davey hereby bets Lou that the Mets **shall [i.e., hereby have a duty to]** win the World Series this year.

*In fact, Davey just lost the bet!*

44

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions > “shall” vs. “will” vs. “must”

- “Must” means “is/are required to.” This could arguably be used as an alternative to “shall” to impose an obligation.
  - ☹ The Purchaser **must** wire the Purchase Price to the Seller.
- But “must” really asserts that a duty merely exists, not that it derives from the provision in which it is used.
  - ☺ If companies **must [are required to]** pay an excise tax on the Product of 20% or less pursuant to applicable law, then Newcomer Co. **shall [hereby has a duty to]** sell the Product.
  - ☹ If companies **shall [hereby have a duty to]** pay an excise tax on the Product of 20% or less pursuant to applicable law, then Newcomer Co. **shall [hereby has a duty to]** sell the Product.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions > “shall” vs. “will” vs. “must”

- Note that “must” works in instances in which “shall” does not, e.g., in expressing conditions.
  - ☺ In order for Lindsay to drive the car home from the pub, she **must** first convince her mom to give her the keys.
  - ☹ In order for Lindsay to drive the car home from the pub, she **shall** first convince her mom to give her the keys.
    - ❖ You should not draft the sentence this way since Lindsay is not **obligated** to convince her mom to give her the keys, and there should not be a cause of action against Lindsay if she failed to convince her mom to give her the keys. (In fact, it could very well be the other way around if she succeeded in convincing her mom....)

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligation and Prohibitions > “shall” vs. “will” vs. “must”

**Use:**

- “shall” to convey an obligation
- “will” to convey futurity
- “must” to convey a condition to be satisfied or to point to an obligation that exists but that derives from another provision

**Do not use:**

- “is obligated to”
- “agrees to”
- “covenants and agrees to”
- “shall be obligated to”
- “undertakes to”

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions > Active Voice vs. Passive Voice

Active Voice  
vs.  
Passive Voice

48



*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions >  
Active Voice vs. Passive Voice

General rule: Use the active voice rather than the passive voice when imposing an obligation.\*

- Makes clear which party is the actor
- More concise than the passive voice
- Easier to read/More natural than the passive voice
- In the context of an obligation, consistent with substituting “hereby has/have the duty to” for “shall”

\* There are certain instances in which it makes sense to use the passive voice (e.g., those in which the identity of the actor does not matter).

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*Basic Concepts in Drafting Contracts*

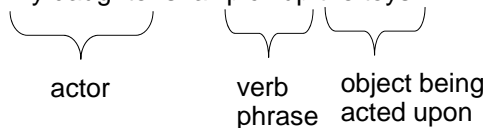
The Framework of a Contract > Body > Obligations and Prohibitions >  
Active Voice vs. Passive Voice

**Active Voice: The actor is the sentence’s subject.**

General format (for an obligation) =

**[actor] + shall/shall not + [verb (or verb phrase)] + [object being acted upon]**

Example: My daughter shall pick up the toys.



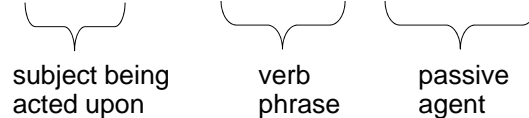
50

**Passive Voice (with identified passive agent): The subject of the sentence is not the actor.**

General format (for an obligation) =

**[subject being acted upon] + shall/shall not + [verb (or verb phrase)] +  
by + [passive agent]**

Example: The toys shall be picked up by my daughter.



- Does not fit the “hereby has/have a duty to” rule
- Less concise and more awkward than active voice

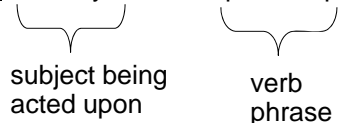
51

**Truncated Passive Voice (no identified passive agent): The actor is not identified.**

General format (for an obligation) =

**[subject being acted upon] + shall/shall not + [verb (or verb phrase)] +  
~~by + [passive agent]~~**

Example: The toys shall be picked up.



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**Truncated Passive Voice (no identified passive agent)**

Example: The toys shall be picked up.

subject being acted upon      verb phrase

Who is obligated to pick up the toys?

- My daughter, Julia?
- My son, Matthew?
- ⊗ Answer: Mommy and Daddy.



*Hey! Was the passive agent intentionally omitted?*

**\*\* You can't impose obligations upon persons that are not party to the contract. (Example 1 – Accountants)**

- ⊗ Upon final resolution of all Disputed Items, **the Accountants shall issue** a report showing a calculation of the Final Net Working Capital. **The Accountants shall make** their determination of the Disputed Items within 60 days after having been selected.
  - ❖ What if the Accountants don't issue a report showing a calculation of the Final Net Working Capital?
  - ❖ What if the Accountants don't make their determination within 60 days?

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions > Third Parties

\*\* You can't impose obligations upon persons that are not party to the contract. (*Example 1 – Accountants*)

- ☹ Upon final resolution of all Disputed Items, **the Accountants must issue** a report showing a calculation of the Final Net Working Capital. **The Accountants must make** their determination of the Disputed Items within 60 days after having been selected.
- ☹ Upon final resolution of all Disputed Items, **the Parties shall cause the Accountants to issue** a report showing a calculation of the Final Net Working Capital. **The Parties shall cause the Accountants to make** their determination of the Disputed Items within 60 days after having been selected.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Obligations and Prohibitions > Third Parties

\*\* You can't impose obligations upon persons that are not party to the contract. (*Example 1 – Accountants*)

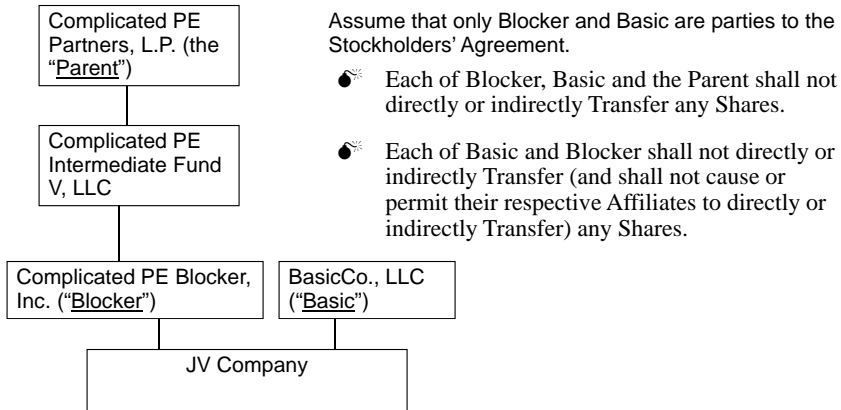
- ☺ If the Parties are unable to resolve any disagreement as to one or more Disputed Items within 30 days after the Receiving Party's receipt of a Protest Notice, then the Parties **shall promptly engage** Big Accountant Co. (the "Accountants") by signing an engagement letter with the Accountants pursuant to which, among other things, the Accountants **agree to comply with** procedures set forth in this Section 2.4(b)(iii)....The Parties **shall use their respective reasonable best efforts to cause** the Accountants to reach a final determination with respect to all Disputed Items (such determination, a "Final Determination") and to provide to the Parties, no later than the 60th day after the Accountants have been engaged pursuant to this Section 2.4(b)(iii), a report with respect to the NWC Statement (the "Final Determination Report") that includes a calculation of the Net Working Capital.

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Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Obligations and Prohibitions > Third Parties

**\*\* You can't impose obligations upon persons that are not party to the contract. (Example 2 – Parent Companies)**

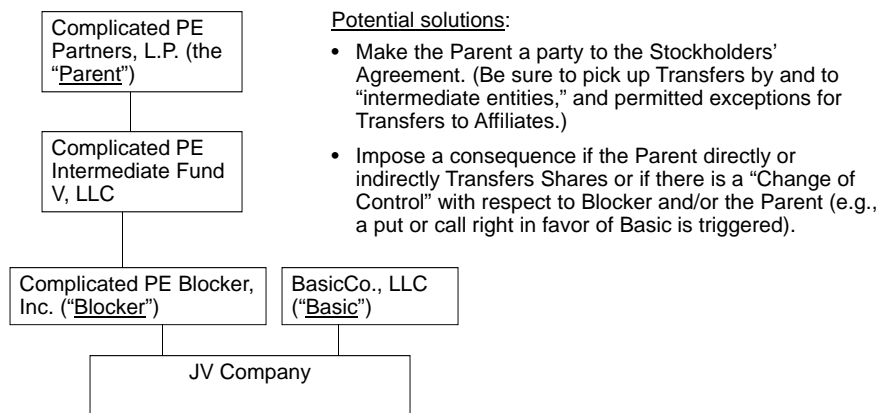


57

Basic Concepts in Drafting Contracts

The Framework of a Contract > Body > Obligations and Prohibitions > Third Parties

**\*\* You can't impose obligations upon persons that are not party to the contract. (Example 2 – Parent Companies)**



58

## Discretionary Language

59

- Deals with what a party is permitted to do
- Think: “is/are permitted to”
- Discretionary language is really an exception to prohibitions:
  - in a contract (i.e., an exception to “shall not”)
  - that are default rules (e.g., Section 18-702(b) of the Delaware Limited Liability Company Act provides that, unless otherwise provided in a limited liability company agreement, a member of a limited liability company ceases to have the power to exercise any rights or powers of a member upon the assignment of all of the member’s limited liability company interest)

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Discretionary Language > “is/are permitted to” vs. “might possibly”

- “May” can convey what a party **is entitled/permitted to do**, or it can convey what a party **might possibility do** (particularly when used with respect to a third party).
- Example: “may” = “is permitted to”
  - ☹ The Seller shall not encumber the Shares; except that the Seller **may pledge** the Shares to the Bank in connection with a loan provided by the Bank to the Seller.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Discretionary Language > “is/are permitted to” vs. “might possibly”

**Some background on “may”**

- Example: “may” = “might possibly”
  - ☹ The Seller shall deliver in a timely manner all Products that are required to be delivered pursuant to all purchase orders that Key Customers **may submit** during the Pre-Closing Period.
    - ❖ There is ambiguity here: is the provision referring to (1) all the Purchase Orders that Key Customers “might possibly submit” or (2) only those Purchase Orders that Key Customers “are permitted to submit”?
  - ☺ If a Key Customer delivers a purchase order to the Seller during the Pre-Closing Period, then the Seller shall deliver in a timely manner all Products that are required to be delivered pursuant to such purchase order.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Discretionary Language > "Naked" Discretion

- Use discretionary language to create an exception to a prohibition in a contract.
  - ⊙ At the Closing, the Buyer shall convey the Assets to the Seller. During the period (such period, the "Post-Closing Period") beginning on the Closing Date and ending on the date that is 10 days after the Closing Date, the Buyer **shall not sell** the Assets to any Competing Enterprise; except that, **during the Post-Closing Period**, the Buyer **is permitted to sell** the Assets to any Key Vendor that is a Competing Enterprise.
- In this example, it is clear that "is permitted to sell" is being used as the exception to the prohibition "shall not sell."

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Discretionary Language > "Naked" Discretion

- Generally, do not use discretionary language if the permitted action is not otherwise prohibited.
  - ⊙ At the Closing, the Buyer shall convey the Assets to the Seller. During the period (such period, the "Post-Closing Period") beginning on the Closing Date and ending on the date that is 10 days after the Closing Date, the Buyer **shall not sell** the Assets to any Competing Enterprise. **After the expiration of the Post-Closing Period**, the Buyer **is permitted to sell** the Assets to any Key Vendor that is a Competing Enterprise.
- "is permitted to sell" does not add anything here: there is nothing otherwise prohibiting the Buyer from using the Assets after the Post-Closing Period.
- In fact, including the superfluous language might create an unwanted implication: the Buyer is permitted to sell the Assets after the Post-Closing Period, *but only* to Key Vendors that are Competing Enterprises.

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## Language of Declaration

- Assertions of fact memorialized in a contract
- Two types:
  - Representations
  - Acknowledgments

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Language of Declaration > Representations

- Statements made by a party of what was, is, or will be true to induce someone to enter into a contract
- Need not be within the control or knowledge of the party making the representation
  - Within control/knowledge: AI represents to George that all of the papers he has written through the date hereof concerning global warming attribute the primary causes of global warming to humans.
  - Not within control/knowledge: AI represents to George that at least 51% of all reports written through the date hereof by reputable scientists concerning global warming attribute the primary causes of global warming to humans.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Language of Declaration > Representations

**The lead-in\*...**

- ☺ [Party A] represents to [Party B] as follows:...
- ☺ **Each of** [Party A] and [Party B] represents to [Party C] as follows:...
- ☹ [Party A] and [Party B] **jointly and severally** represent to [Party C] as follows:...

\* Not for this presentation, but the lead-in can be structured in different manners with respect to the date or dates as of which the reps as a whole are made, which will affect closing conditions, termination rights, and indemnification rights.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Language of Declaration > Representations

Example: Mitt represents to Newt as follows:...

- ☺ During December 2011, Mitt did not disparage Newt. (*Past circumstance or event; within the representing party's control/knowledge*)
- ☺ During December 2011, no writer for *Iowa Daily* disparaged Newt. (*Past circumstance or event; not within the representing party's control/knowledge*)

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Language of Declaration > Representations

Example: Hillary represents to Barack as follows:...

- ☺ Hillary is a member of the Justine League. (*Present circumstance or event; within the representing party's control/knowledge*)
- ☺ Schedule A contains a complete and accurate list of all interns with whom William works on a weekly basis. (*Present circumstance or event; not within the representing party's control/knowledge*)

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Example: Ron represents to Rick as follows:...

- ☹ Ron will not mention the Federal Reserve in any upcoming debate.  
*(Future circumstance or event; within the representing party's control/knowledge)*
  - This is probably better phrased as an obligation, as follows:
    - ☺ Ron **shall not** mention the Federal Reserve in any upcoming debate.

71

Example: Rick represents to Newt as follows:...

- ☺ Each of Rick's Constituents will attend at least three Newt Rallies.  
*(Future circumstance or event; not within the representing party's control/knowledge)*
  - We could phrase this as **an obligation**, as follows:
    - ☺ Rick **shall encourage** each of his Constituents to attend at least three Newt Rallies.
  - Phrasing this as a representation, however, ensures (at least to a certain degree) that Rick is "on the hook" if each of his Constituents do not attend at least three Newt Rallies, whether or not he encouraged them to do so.
    - ☹ Each of Rick's Constituents **shall attend** at least three Newt Rallies.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Language of Declaration > Acknowledgments

- A statement in a contract that a party accepts as true
- Why?
  - Aligns intentions
  - Serves as an estoppel
  - Stronger than recitals

73

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Language of Declaration > Acknowledgments

Examples:

- The Shareholder acknowledges that the Shares have not been registered under the Securities Act.
- The Consultant acknowledges that he has reviewed a copy of the Company Policies as in effect on the Effective Date.
- The Employee acknowledges that she has had an adequate opportunity to consult with her own counsel in connection with this Agreement.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Language of Declaration > Acknowledgments

**Do not...**

- ...use acknowledgments to introduce other categories of language.
  - ⊗ The Purchaser acknowledges that it shall pay the Closing Costs at the Closing.
- ...use “unconditionally” or “expressly” (or other adverbs) before “acknowledge”
  - ⊗ Luke Skywalker begrudgingly acknowledges that the Dark Side of the Force has a certain appeal.

75

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Language of Declaration > Acknowledgments

**Do not...**

- ...use “acknowledges and agrees”
  - ⊗ The Consultant acknowledges and agrees that he has reviewed a copy of, and shall comply with, the Company Policies as in effect on the Effective Date.
  - ☺ The Consultant acknowledges that he has reviewed a copy of the Company Policies as in effect on the Effective Date. The Consultant shall comply with the Company Policies.

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## Language of Policy

77

### Two basic types:

- Language that states rules governing an event or circumstance
- Language addressing the scope, meaning, or duration of a contract or provision

78

**Language that states rules governing an event or circumstance**

- Any purported transfer in contravention of Section 2.1 will be void.
- The Post-Closing Statement will be deemed final upon the Accountant's delivery of the Final Report.

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**Language addressing the scope, meaning, or duration of a contract or provision**

- This Agreement terminates on December 31, 2013.
- This Agreement constitutes the agreement of the Parties with respect to the subject matter hereof.
- If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable by reason of excessive scope as to geographical, temporal, or functional coverage, then such provision will be deemed to extend only to the maximum geographic, temporal, and functional scope as to which it is permitted to be enforceable.

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### Verb Tenses: Present vs. Future

- Use present tense for policies that apply on the effectiveness of the contract
  - ☺ This Agreement **constitutes** the entire agreement of the Parties with respect to the subject matter hereof.
  - ☹ This Agreement **shall constitute** the entire agreement of the Parties with respect to the subject matter hereof.

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### Verb Tenses: Present vs. Future

- Use “will” for policies relating to future events that might or might not take place
  - ☹ If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement **will terminate**.
  - ☺ If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement **will *thereby* terminate**.
  - ☺ If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement **will terminate *by virtue thereof***.

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*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Body > Recap

- Definitions
- Language of Performance
- Obligations and Prohibitions
- Discretionary Language
- Language of Declaration
  - Representations
  - Acknowledgements
- Language of Policy

83

*Basic Concepts in Drafting Contracts*

The Framework of a Contract > Signature Pages

Entities can sign on behalf of limited liability companies and partnerships – you need to “reach an authorized human.”

Each Party is signing this Agreement as of the Effective Date.

**BASIC STRUCTURE, INC.**

By: \_\_\_\_\_  
Name: Adam Smith  
Title: President

**ULTIMATE SUB, LLC**

By: PASS-THROUGH, LP,  
its Managing Member

By: USELESS INTERMEDIATE SUB, LLC,  
its General Partner

By: ULTIMATE PARENT, INC.,  
its Managing Member

By: \_\_\_\_\_  
Name: Dr. Complicated  
Title: Chief Difficulty Officer

84

Drafting tips for the lead-in on the signature page

- ☹ Each of the Parties has executed this Agreement as of the \_\_\_\_ day of October, 2013.
- ☹ Each of the Parties has executed this Agreement as of October \_\_\_\_, 2013.
- ☹ Each of the Parties has executed this Agreement as of \_\_\_\_\_, 2013.
- ☹ Each Party is signing this Agreement as of the Effective Date.
- ☹ Each Party has executed **and delivered** this Agreement as of the Effective Date.

85

Drafting tips for the lead-in on the signature page

- For written consents of stockholders of a Delaware corporation, *H-M Wexford LLC v. Encorp, Inc.* takes a strict approach with respect to DGCL Section 228(c) – do not use a “hardwired as of” date
  - ☹ Each of the undersigned is signing this Written Consent **as of the date appearing next to such undersigned’s signature.**

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### Practical Tips

- On the page prior to the sig page:
  - Use “[Signature page follows]” rather than “[THE REMAINDER OF THIS PAGE INTENTIONALLY HAS BEEN LEFT BLANK]”
  - Insert a “Section Break” prior to the sig page, not a “Page Break”
- Get rid of headers and footers on the sig page
  - Exception: You might want to specifically label the footer of the sig page to denote the counterpart being signed (e.g., “*Signature Page to Assignment Agreement (Foreign Seller to Domestic Purchaser)*”)

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### Practical Tips

- Make sure that you and your adversarial counterpart are “on the same page” – Think ahead!
  - Same exact counterparts
  - Number of executed originals per document (be mindful of documents that are negotiable instruments....)
- Make sure that you and your client are “on the same page” – Think ahead!
  - Number of executed originals per document (be mindful of documents that are negotiable instruments....)
  - \*\* Executive availability

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### Practical Tips

- Scan signature pages (and, once the deal is closed, entire documents) and keep originals in a safe place
- Be mindful of negotiable instruments and post-closing documents to be signed by officers of the target who will continue as officers of the company post-closing (e.g., CEO employment agreement, stockholders' agreement)
- Follow up quickly and aggressively after closing to catalogue signature pages received and obtain any missing signature pages

*Ready thy quill and powdered wig! It's time for...*



Legal Archaisms

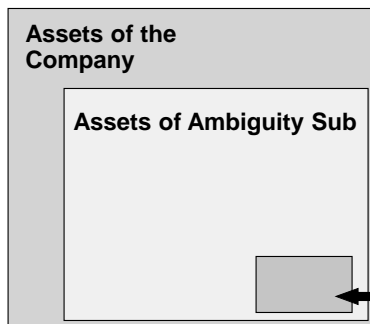
**“that” vs. “which” (vs. “, which”)**

- **“that”** – Think: restrictive; limiting
  - I’ll give you all the books in my library **that** I have read.
    - ❖ i.e., I’m not going to give you all of the books in my library – just those that I have read.
- **“, which”** – Think: descriptive
  - I’ll give you all the books in my library, **which** I have read.
    - ❖ i.e., I have read all of the books in my library and I will give them to you.
- **“which”** [no preceding comma] – Think: Can I replace with “that”?
  - I’ll give you all the books in my library **which** I have read.
    - ❖ It’s unclear whether you get all the books in my library or only those that I have read.

Legal Archaisms

**“that” vs. “which” (vs. “, which”)**

- ⌘ **“Purchased Assets”** means all of the assets owned by the Company and its Subsidiaries, other than those assets owned by Ambiguity Sub **which** are not material to the Company’s operations.



- If “which” is interpreted to mean “that”, then only the blue (small) rectangle gets carved out
- But if “which” is interpreted to mean “, which”, then the green (medium) rectangle gets carved out

Immaterial Assets of Ambiguity Sub

Legal Archaisms

- ☹ WHEREAS,
- ☹ NOW, THEREFORE,
- ☹ IN WITNESS WHEREOF,
- ☹ Do hereby/does hereby
- ☹ Undertakes to –

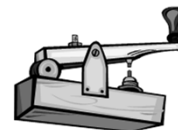
- just use “shall”



Lancelot does hereby conveyeth his undying love for Guenevere and henceforth shall stave off with sword all others who attempteth to bring her harm.

Legal Archaisms

All notices, consents, approvals, reports, designations, requests, waivers, elections, and other communications (collectively, “Notices”) authorized or required to be given pursuant to this Agreement shall be given in writing and either personally delivered to the Partner to whom it is given or delivered by an established delivery service by which receipts are given or mailed by registered or certified mail, postage prepaid, or sent by **telex, electronic telecopier or telegram**, addressed to the Partner at his or its address listed beneath such Partner’s respective signature hereto.



Legal Archaisms

☹ WITNESSETH:

☹ WITNESSETH:

☺ WITNESSETH:

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Summary

- Language matters.
- The law matters, too. But that's a story for another day...
- Understand the concept, then put it in words – this is often easier said than done!
- Separate out the function of each provision or clause (e.g., language of performance, language of obligation, language of declaration, etc.).
- Taking time to develop good drafting habits now will make you a much more effective drafter when time is of the essence.
- Read what you draft to see if it makes sense. If not, fix the problem/cure the ambiguity.

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*Basic Concepts in Drafting Contracts*

The End > This is the end of the presentation. Any questions? Please feel free to ask me now, as I'm packing up, or via email or a phone call.

# Questions?



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## About the Presenter

**Vincent R. Martorana** is Counsel in the Corporate & Securities Group with Reed Smith's New York office. His practice includes the representation of clients in domestic and cross-border mergers, stock and asset acquisitions and divestitures, joint ventures, strategic alliances, licensing arrangements, corporate restructurings, private equity investments, and securities offerings. He also regularly provides advice on corporate governance and state laws governing business entities (including Delaware and New York corporate, partnership, and limited liability company law). Vincent has represented a wide range of clients—from start-up and early-stage companies to well-established enterprises—in various industries, including technology, healthcare, pharmaceutical products, consumer products, and energy.

Vincent has extensive experience providing advice on contract drafting, analysis, and interpretation relating to disputes, settlements, and negotiated transactions. He has presented his continuing legal education contract-drafting courses for in-house legal departments and at various other venues, including Practising Law Institute, Strafford Webinars, The Business Development Academy, the National Academy of Continuing Legal Education, Commercial Law WebAdvisor, the American Bar Association, the New York State Bar Association, the New York City Bar Association, the New York County Lawyers Association, the Brooklyn Bar Association, the Suffolk County Bar Association, and the Westchester County Bar Association.

He is also the author of *Drafting Points* ([www.draftingpoints.com](http://www.draftingpoints.com)), a blog that is dedicated to contract-drafting issues. He has also written several articles on contract drafting and interpretation and is the co-author of the Reed Smith LLP white paper *A Guide to Contract Interpretation* (February 2013).

Vincent received a J.D. from the University of Chicago Law School and a B.S. in Economics (with concentrations in Finance and Operations & Information Management), *magna cum laude*, from the Wharton School at the University of Pennsylvania.



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*Neither the Materials nor any portion thereof constitutes legal advice.*

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*Fin!*

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## **2. HOW TO HANDLE A DWI CASE IN NEW YORK STATE**



**NEW DMV REGULATIONS**  
**AFFECTING REPEAT DWI OFFENDERS**

Materials Submitted by

THOMAS J. O'HERN, ESQ.

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Excerpted from

Handling the DWI Case in New York by

Peter Gerstenzang, Esq. and Eric H. Sills, Esq.

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**CHAPTER 55**

**NEW DMV REGULATIONS AFFECTING REPEAT DWI OFFENDERS**

- § 55:1 In general
- § 55:2 Summary of pre-existing DMV policy
- § 55:3 Effective date of new regulations
- § 55:4 Summary of new regulations -- Key definitions
- § 55:5 Summary of new regulations -- Key provisions
- § 55:6 New regulations only apply to repeat DWI offenders
- § 55:7 New regulations generally only apply where person's license is revoked
- § 55:8 DMV's definition of "history of abuse of alcohol or drugs" now utilizes 25-year look-back period
- § 55:9 Second offenders
- § 55:10 Third offenders no longer eligible for conditional license
- § 55:11 It is often now necessary to obtain person's lifetime driving record
- § 55:12 New lifetime revocation #1 -- Person has 5 or more lifetime DWIs and is currently revoked
- § 55:13 New lifetime revocation #2 -- Person has 3 or 4 DWIs and 1 or more SDOs within the 25-year look-back period and is currently revoked

- § 55:14 New lifetime revocation #3 -- Person has 5 or more lifetime DWIs and is convicted of a high-point driving violation
- § 55:15 New lifetime revocation #4 -- Person has 3 or 4 DWIs and 1 or more SDOs within the 25-period and is convicted of a high-point driving violation
- § 55:16 New lifetime revocation #5 -- Person revoked for new DWI related conviction/incident while on license with A2 problem driver restriction
- § 55:17 Person has 3 or 4 DWIs, no SDOs, and is currently revoked for a DWI-related conviction/incident – Statutory revocation + 5 more years + 5 more years on an A2 restricted use license with an IID
- § 55:18 Person has 3 or 4 DWIs, no SDOs, and is currently revoked for a non-DWI-related conviction/incident – Statutory revocation + 2 more years + 2 more years on an A2 restricted use license with no IID
- § 55:19 Applicability of new regulations to person who is "permanently" revoked pursuant to VTL § 1193(2)(b)(12)
- § 55:20 Legal challenges to the new DMV regulations
- § 55:21 The Legislature has preempted the field of DWI law in a manner that limits the discretion of other branches of government to expand the scope of the DWI laws
- § 55:22 The new DMV regulations conflict with existing statutes -- Generally
- § 55:23 The new regulations conflict with VTL § 1193(2)(b)(12)
- § 55:24 The 5-year IID portion of the new regulations conflicts with VTL § 1198, PL § 65.10(2)(k-1) and case law
- § 55:25 The 25-year look-back portion of the new regulations conflicts with numerous statutes
- § 55:26 The new regulations violate the separation of powers doctrine
- § 55:27 The new regulations are being applied retroactively
- § 55:28 Although DMV can theoretically deviate from the new regulations in "unusual, extenuating and compelling circumstances," in reality this standard cannot be met
- § 55:29 IID rules now apply to youthful offenders § 55:30 Duration of IID requirement
- § 55:31 "Good cause" for not installing IID defined
- § 55:32 Violating VTL § 1192 while on a conditional license is now AUO 1st















### **3. MATRIMONIAL ACTIONS**



## MATRIMONIAL ACTIONS 2013 OUTLINE

By:

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- I. GENERALLY- PRELIMINARY CONSIDERATIONS
  - A. DRL §230- Residence Requirements of Parties
  - B. Jurisdiction
    - (1) *In rem* jurisdiction
    - (2) *In Personam* Jurisdiction
      - a. New York Domiciliary
      - b. Non-Domiciliary
    - (3) Consent of the parties
- II. PAPERS, PARTIES AND PROCEDURE
  - A. Filing and Service of Summons
    - (1) DRL section 211 Filing of summons before service
    - (2) DRL Section 232 Contents and Form of Summons: Proof of Service
    - (3) Personal Service Requirements CPLR section 308 and DRL section 232
      - a. Personal Delivery
      - b. Pursuant to Manner Directed by Court- Service by Publication
      - c. Service by Mail
      - d. Electronic Service
      - e. Waiver by the Defendant
      - f. Default Judgments- Failure to Appear
  - B. Filing of summons before service
  - C. Parties
    - (1) Co-Respondent as a Party
    - (2) Special considerations for certain types of parties
      - a. Infants
      - b. Incompetents
      - c. Incapacity

- III. GROUND FOR DIVORCE, SEPARATION, ANNULMENT AND DISSOLUTION/DEFENSES
  - A. Divorce
    - (1) No fault statute DRL section 170 (7) grounds
      - a. Sufficient pleadings; summary judgment and entitlement to a trial
      - b. Can you at least get summary judgment under the no fault statute to dispense with a trial on grounds?
      - c. No-fault: Two actions pending or old action still pending
    - (2) Additional Grounds for a divorce
      - a. Adultery
        - i. Statutory Authority
        - ii. Statutory Definition
        - iii. Single Act Sufficient
        - iv. Criminal Nature
        - v. Act of Adultery During Pendency of Divorce Action
      - b. Cruelty
        - i. Statutory Authority
      - ii. Key Statutory Elements
      - iii. Course of Conduct
        - iv. Long Term vs. Short Term Marriage
        - v. Long Term (“Vintage”) Marriage
        - vi. Exception: Long Term Marriage
        - vii Short Term Marriage
        - viii. Specific Types of Conduct—Cruelty
        - ix. Conduct Which is Insufficient
      - c. Abandonment
        - i. Statutory Authority
        - ii. Core Element
        - iii. Actual Abandonment
        - iv. Lock Out Cases
        - v. Refusal To Relocate
        - vi. Constructive Abandonment
        - vii. Lack of Social Companionship
  - B. Defense Issues Pertaining to Adultery, Cruelty and Abandonment
    - 1. Adultery Defense Issues
      - a. Statutory Authority
      - b. Cases and Practice Tips
        - i. Procurement or Connivance
        - ii. Forgiveness
        - iii. Statute of Limitations
        - iv. Adultery By The Accusing Spouse
    - 2. Cruelty: Statute Of Limitations [DRL 210]:
      - a. Five Years Prior to Date of Commencement
      - b. Continuous Course of Conduct
      - c. Conduct Subsequent to the Commencement
  - d. Cruelty: Lure and Attraction Of a Paramour

### 3. Abandonment: Consent and Justification

#### C. Imprisonment as Grounds for Divorce

#### D. Other “no fault” divorce options

1) Living Separate and Apart for More than One Year Following Execution of a Written Separation Agreement

2) Living Separate and Apart for More than One Year Pursuant To A Judgment or Decree of Separation

#### E. Difference of relief available; divorce and separation actions

#### F. Other less common matrimonial actions

1. Annulments/Declaration as to the Nullity of a Marriage

2. Dissolution (Enoch Arden Law)

### IV. COURT RULES, CERTIFICATION AND VERIFICATION REQUIREMENTS IN MATRIMONIAL ACTIONS

#### A. New York Trial Court Rules

i. 22 NYCRR 202.5 – Papers filed in Court

ii. 22 NYCRR 202.6- Request for Judicial Intervention

iii. 22 NYCRR 202.7- Affirmation of Good Faith

iii. 22 NYCRR 202.16 – Matrimonial Action

iv. 22 NYCRR 202.16 (e)

v. 22 NYCRR 130-1.-1a-

vi. 22 NYCRR 202.16a- Automatic Orders

#### B. Verification Requirements

### V. FORMS

- (1)** Application for Index Number
- (2)** Summons with Notice
- (3)** Summons with Notice marked up
- (4)** Notice of Appearance
- (5)** Limited Notice of Appearance
- (6)** Complaint
- (7)** Verified Answer
- (8)** Verified Answer with Counterclaims
- (9)** Verified Reply
- (10)** Affidavit of Service
- (11)** Admission of Service
- (12)** Service by Mail
- (13)** Motion for alternate means of service
- (14)** Default divorce papers

















#### **4. ETHICAL ISSUES: FEES, RETAINERS, ESCROW ACCOUNTS, ADVERTISING AND WEBSITES**





## **Ethics Update 2012**

Deborah A. Scalise and Sarah Jo Hamilton

This outline is submitted to briefly describe and deal with current topics of interest in ethics and professionalism. Note that this outline contains references to the Judiciary Law, Rules of Conduct in the Rules of Professional Conduct and its predecessor the Disciplinary Rules (“DR”)2 in the Lawyer’s Code of Professional Responsibility (the Code),The Rules of Judicial Conduct, case law, bar association advisory opinions, and Judicial Advisory Opinions. However, this is not an exhaustive list of every case or rule in each area discussed, but merely a basis for discussion!

- Filing, Accounting and Recordkeeping Requirements
  - Division of Legal Fees
  - Ethics and Legal Writing
  - Civility, Discovery & Evidentiary Issues
  - Lawyers and Judges Working Together
  - Duty To Report Fraud
- 

## **Ethics Resources 2012**

- Rules of Professional Conduct (effective April 1, 2009)/Lawyer’s Code of Professional Responsibility (prior to April 1, 2009)
  - Judiciary Law
  - Attorney Admissions
  - Other Applicable Rules
  - Attorney Disciplinary Procedures
  - Disciplinary Case Law
  - Judicial Conduct
  - Formal and Informal Ethics Opinions
  - Other Resources and Periodicals
  - Telephone Hotlines
  - Websites
- 

## **Dealing With an Ethical Dilemma**

In today’s legal world every practitioner encounters ethical issues ranging from obligations to be fulfilled in the practice of law, (such as Continuing Legal Education and biannual registration), to issues arising from client representation, (such as conflicts and client fraud). Somehow a lawyer must find a way to deal with such issues and to do so in compliance with the New York Rules of Professional Conduct, as well as a multitude of other rules in the Judiciary Law; and the Rules of Court. In addition, where the rules are not specific, lawyers may look to bar association advisory opinions or case law for guidance. As a result, it can be difficult to deal with issues on behalf of a client, while maintaining and protecting our licenses to earn a living. This article will give a brief practical overview as to what to do if an ethics and professional responsibility issue arises and what to do when facing disciplinary authorities conducting a grievance investigation.

















## **5. REAL ESTATE TRANSACTIONS**



**Fundamentals of a Real Estate Sale or Purchase Transaction©**

**Presented by Mindy H. Stern, Esq.  
Schoeman Updike Kaufman Stern & Ascher LLP  
551 Fifth Avenue, 12<sup>th</sup> Floor  
New York, NY 10176**

**Bridging the Gap 2 Making a Smooth Transition  
October 1, 2013**

**OUTLINE SUMMARY**

Introduction

1. How Do The Buyer and Seller Find One Another?
2. How Does The Buyer Know What He or She is Buying? (Due Diligence)
3. How Do The Parties Confirm the Deal Terms?
4. How Does the Buyer Pay for the Transaction?
5. How Does the Buyer Confirm that He or She is Getting What Was Bargained For?
6. Closing Preparations and Attendance – Who Does What?

















## **6. FUNDAMENTALS OF DEPOSITIONS**



## **DEPOSITIONS**

**W. Russell Corker**  
rcorker@corkerlaw.com

### **INTRODUCTION**

- I. Oral depositions are usually the most powerful discovery weapon available to the litigator.
- II. With only a small percentage of cases actually going to trial, the real battleground for most litigation is the deposition room.
- III. Effective depositions can have a dramatic impact on the outcome of the litigation.
- IV. Proper deposition skills are essential for every litigator, regardless of what area of the law you practice; at some time, most lawyers will be required to take a deposition.
- V. Creating a good “Discovery Plan” should be part of every case opened in your office.
- VI. While interrogatories and discovery demands are efficient for identifying documents and individuals, only depositions provide the opportunity for follow-up questions, which usually yield more important information about events.
  - A. CPLR § 3130 prohibits both depositions and interrogatories in personal injury, property and wrongful death actions predicated solely on a cause or causes of action for negligence.
  - B. In a Products Liability case, for instance, interrogatories and depositions are available.

- VII. CPLR Article 31 contains the rules governing disclosure in general, and depositions in particular (CPLR §3106 -3117).
- VIII. The popular name for depositions is “EBT” (Examination Before Trial) but depositions can be taken, by Court Order, before an action has been commenced, during trial and even after trial (see, CPLR 3102(c), (d) and CPLR 5229).















**WEDNESDAY, OCTOBER 2, 2013 – DAY TWO**



**7. AUTOMOBILE LITIGATION: NO-FAULT LAW & BODILY  
INJURY CLAIMS IN LIGHT OF SERIOUS INJURY  
THRESHOLD REQUIREMENTS**





NEW YORK STATE BAR ASSOCIATION

NO FAULT INSURANCE  
FUNDAMENTALS:  
SERIOUS INJURY THRESHOLD  
NO FAULT COVERAGE

*Robert A. Glick, Esq.  
Brand Glick & Brand, P.C.*



Top Twenty Drivers' Statements

20. *"A truck backed into my windshield and into my wife's face."*

19. *"The telephone pole was approaching, I was attempting to swerve out of its way when it struck the front end."*

18. *"The guy was all over the road. I had to swerve a number of times before I hit him."*

17. *"I pulled away from the side of the road glanced at my mother-in-law and headed off the embankment."*

16. *"I had been driving for 40 years when I fell asleep at the wheel and had an accident."*



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Attorneys at Law



## Top Twenty Drivers' Statements

15. *"The pedestrian had no idea which way to run, so I ran over him."*

14. *"I thought my window was down but found out it was up when I put my head through it."*

13. *"Coming home, I drove into the wrong house and collided with a tree I don't have."*

12. *"In an attempt to kill a fly, I drove into a telephone pole."*

11. *"I was on my way to the doctor with rear end trouble when my universal joint gave way causing me to have an accident."*



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## Top Twenty Drivers' Statements

10. *"I was driving in the wrong lane, but I was there first. The car that ran into me didn't show up until much later."*

9. *"I had been shopping for plants all day and was on my way home. As I reached an intersection, a hedge sprang up, obscuring my vision."*

8. *"I told the police that I was not injured, but on removing my hat, I found that I had a fractured skull."*

7. *"I saw a slow-moving, sad-faced old gentleman as he bounced off the hood of my car."*

6. *"My car was legally parked as it backed into the other vehicle."*



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## Top Twenty Drivers' Statements

5. *"As I approached the intersection, a stop sign suddenly appeared in a place where no stop sign had ever appeared before. I was unable to stop in time to avoid the accident."*

4. *"A pedestrian hit me and went under my car."*

3. *"The indirect cause of the accident was a guy in small car with a big mouth."*

2. *"A bee flew in my window and forced me to hit the pedestrian."*

1. *"The gentleman behind me struck me on the backside. He then went to rest in the bush with just his rear end showing."*



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# THE SERIOUS INJURY THRESHOLD



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## LICARI v. ELLIOT

While there is little doubt that the plaintiff suffered discomfort as a result of the accident, the court has no choice but to enforce the legislative mandate and dismiss the complaint when a plaintiff fails to meet the burden of proving the threshold requirement of establishing a prima facie case that he sustained a serious injury within the meaning of the statute . . .

*Licari v. Elliot*, 57 N.Y. 2d 230, 441 N.E. 2d 1088, 455 N.Y.S.2d 570 (1982).

## STATUTORY INTENT

**The legislative intent of the no-fault system was to eliminate frivolous claims, restrict recovery to major significant injuries.**

**A specific goal of the no-fault system is to prevent minor automobile personal injury cases from being litigated.**



# NEW YORK INSURANCE LAW SECTION 5104(a):



...in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there should be no right of recovery for non-economic loss, except in the case of serious injury, or for basic economic loss.

# NEW YORK INSURANCE LAW SECTION 5104(a):



...in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the **use or operation** of a motor vehicle in this state, there should be no right of recovery for non-economic loss, except in the case of serious injury, or for basic economic loss.

## NEW YORK INSURANCE LAW SECTION 5104(a):



...in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the **use or operation** of a motor vehicle in this state, there should be no right of recovery for non-economic loss, except in the case of **serious injury**, or for basic economic loss.

## NEW YORK INSURANCE LAW SECTION 5102(d):

A personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

## NEW YORK INSURANCE LAW SECTION 5102(d):

A personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system;

OR

A medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

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## A Personal injury which results in:

- Death;
- Dismemberment;
- Significant disfigurement;
- Loss of fetus;
- Fracture;
- Permanent loss of a body organ, member, function or system;



Oberly v. Bangs Ambulance,  
96 N.Y.2d 295 (May, 2001)



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Oberly v. Bangs Ambulance,  
96 N.Y.2d 295 (May, 2001)

For a permanent loss of use of a body organ, member, function or system to qualify as a “serious injury,” the loss of use must be *total*.



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A Personal injury which results in:

- Death;
- Dismemberment;
- Significant disfigurement;
- Loss of fetus;
- Fracture;
- Permanent loss of a body organ, member, function or system;
- Permanent consequential limitation of use of a body organ or member;
- Significant limitation of use of a body function or system; OR

A medically determined injury or impairment which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.





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| <u>Permanent or Consequential<br/>Limitation of a Body Organ<br/>or Member</u> | <u>Significant Limitation of<br/>Use of a Body Function or<br/>System</u> |
|--|---|
| <b>Significant Limitation of use</b>   | <b>Significant Limitation of use</b>                                      |
| <b>Limitation <i>must</i> be permanent <i>and</i> total</b>                    | <b>Limitation <i>need not</i> be permanent</b>                            |
| <b>Limitation must be to a <i>body organ or member</i></b>                     | <b>Limitation must be to a <i>body function or system</i></b>             |


## 90/180 Day Rule


**The inability to perform the required acts lasted for at least 90 days during the first 180 days following the accident;**

**Substantially all of his usual activities (material acts) were curtailed;**

**Competent medical evidence that he sustained an injury or impairment as a result of the accident; and**

**Competent medical evidence that the injury sustained was a cause of the alleged disability or impairment during the applicable period.**





## SUMMARY JUDGMENT

### *Burden of Proof*


#### *Defendant's Burden*

**Initially the burden of proof is on the Defendant** to present competent evidence that the plaintiff did not sustain a "serious injury" within the meaning of §5102(d).

#### *Plaintiff's Burden*

After the defendant meets his initial burden, **the burden of proof shifts to the Plaintiff** to prove that he has suffered a "serious injury."



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Attorneys at Law



## GRANTING SUMMARY JUDGMENT ON LIABILITY DOES NOT ESTABLISH SERIOUS INJURY

Granting of the plaintiff's motion for summary judgment as to liability does not automatically create a finding that the plaintiff sustained a serious injury, when the issue of serious injury was not raised in the motion.

***Zeca v. Riccardelli***  
***(May 8, 2002)***

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**PLAINTIFF MUST**  
**ESTABLISH**  
**"OBJECTIVE" PROOF**

***Toure v. Avis Rent-A-Car Systems***

***Manzano v. O'Neill***




***Nitti v. Clerrico***

**(July, 2002)**










**TOURE, MANZANO &**  
**NITTI**

**“Expert Opinions not backed by  
objective proof will not be  
sufficient to establish a  
serious injury”**



## SUMMARY JUDGMENT

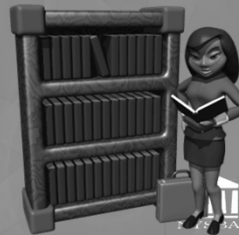
### *Satisfying the Burden*

-  **Medical proof**
-  **Subjective complaints are not sufficient**
-  **Sworn medical statements are required**
-  **Tracking the statutory language is not sufficient**
-  **Conclusory statements are not sufficient**
-  **Sworn medical opinions must be formed shortly after examining the plaintiff**
-  **Include plaintiff's affidavit to establish plaintiff has been out of work or can't partake in daily activities**



## RECENT CASES

Pommells v. Perez  
Brown v. Dunlap  
Carrasco v. Mendez  
*(Decided April, 2005)*



## Pommells/Brown/Carrasco

- Three cases consolidated for appeal purposes.
- Proof of a herniated disc, without additional objective medical evidence establishing significant physical limitations is insufficient.
- Unexplained interruptions (gaps or terminations) in treatment may not satisfy plaintiff's burden.
- A plaintiff is not required to continue treatment that would be "palliative in nature" – but it must be explained.
- A Plaintiff's failure to refute preexisting conditions that caused the plaintiff's injuries will not survive summary judgment.



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## The Impact of Pommells/Brown/Carrasco

Where there are significant gaps in treatment and/or pre-existing injuries, plaintiffs can no longer escape dismissal of their claims by having a physician causally relate the injury to the accident.

Plaintiff must be able to explain these significant causation issues or provide a reasonable excuse.



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## TRIAL

**If the plaintiff makes a threshold showing sufficient to defeat the defendant's motion for summary judgment, the issue of whether there has been a "serious injury" becomes a question of fact to be determined at trial.**



## PRACTICAL CONSIDERATIONS

- **Initial case analysis: Does the plaintiff meet the threshold?**
- **Use the Threshold as a tactic during settlement discussions**
- **Obtain all medical records and review them carefully**
- **Does the plaintiff need to be examined to determine if he/she will meet the threshold?**
- **Remember, courts are not inclined to grant summary judgment**
- **Be sure the examining physician uses objective tests**
- **Be sure your proofs are submitted in proper form**



**NEW YORK**  
**NO FAULT LAW**


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## INTRODUCTION

What is a no-fault claim?

- A breach of contract claim.
- Six (6) year statute of limitations period based upon the failure of the insurer to reimburse for medical treatment tendered due to injuries sustained a motor vehicle accident.

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# ARBITRATION vs. LITIGATION

## Contrast and Comparison

### Arbitration

- Inexpensive
- Two-step process:
  - Conciliation: Mediation phase where both parties exchange respective position, followed by Arbitration
- Relaxed rules of evidence (i.e. no requirement to authenticate documents)
- No discovery required
- Claimant customarily fails to provide all necessary documents to administer claim (failure to produce initial evaluation, treatment notes, or letter of medical necessity)
- For Claims under \$2,000, appearance not required.

# ARBITRATION vs. LITIGATION

## Contrast and Comparison

### Litigation

- Slow moving (due to plaintiff inaction)
- Expensive (discovery i.e. written interrogatories, document production)
- Rules of evidence in force (i.e. IME physicians must testify as to IME cut-off)
- Courts unfavorably view no-fault claims





## APPEALS

Master Arbitration  
Appellate Division

Same Results.  
Unlikely to overturn prior decision.

## GROUND TO VACATE ARBITRATION DECISION

- The rights of a party were prejudiced by:
  - Corruption, fraud or misconduct in procuring the award
  - Partiality of the arbitrator
  - The arbitrator exceeded his/her power.

## INDEPENDENT MEDICAL EXAMINATION



- Scheduling letters:
  - If represented, sent to attorney of record;
  - May schedule any time. Generally one month after accident;
  - Letter must contain mandatory reimbursement for transportation and/or lost income;
  - All treatment before first IME no-show must be paid in full;
  - For fractures, bulges, and/or herniations, schedule orthopedist;
  - For soft tissue injuries, refer to neurologist;
  - If psych, chiropractor, or acupuncture, received, refer to IME physician in each discipline.

## PEER REVIEW(S)



- Situations when it should be considered:
  - Unnecessary and frivolous medical testing and treatment;
  - Availability of alternative low-cost treatment;
  - Unscientifically proven medical testing (CPT: Current perception threshold testing);
  - Who should perform peer reviews?
    - Doctors – Doctors - Doctors  
A treating physician's opinion will carry significantly more weight than a nurse practitioner second guessing his/her prognosis.

## FORM NF-10



- Must include the following:
  - Signed and dated including dates of service billed and when they were received by insured;
  - Must include **all bases** upon which the claim is being denied;
  - If conducting SIU investigation and/or peer review, do not send NF-10 -- Send delay letter;
  - Unless you have a valid coverage defense (no policy), an untimely denial will be fatal.

## "DELAY" LETTERS

- What are their purpose?
  - To advise the claimant and/or medical provider of an on-going investigation or permit sufficient time outside the 30 days to verify the treatment tendered by requesting additional information or to conduct peer reviews.
- When do you send them?
  - Within 15 days of receipt of the first bill:
    - If claim is still pending, send another delay letter within 10 days;
    - If on-going, send one at least once a month;
    - When investigation completed, send NF-10. In NF-10, refer back to all dates of delay letters.



## OGC OPINIONS


For all questions not fully addressed in the NY PIP regulations, the NYS Insurance Department for the Office of General Counsel prepare opinion letters on written question presented.



## NOTICE REQUIREMENTS





- The time for claimant to submit written notification of an accident is 30 days.
- Notice is satisfied by the insurer's receipt of an MV-104 or other accident report indicating injury, the applicant's submission of an NF-2 application for no-fault benefits, or by the insurer's receipt of a completed hospital facility form (NF-3).
- When an insured denies a claim based upon late notice, the denial must advise the applicant that late notice will be excused where the applicant can provide reasonable justification of the failure to give timely notice.




## NOTICE REQUIREMENTS (CONTINUED)

- What is clear and reasonable justification?
  - The OGC advised that "it would be difficult to create an encompassing list which would have uniform applicability, but the new proposal includes provisions that require insurers to establish reasonable objective standards for review of late notice of claim and late submission of proof of claim.
  - The regulation specifies that appropriate consideration must be given to pedestrians and non-related occupants of motor vehicles who may have difficulty ascertaining the insured.
  - Additionally, a denial for late submission should not be based upon a third-party's failure to provide the information necessary to establish the claim.


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## PROOF OF CLAIM



- Failure by any medical provider to submit written proof of claim within 45 days from the date of service is required to ensure payment.
- An insurer may deny based upon a violation of the 45 day rule except in the instant where "there is a clear and reasonable justification" for the delay in forwarding the billing.



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|                                  | REGULATION 68-A   | 1 <sup>ST</sup> AMENDMENT TO REG. 68-C | 1 <sup>ST</sup> AMENDMENT TO REG. 68-D |
|----------------------------------|---|--|--|
| <u>Policy Conditions</u>         |   |  |  |
| Notice Requirement of Claim      | 30 Days   | ---                                    | ---                                    |
| Medical                          | 45 Days   | ---                                    | ---                                    |
| Work Loss                        | 90 Days   | ---                                    | ---                                    |
| Other Necessary Expenses         | 90 Days   | ---                                    | ---                                    |
| Relief for Failure to Comply     | Demonstrate clear and reasonable justification for failure to comply.<br>File for expedited arbitration.  |  |  |
| <u>Claim Practice Procedures</u> |   |  |  |
| Acknowledgement of Claim         | Section 65-3.4(b)<br><br>Application within 5 business days. If claim sent to incorrect office, application must be forwarded within at least 10 business days. |  |  |
| Procedures                       | Section 65-3.5(a)<br><br>Send other forms with NF2.<br>Speeds up process.   | ---                                    | ---                                    |
|                                  | Section 65-3.5(b)<br><br>May request any information "to establish proof of claim."   | ---                                    | ---                                    |

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Attorneys at Law



|                            | REGULATION 68-A   | 1 <sup>ST</sup> AMENDMENT TO REG. 68-C                                      | 1 <sup>ST</sup> AMENDMENT TO REG. 68-D |
|----------------------------|---|---|--|
| Examination Under Oath     | Section 65-3.5(3)<br>Insurer must have objective standard for conducting examination under oath.  | ---   | ---                                    |
| Late Notice                | Section 65-3.5(l)<br>Carrier must establish standards for review of late notice of claim and late proof of claim. Must have supervisory review of claims denied.                    | ---   | ---                                    |
| Electronic Data            | Section 65-3.5(k)<br>Carriers with more than 1,000 policies are required to establish procedures for receipt of claims, notices, and verification by fax or electronic transmittal. | ---   | ---                                    |
| Interest on Overdue Claims | Section 65-3.9<br>% simple interest   | ---   | ---                                    |
| <u>Attorney's Fees:</u>    |   |   |  |
| No Denial                  | Increases attorney fee prior to arbitration to 20% of amount overdue plus any interest subject to maximum of \$60.00  |   |  |
| Denial Issues              | Section 65-3.10(a)<br>\$80.00 attorney fee due when a claim is denied and settled prior to arbitration.   |   |  |
| Direct Payments            | Section 65-3.11(a)<br>Limits assignment to health care services as provided in Section 5102(a)(1) and Section 5102(a)(2) of Insurance Law.  | ---   | ---                                    |
|                            |   | Requires provider to submit properly executed assignment on NF-3 or NF-AOB. |  |

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|  | REGULATION 68-A  | 1 <sup>ST</sup> AMENDMENT TO REG. 68-C                                    | 1 <sup>ST</sup> AMENDMENT TO REG. 68-D  |
|--|--|---|---|
| Direct Payments (Cont'd)               | ---  | Section 65-3.11(c)<br>Insurer may request in writing original assignment. | ---   |
| Medical Benefits                       | Section 65-3.16(a)(12)<br>Provider of health care benefits must meet State and local licensing requirements.   | ---   |   |
| <u>Optional Arbitration Procedures</u> |  |   |   |
| Special Expedited Arbitration          | Section 65-4.5(b)<br>To resolve disputes that solely involve late notice of claim. Conciliation Center will walk claim through. Will be mailed to arbitrator within 1-2 days. Arbitrator has 10 days to issue decision. Rocket Docket. | ---   | Section 65-4.2(b)(3)<br>Applicant to submit all supporting documents with arbitration request. Document submitted later will be marked "late" (except additional or on-going benefits). Carrier has 30 days to respond to arbitration notice from Conciliation Center otherwise marked "late." Insurer may, in writing, request additional 30 calendar days to respond. |

## PRIMA FACIE CASE AND BURDEN OF PROOF

- If the denial is untimely, the insurer is precluded from raising any defenses to the applicant's claim for no-fault benefits
- Therefore, as long as the provider is able to establish that it performed the services billed, any challenge as to the medical necessity of such treatment is barred under the 30 day rule.



## THE EBB AND FLOW OF PIP FRAUD

- Medical no-fault (PIP) claim costs are rising faster in New York than anywhere else in the country.
- The sudden surge in claims costs is the result of greater frequency of claims as well as extraordinarily large increases in the average cost per claim.
- Medical no-fault claim frequency in New York is 30% above the median no-fault state while New York's average cost per claim is more than double the no-fault median.
- The rise in frequency and cost of medical no-fault claims cannot be explained by any economic factors such as increases in medical inflation.

## THE ANATOMY OF A FRAUD

- The more common crimes associated with auto insurance are staged accidents, stolen identities, fraudulent police reports, and "jump-ins."
- Owners and managers of medical clinics pay "runners" or recruiters to arrange minor auto accidents and send individuals supposedly injured in the accidents to the clinics for treatment.
- Although staged accidents are intended to cause no real injuries to the defendant driver or passengers, the accidents are reported to police so that a record can be created to support the fraudulent insurance claims.
- Medical bills often reach \$10,000 to \$20,000 per passenger and can go as high as \$50,000 per passenger under the New York no-fault law. A single staged accident with multiple claimants generally results in billings for hundreds or even thousands of treatments.



## THE MANY FACES OF MEDICAL FRAUD

Flaws in New York's no-fault laws have permitted perpetrators of fraud to get away with a surprisingly wide array of abuses. Virtually all insurers have indicated significant fraud and abuse in the following areas:

- Provider Billing
- Durable Medical Suppliers
- Transportation "Provider" Bills
- Lost Wages
- Household Help

## THE MANY FACES OF MEDICAL FRAUD (continued)

- Exotic Medical Treatments:
  - Aromatherapy
  - Biofeedback
  - Acupuncture
  - Psychotherapy
  - Massages
  - Whirlpool Sessions
  - Electrical Stimulation
  - Thermography
- Treatment Frequency



## OTHER TYPES OF FRAUD

- ***Identity Fraud***
- ***Bounced Checks***
- ***Garaging***



## GARAGING INVESTIGATION

- Circumstantial proof required to disclaim coverage *ab initio* (retroactive to the inception date of the policy)
  - All NF-2, NF-3 and police report record a NY address.
  - Initial reservations of rights letter.
  - Retention of NY investigator to obtain NYSDMV information and visit location of insured and secure insured recorded statement (if not represented).
  - Send SIU adjuster to alleged MA address listed on policy to ascertain whether its a valid address and/or whether the individual ever lived or principally garaged their vehicle at the location.
  - Trace report establishing insured residential history.
  - Registration and licensing of vehicle and insured.
  - Schedule EUO as last resort to bolster investigation.



## CASES OF INTEREST

- Payment priority
- Insurer must show lack of medical necessity.
- Establishing fraud requires clear and convincing evidence.



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## CASES OF INTEREST


(CONTINUED)

- Blanket disclaimers do not eliminate insurer's obligation to pay or deny claims within 30 days.
- Verification requests sent within 25 days considered timely.
- Insurer's failure to timely disclaim coverage precludes it from denying claims




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## CASES OF INTEREST (CONTINUED)

- Insurer can request verification of medical necessity from medical supply company.
- Non-payment complaint against insurer dismissed for assignor's failure to appear at pre-claim exam.
- Court defines medical necessity.





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## CASES OF INTEREST (CONTINUED)

- Discovery motion denied for failure to include denial of claim or demand for verification forms.
- Insurer met burden to show accident was staged by using circumstantial evidence.



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NEW YORK STATE BAR ASSOCIATION

NO FAULT INSURANCE  
FUNDAMENTALS:  
SERIOUS INJURY THRESHOLD  
NO FAULT COVERAGE

*Tuesday, May 16, 2006*

*Robert A. Glick, Esq.  
Brand Glick & Brand, P.C.*



NYSBA

**NYSBACLE**

















## **8. ELDER LAW**



**New York State Bar Association  
Bridging the Gap – Making a Smooth Transition**

## **ELDER LAW**

**By: Ellyn S. Kravitz, J.D, LL.M., CELA  
Of Counsel  
Abrams, Fensterman, Fensterman,  
Eisman, Formato, Ferrara & Einiger,  
LLP**

1. Overview of Elder Law
2. Essential Planning Documents
3. Power of Attorney
4. Health Care Proxy
5. Living Will
6. Family Health Care Decision Making Act
7. Burial Designation Form
8. Guardianships
9. Will Drafting
10. Financing Long Term Care
11. Medicare
12. Medigap Insurance Policies
13. Medicaid
14. Resource and Income Levels for Nursing Home Medicaid
15. Resource and Income Levels for Community Medicaid
16. Asset Transfers
17. Regional Rates
18. Calculation of Penalty Period for Transfer of Assets
19. Residence
20. Exempt Transfers
21. Medicaid Liens
22. Estate Recovery
23. Retirement Accounts
24. Treatment of Trusts
25. Types of Supplemental Needs Trusts
26. Long Term Care Insurance





## **BRIDGING THE GAP 2013 ELDER LAW**

**Ellyn S. Kravitz, JD, LL.M, CELA  
Of Counsel  
Abrams, Fensterman, Fensterman, Eisman,  
Formato, Ferrara & Einiger, LLP  
[www.abramslaw.com](http://www.abramslaw.com)**

## **ELDER LAW**

**Life and Estate Planning  
Trusts and Estates  
Government Benefits  
Retirement Planning  
Veterans Benefits  
Health Law  
Special Needs Planning**

## **ESSENTIAL ESTATE PLANNING DOCUMENTS**

### **Advance Directives:**

**Power of Attorney  
Health Care Proxy  
Living Will  
Burial Designation Form  
Last Will and Testament**

## **POWER OF ATTORNEY General Obligations Law Article 5 Title 15**

2009 change in the statute; amended in 2010

Effective date of new statute: September 12, 2010

Documents executed prior to September 12, 2010,  
governed by prior law

POA is durable unless otherwise stated

## POA

Agent must sign POA in order for it to be effective

Does not automatically revoke prior POAs

Form provides for Modifications

Signatures must be witnessed by a notary public

## Statutory Gift Rider

Executed at the same time of POA

Must be witnessed by two witnesses in the same manner as a Will

Agent acts in accordance with wishes of Principal – best interests standard – Matter of Ferrara

## **HEALTH CARE PROXY Article 29-C Public Health Law**

Principal appoints an agent to make health care decisions

Effective only when the Principal is incapacitated

Only appoint one agent at a time to act

Organ Donation

Artificial Nutrition and Hydration

## **LIVING WILL**

Health Care Declaration

Clear and convincing evidence - receive or refuse medical treatment

## **FAMILY HEALTH CARE DECISION MAKING ACT**

As of June 1, 2010 – this statute establishes the authority of a patient's family member or close friend to make health care decisions for a patient under the following circumstances:

1. Patient lacks decisional capacity
2. Patient did not leave prior instructions
3. No health care agent appointed

## **FHCDMA**

Applies in hospital and nursing home setting

Hierarchy:

1. Court appointed guardian
2. Spouse/domestic partner
3. A child 18 years of age or older
4. Parent
5. Sibling
6. Close family friend or relative

# **BURIAL DESIGNATION FORM**

## **PHL Section 4200**

Hierarchy:

1. Written instrument
2. Surviving spouse
3. Surviving domestic partner
4. Surviving children – 18 years of age or older
5. Surviving parents of decedent
6. Surviving siblings of decedent
7. Court appointed guardian
8. Fiduciary of the estate of decedent

# **GUARDIANSHIPS**

When is this necessary?

Failure to execute advance directives

## **TYPES OF GUARDIANSHIPS**

Article 81 of the Mental Hygiene Law

Article 17 of the Surrogate's Court Procedure Act

Article 17-A of the Surrogate's Court Procedure Act

Person and Property Management

## **ARTICLE 81 OF MHL**

Provides the least restrictive form of intervention

Takes into account the personal wishes of the incapacitated person

Tailors the needs of each individual

## **ARTICLE 81 OF MHL – cont'd**

Standard of proof – Clear and convincing evidence

Demonstrate that the AIP will suffer harm because:

1. AIP unable to provide for the personal needs and/or property management
2. Cannot understand and appreciate the nature and consequences of such inability

## **WILL DRAFTING EPTL**

Meet with client – Capacity to execute a Will

Listen to client

Written questionnaire

Taxable vs. non taxable estate



## **WILL DRAFTING ISSUES**

Title of property – jointly owned  
Beneficiary designations  
Testamentary substitutes  
Tax apportionment clause – EPTL 2-1.8  
Probate estate  
Taxable estate  
Right of Election

## **FIDUCIARIES**

Executor  
Trustee  
Guardian of minor children  
Compensation

## **Execution of Will**

### **EPTL 3-2.1**

1. Testator signs at the end
2. In the presence of two witnesses
3. Testator declares that the document is his Will
4. Witnesses attest to Testator's signature
5. Witnesses sign their names
6. Affidavit of Attesting Witness

## **EXECUTION TIPS**

1. Have three witnesses
2. Execute only one original Will
3. Have testator initial all pages
4. Affidavit of Attesting Witnesses
5. Will storage

## FINANCING LONG TERM CARE

Private Pay

Long Term Care Insurance

Medicare

Medicaid

## MEDICARE

**PART A**

Hospital and skilled nursing benefits

**PART B**

Doctors/Durable Medical Equipment

**PART C**

Managed Care

**PART D**

Prescription

## 2013 Medicare Part A

|  |  |
|--|--|
| Hospital deductible                          | \$1,184  |
| Hospital co-insurance amounts                | \$296 per day for days 61-90; \$592 for days 91 -150 |
| Skilled nursing facility co-insurance amount | \$148.00 per day for days 21-100                     |

## Medicare - Benefits in a Nursing Facility

NO LONG TERM COVERAGE

**Will cover only a portion of nursing home costs if:**

1. Individual had a minimum 3 day hospital stay within 20 days of entering nursing facility
- AND**
2. Hospital stay is related to the same condition for which the person enters the nursing facility

## **Medicare – Benefits in a Nursing Facility**

### **If meet requirements:**

First 20 days paid in full

Days 21-100 - all costs but a daily co-insurance - \$148.00

After 100 days – no coverage

### **SKILLED NURSING CARE VS. CUSTODIAL CARE**

## **MEDIGAP INSURANCE POLICIES**

Supplemental health insurance

May cover the \$148.00 co-insurance amount

## MEDICAID

Federally based  
 Administered through state or county agencies  
 Federal minimum standards but states allowed flexibility

Means Tested  
 Elderly, blind or disabled

Works with Medicare and other benefits

## 2013 Resource & Income Levels - Nursing Home

|                                     |                   |
|-------------------------------------|-------------------|
| <b>Single Individual</b>            | \$14,400/\$50     |
| <b>Community Spouse</b>             | \$115,920/\$2,898 |
| <b>Legally responsible relative</b> |                   |
|                                     | Spousal Refusal   |
|                                     | Right of Election |
|                                     | Divorce           |

## 2013 Resource & Income Levels - Community

|                                     |                   |
|-------------------------------------|-------------------|
| <b>Single Individual</b>            | \$14,400/\$800    |
| <b>Couple</b>                       | \$21,150/\$1,175  |
| <b>Legally responsible relative</b> |                   |
|                                     | Spousal Refusal   |
|                                     | Right of Election |
|                                     | Divorce           |

## ASSET TRANSFERS

Rules apply to both income and assets

Individual and spouse

Disclaimers

Jointly held asset

Home care

## Calculation of the Penalty Period

The total value of all uncompensated transfers divided by the average monthly regional cost of nursing home care

Example: \$100,000 gift  
 Regional rate - \$10,000  
 Penalty period/period of ineligibility – 10 months

## 2013 Regional Rates

|                       |          |
|-----------------------|----------|
| Central               | \$ 8,432 |
| Long Island           | \$12,034 |
| New York City         | \$11,350 |
| Northeastern          | \$ 8,950 |
| Northern Metropolitan | \$10,737 |
| Western               | \$ 8,682 |
| Rochester             | \$ 9,782 |



## **PENALTY PERIOD**

DRA 2005

Below Medicaid resource allowance  
In a nursing facility  
Approved application but for the penalty period

Penalty period begins when you need nursing home care and in the facility

## **RESIDENCE**

Intent to return home requirement

Qualified individual living in residence

\$802,000 home equity cap

- Spouse
- Child under 21, blind or disabled

## EXEMPT TRANSFERS

Transfer of residence to a qualified person:

- Spouse
- Blind or disabled child
- Sibling with equity interest – 1 year resident
- Caregiver child – 2 year resident

Not for purposes of applying for Medicaid

Transfer to a child with disabilities

Sole benefit trust

Transfer between spouses

## MEDICAID LIENS

Liens allowed in limited circumstances

Liens eliminated if recipient returns home

Notice of Lien required

## ESTATE RECOVERY

State may assert claim against estates of persons who received benefits after age 55

Definition of estate – probate vs. nonprobate

Exempt assets

## RETIREMENT ACCOUNTS

Pay-out status

Age of Medicaid applicant

IRS vs. Medicaid tables

Roth IRAs

Community spouse retirement account

## **Treatment of Trusts for Medicaid Eligibility Purposes**

Revocable Trust

Irrevocable Trust

## **Supplemental Needs Trusts**

First Party Self Settled Trusts

Third Party Trusts

Pooled Trusts

## **LONG TERM CARE INSURANCE**

Purchase when younger

Good for those with moderate wealth

Look at financial stability of insurer

*The End*

**Ellyn S. Kravitz, JD, LL.M, CELA**









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## **9. BECOMING CONVERSANT WITH PATENT AND TRADEMARK ISSUES**



**BOND** SCHOENECK  
& KING

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## Becoming Conversant with Patent and Trademark Issues

New York State Bar Association  
Bridging The Gap  
October 2, 2013  
Hotel Pennsylvania  
New York City

George R. McGuire, Esq.  
Bond, Schoeneck & King, PLLC

## What is a Trademark/Service Mark?

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- Trademark: Any word, name, symbol, device, or any combination thereof that permits consumers to identify and distinguish the goods/services of one manufacturer/retailer from those of another
- Service mark: Any word, phrase, symbol or design, or a combination thereof, that identifies and distinguishes the source of a service



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## What is a Trademark?

- Less Traditional Examples:

- Single colors: “Tiffany blue”
- Sounds: NBC chimes
- Smells: tennis balls that smell like cut grass
- Trade dress: The elements regarding the packaging or display of an item that conveys a “source” related impression
  - Coca-cola bottle



3

## Trademark Law: Purposes

- Benefit Consumers:
  - Consumers use TMs to identify goods/services that represent a certain quality or value
  - Permits educated purchasing
- Benefit Merchants:
  - Goodwill of consumers
  - Repeat sales
  - Advertising tool
  - Helps with Marketing of new products



4

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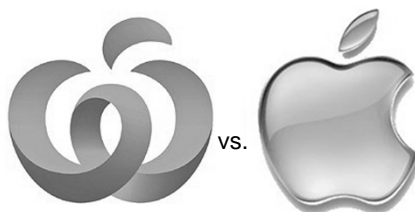


## Selecting New Trademarks: Brainstorming New Names

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- Two Legal Issues When Selecting a Mark:

1. Will use of the mark subject you to an infringement suit by another (or will another be able to stop you from using a particular mark)?
2. How much protection will the mark provide against future uses by others of similar marks?



5

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## Selecting a Mark

---

- Brainstorm new names:

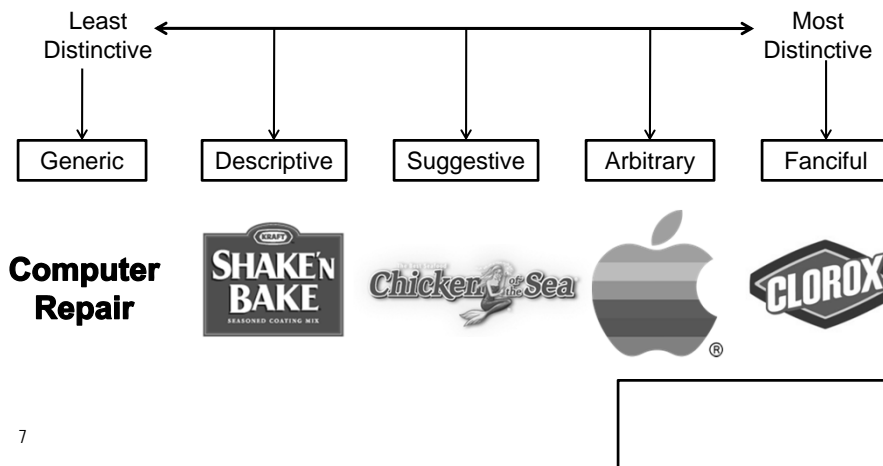
- Avoid descriptive and generic names;
  - Descriptive = describes a quality, characteristic or nature of the good/service
  - Generic = the common name for the good/service
- Preferably choose arbitrary (real word, no connection to the good/service), fanciful (made up), or suggestive names (suggests something about but does not specifically describe the good/service) ;
- ALWAYS have proposed marks searched before using (and before spending money on printing)

6

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# Selecting a Trademark

## The Distinctiveness Continuum



# Genericide: Dangers of Improper Use of a Trademark

## Cellophane

Party Favorite for all ages  
**CHIPS IN CELLOPHANE!**

Potato chips are a must for parties... a quick 'n easy way to perk up ordinary meals—and it's just no picnic without 'em! You can see the chips you buy, know they're crispy fresh and clean when you BUY CHIPS IN CELLOPHANE

**Chips are better 'cause they're fresher in Cellophane**

## Thermos

**A Fly in the Milk May Mean a Baby in the Grave**

Fly is the most dangerous insect known. They are born in filth, live on filth and carry death-dealing germs and bacteria wherever they alight.

Fly is attracted by milk. A fly alighting on the mouth of a baby suckling into the empty breast is a risk of disease germ. Germs multiply with appalling rapidity in milk at a temperature of 40 degrees of heat.

Thermos keeps milk's milk cold, clean, even and fit good. Bacteria cannot survive in cold pure milk. Ask your doctor. Thermos is made so that cannot get near the contents. It keeps milk fresh for 24 hours.

Thermos Bottles \$1 up. Thermos Carafes \$5

Do not use any other brand.

There is only one genuine Thermos. If you doubt it, read a genuine Thermos. It plainly stamped Thermos on the bottom of each article, or will only you request printed on on receipt of order. Write for catalog.

American Thermos Bottle Co.  
Thermos Bldg., New York  
Thermos Bottle Co., Toronto, Can.

**THERMOS**

## Aspirin

*Demand*

**ASPIRIN**

SAY "BAYER ASPIRIN" - Genuine

Proved safe by millions and prescribed by physicians for

Headache Colds Neuralgia Lumbago  
Pain Toothache Neuritis Rheumatism

**DOES NOT AFFECT THE HEART.**

*Safe* Accept only "Bayer" package which contains proven directions. There's "Bayer" letters of 12 tablets. Also bottles of 24 and 48-tablets.

Aspirin is the trade mark of Bayer Manufacturing of Monheim-on-Rhine.

## Clearing Rights

---

- Knock-Out Search – very quick
  - USPTO Database
  - Google search or other search engine
    - Doesn't indicate if mark IS available, but may indicate mark is NOT available
  
- Full Search – standard about 1 week
  - Trademark search agency
  - Includes phonetics, synonyms
  - Large common law database
  - Websites/Domain names

9

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## What to Consider When Reviewing Search Results

---

- If conflicting mark is found in the search report, consider the following:
  - Are the goods similar?
  - Are they in the same trade channels?
  - Do the marks have similar looks, sounds, and meanings?
  - Is the mark famous?
  - Is the mark descriptive?
  - Is the mark strong or weak?
  - Is the conflicting mark still in use?

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## Selecting a Mark: The Process

---

Brainstorming – work with marketing and legal to create a list of potential marks



Registrability/Protectability – determine whether the marks are registrable (strong, non-descriptive, etc), and determine the appropriate classification



Availability/Search – determine whether someone else is using the mark



Registration – file for federal/state registration

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## Federal Registration of Trademarks

---

- Benefits – Why Register?
  - Nationwide Exclusivity
  - Federal Court Jurisdiction
  - Prima Facie: Ownership, Validity, Exclusive Rights, Continuous Use
  - Constructive Notice
  - Statutory Remedies (Treble Damages)
  - Bar Infringing Importations
  - Incontestable after 5 Years

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## Should You Register?

---

- Registration Rules of Thumb:
  - If using mark for only a short period of time (e.g., < 2 years), probably not worth registering mark
  - If trying to develop brand name recognition in mark and plan on using mark for a long period of time, register the mark
  - If planning on expanding geographic coverage, then worth registering

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## Factors for Federal Registration

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- Likelihood of Confusion Factors:
  1. Strength Of Mark
  2. Similarity of Marks
  3. Proximity of Goods/Services
  4. Bridging The Gap
  5. Actual Confusion
  6. Sophistication of Buyers
  7. Channels of Trade

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## Use of Trademarks

---

- Avoid Improper Use:
  - Never as a noun, always as an adjective
  - Use proper symbol designating status
  - Company-wide education (seminars, guidebooks)
  - Police marks in trade publications, magazines, general press
  - Send cease and desist letters to those misusing mark and follow up to ensure compliance

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## Proper Marking: TM, SM, & ®

---

- TM/SM:
  - Anyone who claims rights in a mark may use the TM (trademark) or SM (service mark) designation with the mark to alert the public to the claim.
  - Not necessary to have a registration, or even a pending application, to use these designations.
- ®:
  - May only be used when the mark is registered in the PTO.
  - Improper to use this symbol at any point before the registration is issued.

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# Trademark Summary

- Use Properly!
  - Mark appropriately with notice symbol
  - Always as adjective, never as a noun
  - Choose arbitrary, fanciful or suggestive marks, never descriptive or generic marks
  - Police use of the mark
- Register marks worth registering
- ALWAYS clear the rights to use a mark

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US05720125A

**United States Patent** [19] (11) Patent Number: **5,720,125**  
**Oviatt** [45] Date of Patent: **Feb. 24, 1998**

[54] **THROWAWAY MOUSETRAP FOR CATCHING MICE & LIVE** 4,550,223 1/1985 Soller 4361  
 4,566,218 1/1986 Kamawa 4361  
 4,578,802 4/1986 Melton 4361  
 4,768,305 9/1988 Sackett 4361  
 5,452,539 9/1995 Kamawa 4361  
 5,502,018 4/1996 Oviatt 4361  
 5,564,221 10/1996 Henzogen 4361

[76] Inventor: **Bill Oviatt**, 177 N. 3 St., Lander, Wyo. 82520

[21] Appl. No.: **632,332**

[22] Filed: **Apr. 17, 1996**

[51] Int. Cl.<sup>6</sup> **A01M 23/08**

[52] U.S. Cl. **43/61**

[58] Field of Search **43/60, 61, 75, 43/66**

*Primary Examiner—Kurt Rowan  
 Attorney, Agent, or Firm—Rick Martin*

[57] **ABSTRACT**

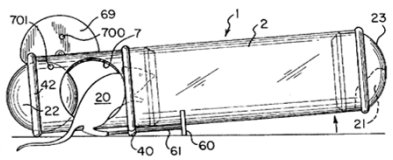
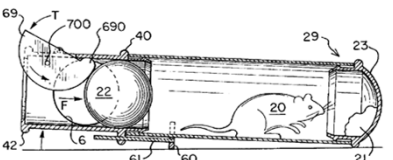
A disposable mousetrap consists of a clear plastic tube having a filament centrally located on the tube. Bait is placed at the bait end of the tube. The opposite end of the tube has a mouse entrance. When the mouse enters the mouse entrance he causes the tube to rotate downward at the bait end. A ping pong ball then rolls to close the mouse entrance. A hinged wedge locks the ping pong ball in place. A filament rod is then snapped off. The rod is inserted into the hinged wedge and tube, thereby permanently trapping the mouse. The trap is then disposed as hazardous waste.

References Cited

U.S. PATENT DOCUMENTS

|           |         |           |      |
|-----------|---------|-----------|------|
| 1,236,641 | 5/1917  | Cushing   | 4360 |
| 1,581,297 | 4/1926  | Schmuck   | 4360 |
| 1,703,090 | 3/1929  | Draugh    | 4361 |
| 2,475,662 | 7/1949  | Rosen     | 4361 |
| 2,485,319 | 10/1949 | Rosen     | 4361 |
| 2,625,729 | 10/1953 | Chalenger | 4360 |
| 2,885,820 | 5/1959  | Maggio    | 4361 |

6 Claims, 3 Drawing Sheets

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## Patent Quotes

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*I knew that a country without a patent office and good patent laws was just a crab, and couldn't travel any way but sideways or backwards.*

Mark Twain  
"A Connecticut Yankee in King Arthur's Court"

*An inventor is a man who looks around upon the world, and is not content with things as they are; he wants to improve whatever he sees; he wants to benefit the world; he is haunted by an idea; the spirit of invention possesses him, seeing materialization.*

Alexander Graham Bell

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## Patent

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- What is it?
  - Grant from government
  - Right to exclude others from practicing the claimed invention
- How do you get one?
  - File with the U.S. Patent Office (or foreign office)
  - Disclose everything about the invention
    - Including "best mode" known for practicing
- How long does it last?
  - Constitution: "for limited times"
  - 20 years from filing date for utility patents
  - 14 years for design patents

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# Parts of a Patent

- Drawings – illustrate the invention
- Specification – describe the invention
- Claims – define the scope of the patent ranging from very short...:

What is claimed is:  
**1. Element 95.**

U.S. Patent No. 3,156,523 (Nov. 10, 1964):  
 Synthetic element "Americium" (atomic number 95)

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# Parts of a Patent

- ...to very long:

U.S. Patent No. 6,953,802

– Claim 1:

- 22 pages
- >17,000 words

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US 6,953,802 B2

60

survival. Cell surface adhesion molecules facilitate allogeneic recognition in vivo and may be critical for lymphocyte traffic in vivo. The following describes a model which can be used to study the in vivo effects of the compounds of this invention in the control of allograft rejection.

The following procedures are described in Coito et al., *Transplantation* (1998) 65(9):699-706 and in Keom et al., *Transplantation* (1998) 65(9):854-859, both of which are incorporated by reference in their entirety.

Following the procedures described in Coito and Keom, male adult rats weighing approximately 200-250 g are used in this model. Lewis X Brown Norway rats, hearts are transplanted into the abdominal great vessels using standard microvascular techniques.

A candidate compound is administered to the transplant recipient in a suitable pharmaceutical carrier for a 7-day course of treatment starting the day of the engraftment. Doses range from 0.3 to 30 mg/kg/day. Control recipients receive the pharmaceutical carrier only.

The rats are euthanized and their cardiac allografts are analyzed as described in Coito and Keom.

Using conventional formulations, compounds of this invention would be active in this model.

What is claimed is:

I. A compound of Formula (I):

wherein:

R<sup>1</sup> is selected from the group consisting of:

- A) hydrogen;
- B) alkyl of from 1 to 6 carbon atoms;
- C) substituted alkyl of from 1 to 10 carbon atoms, having 1 to 5 substituents selected from the group consisting of:
  - (1) allyloxy as defined in V herein;
  - (2) substituted alkoxy as defined in B<sup>1</sup> herein;
  - (3) acyl as defined in B<sup>1</sup> herein;
  - (4) acylamino as defined in S<sup>1</sup> herein;
  - (5) thiocarbonylamino as defined in B<sup>2</sup> herein;
  - (6) silyloxy as defined in T<sup>1</sup> herein;
  - (7) amino having the formula "—NH—";
  - (8) amidino having the formula "—N=C(=NH)—";
  - (9) alkyl amidino wherein alkyl is defined in B herein and amidino is defined in C8 herein;
  - (10) thioamidino as defined in A<sup>1</sup> herein;
  - (11) aminoacyl as defined in U<sup>1</sup> herein;
  - (12) aminocarbonylamino as defined in V<sup>1</sup> herein;
  - (13) aminothiocarbonylamino as defined in W<sup>1</sup> herein;
  - (14) aminocarbonyloxy as defined in X<sup>1</sup> herein;
  - (15) aryl as defined in J herein;
  - (16) substituted aryl as defined in K herein;
  - (17) arylloxy as defined in F<sup>1</sup> herein;
  - (18) substituted arylloxy as defined in F<sup>2</sup> herein;
  - (19) arylalkoxy having the formula "aryl-O-aryl";
  - (20) substituted arylalkoxy having the formula "aryl-C(aryl)" substituted with from 1 to 3 substituents on either or both aryl rings selected from the group consisting of:
    - (a) hydroxy;
    - (b) acyl as defined in B<sup>1</sup> herein;
    - (c) acylamino as defined in S<sup>1</sup> herein;
    - (d) thiocarbonylamino as defined in B<sup>2</sup> herein;
    - (e) silyloxy as defined in T<sup>1</sup> herein;
    - (f) alkyl as defined in B herein;
    - (g) substituted alkyl as defined in C herein;
    - (h) alkoxy as defined in V herein;
    - (i) substituted alkoxy as defined in B<sup>1</sup> herein;
    - (j) alkylaryl as defined in D herein;
    - (k) substituted alkylaryl as defined in E herein;
    - (l) alkylaryl as defined in U<sup>1</sup> herein;
    - (m) substituted alkylaryl as defined in Q<sup>31</sup> herein;
    - (n) amidino as defined in C8 herein;
    - (o) alkylamidino wherein alkyl is defined in B herein and amidino is defined in C8 herein;
    - (p) thioamidino as defined in A<sup>1</sup> herein;
    - (q) amino as defined in C7 herein;
    - (r) aminoacyl as defined in U<sup>1</sup> herein;
    - (s) aminocarbonyloxy as defined in X<sup>1</sup> herein;
    - (t) aminocarbonylamino as defined in W<sup>1</sup> herein;
    - (u) aminothiocarbonylamino as defined in W<sup>1</sup> herein;
    - (v) aryl as defined in J herein;
    - (w) substituted aryl as defined in K herein;
    - (x) arylloxy as defined in F<sup>1</sup> herein;
    - (y) substituted arylloxy as defined in F<sup>2</sup> herein;
    - (z) cycloalkoxy as defined in E<sup>1</sup> herein;
    - (aa) substituted cycloalkoxy as defined in F<sup>3</sup> herein;
    - (ab) heteroaryloxy as defined in K<sup>1</sup> herein;
    - (ac) substituted heteroaryloxy as defined in L<sup>1</sup> herein;
    - (ad) heterocycloalkoxy as defined in M<sup>1</sup> herein;
    - (ae) substituted heterocycloalkoxy as defined in N<sup>1</sup> herein;
    - (af) carboxyl;
    - (ag) carboxylalkyl wherein alkyl is defined in B herein;
    - (ah) carboxyl-substituted alkyl wherein substituted alkyl is defined in C herein;
    - (ai) carboxyl-cycloalkyl wherein cycloalkyl is defined in E herein;
    - (aj) carboxyl-substituted cycloalkyl wherein substituted cycloalkyl is defined in G herein;
    - (ak) carboxylaryl wherein aryl is defined in J herein;
    - (al) carboxyl-substituted aryl wherein substituted aryl is defined in K herein;
    - (am) carboxylheteroaryl wherein heteroaryl is defined in L herein;
    - (an) carboxyl-substituted heteroaryl wherein substituted heteroaryl is defined in M herein;
    - (ao) carboxylheterocyclic wherein heterocyclic is defined in N herein;
    - (ap) carboxyl-substituted heterocyclic wherein substituted heterocyclic is defined in O herein;
    - (aq) carboxylamide;
    - (ar) cyano;
    - (as) thiol as defined in Q<sup>1</sup> herein;
    - (at) thioalkyl as defined in X herein;
    - (au) substituted thioalkyl as defined in C42 herein;
    - (av) thioaryl as defined in C43 herein;
    - (aw) substituted thioaryl as defined in C44 herein;
    - (ax) thioheteroaryl as defined in C47 herein;
    - (ay) substituted thioheteroaryl as defined in C48 herein.

## Patents: Subject Matter (35 U.S.C. 101)

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- **Utility**
  - “anything under the sun made by man”
  - any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.
- **Design**
  - Ornamental design of an article of manufacture
- **Plant**
  - Granted to an inventor who has invented or discovered and asexually reproduced a distinct and new variety of plant, other than a tuber propagated plant or a plant found in an uncultivated state
- **Excluded**
  - Abstract ideas, laws of nature, naturally-occurring phenomena
  - Need to provide useful, concrete, and tangible result

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## Patents: Subject Matter (35 U.S.C. 102)

---

- **Statutory Bars**
  - U.S. (new AIA rules): Patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention
  - Foreign countries: mostly “absolute” novelty or 6-month statutory bar period
- **Not anticipated by prior art**
  - Each and every element of the claimed invention not taught in a single piece of prior art

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## Patents: Subject Matter (35 U.S.C. 103)

---

- Differences between claimed invention and the prior art cannot be obvious to one of ordinary skill in the art
  - Secondary Factors:
    - Education level of inventor/others in field
    - Type of problems encountered in field
      - Rapidity of problems being solved
    - Sophistication of the technology
    - Skepticism of experts
    - Commercial success

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## Patents: Enablement/Best Mode (35 U.S.C. 112)

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- Written description: full description of the invention concluding with at least one claim
- Enablement: Must enable others of ordinary skill in the art to practice the invention without undue experimentation
- Best Mode: Cannot conceal the best mode (best way) of practicing the invention

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## Patents: Utility Applications

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- Provisional Application
  - Valid for 12 months
  - Establishes priority date
  - Will not be reviewed or issue as a patent
- Non-Provisional Application
  - Reviewed by the patent office
  - May issue as a patent

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## Foreign Protection

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- If Filed In U.S.:
  - Paris Convention Priority
    - 1 Year From Filing Date (provisionals count)
  - Wait for Foreign Filing License
    - Certified copy of U.S. Application
- National Filings Without Priority
  - Need Local Counsel (except PCT Stage 1)
- Conventions
  - PCT
  - EPO
  - National Filing

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## Questions

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## **10. HEALTH LAW FUNDAMENTALS**



# Introduction to Healthlaw Bridging The Gap



Alexander G. Bateman, Jr.  
Ruskin Moscou Faltischek P.C.  
1425 RXR Plaza – East Tower - 15<sup>th</sup> Fl.  
Uniondale, NY 11556

Smart Counsel. Straight Talk.

## No Such Thing As “Health Law”



Civil Litigation

Corporate

Criminal Defense

Contracts

Administrative

Employment

Etc.

2

## What We Healthcare Attorneys Do:

- Buying and Selling of Practices
- Mergers & Acquisitions with Hospitals
- Defense of Fraud and Abuse Cases
- Professional Discipline Defense
- Healthlaw Litigations
- Anti Kickback, Stark Law and Referral Law Counseling
- Hospital Privileges Defense
- Compliance Advise
- AND MORE ...



3

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**R/F**  
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Consultants at Law

## Legal Concepts Unique to Healthlaw:

- Prohibition on Corporate Practice
- Fee Splitting
- Professional Misconduct
- E.M.T.A.L.A.
- H.I.P.A.A.
- False Claims

4

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Consultants at Law



# Certificate of Need (CON)



Article 28 – Public Health Law

To establish:

Hospitals  
Skilled Nursing Facilities (SNF)  
Diagnostic & Treatment Centers (Clinics or DTC's)  
Ambulatory Surgery Centers (ASC)

5

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Consultants at Law

# The Regulators



## Medicare – Over 65 or Disabled

- Office of the Inspector General – (OIG)
- F.B.I.
- Department of Justice
- Each of the Southern and Eastern Districts
  - Healthcare Fraud Coordinator
- Healthcare Fraud Strikeforces

6

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Consultants at Law

## The Law

- Title 18 U.S.C.
  - §371 Conspiracy
  - §1351 Mail Fraud
  - §1001 False Statements



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RUSKIN MOSCOU FALTSCHIK & CO.  
Consultants at Law

## Specific Health Care Fraud Crimes (18 USC)

- §1347- Fraud upon “Health Care Benefit Program” Public or Private Funds
  - 10 years – 20 years – Life
- §669 - Embezzlement/Health Care
- §1035- False Statement/Health Care
- §1518- Obstruction of Health Care Investigation

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**The Federal Anti Kickback Statute  
42 USC §1320a-7(b)**

Whoever “knowingly and willfully” solicits, receives, offers or pays remuneration (including kickback, bribe, rebate); Directly or Indirectly, Overtly or Covertly; in Cash or in Kind for the referral of patients paid for by Federal Health Care Program.

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**The Federal Antikickback Statute  
42 USC §1320a-7(b) (cont'd)**

- Criminal – Fine or 5 years
- Civil - \$50,000 penalty per payment
- Admin. – Exclusion from Program

**Advisory Opinion Available**

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## SAFE HARBORS

- AKS – intent based statute
- **IF Precisely** in Safe Harbor – No Violation
- IF Not in Safe Harbor – Depends on Intent



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Consultants at Law

## THE LAW

False Claims Act (FCA)

31 USC §3729-3733

- Treble Damages Penalty - \$5,500 to \$11,000
- Qui Tam Relators – 15-25% Share

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Consultants at Law

**THE LAW**  
**Limitation on Certain Physician Referrals**  
(42 US 1395nn)  
(Stark Law)

1. Prohibits a Physician (MD, DO DDS, DPM, O.D., DC)
2. from making a Referral
3. of a Designated Health Service (DHS)
4. to an entity owned by the physician or family member

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**DHS's**

- Clinical Lab (Blood)
- Physical Therapy
- Occupational Therapy
- Radiology (MRI, CT, Ultrasound)
- Radiation Therapy
- Durable Medical Equipment DME
- Parenteral & Enternal Nutritional & Supplies
- Prosthetics – Orthotics
- Home Health Services
- Inpatient Hospital Services
- Outpatient Speech Therapy

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## Stark Law

- Strict Liability
- 20 Exceptions in law & Extensive Regulations
- Advisory Opinions Available

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## Self Disclosure

### Self Disclosure Available

- To Federal Fiscal Intermediary
- To State Office of Medicaid Inspector General (“OMIG”)

### Formal Self Disclosure Protocol – for AKS Violations

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## New York State

### **Medicaid Fraud Control Unit (MFCU)**

#### **Criminal – Civil – Patient Abuse**

- Part of Attorney General's Office

### **Office of Medicaid Inspector General (OMIG)**

- Audit of Providers
- Civil Enforcement
- Extrapolation
- Criminal Referral

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## **Office of Professional Medical Conduct**

- Physicians
- Physician Assistants
- Specialist Assistant



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## Office of Professional Discipline

- All other Licensed Providers (Acupuncture to Veterinarian)



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## Investigation

- Interview
- Hearing
- Sanctions =
  - Censure and Reprimand
  - Probation with Monitoring
  - Fine
  - Suspension of License
  - Revocation of License



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# The Patient Protection and Affordable Care Act ("OBAMA CARE")

U.S. Supreme Court Says It's Here to Stay

What Happens in January 2013?



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Consultants at Law

# Accountable Care Organizations ("ACOs")



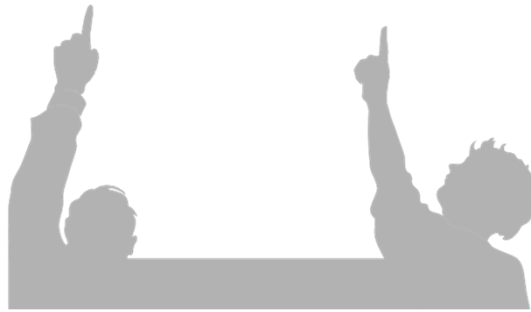
22

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Consultants at Law

# OPEN FORUM

## Questions and Answers



#495355v1

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**R/F**  
RUSKIN MOSCOU FAITS CHEK re  
*Consultant in Law*















## **11. AN OVERVIEW ON JUDGMENT ENFORCEMENT**



## Judgment Enforcement Outline

- I. Laying the Groundwork
  - a. Client Contracts
  - b. Credit References
- II. Patience – Why You Must Have It
  - a. All Judgment Debtors Are Not the Same
  - b. Collateral Pressure
- III. Evaluating a Case and Collection Potential
  - a. The Judgment is Just the Beginning
  - b. Collectability
    - i. Client Records
    - ii. Public Records
    - iii. Perseverance
    - iv. Perseverance
- IV. Managing Client Expectations
- V. Basics of Judgment Enforcement
  - a. What Property is or is not Subject to Enforcement
  - b. Priorities and Lien Docketing
  - c. Four Steps You Should Take to Enforce a Judgment
    - i. Docketing of Transcripts
    - ii. Sheriff's Execution – income and “regular” executions
    - iii. Restraining Notices
    - iv. Subpoenas *Duces Tecum* and *Ad Testificandum*
  - d. What Happens when the Judgment Debtor Ignores You?
    - i. Contempt
    - ii. Arrest
    - iii. Installment Payment Order

















## **12. ETHICAL CONSIDERATIONS FOR BUSINESS AND TRANSACTIONAL LAWYERS**



**ETHICAL CONSIDERATIONS FOR THE BUSINESS  
AND TRANSACTION LAWYER: A PRACTICAL APPROACH**

**Clifford R. Ennico, Esq.  
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E-Mail: crennico@gmail.com  
Internet: www.cliffennico.com**

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- 1. PowerPoint Slide Presentation, “Ethical Considerations for the Business and Transaction Lawyer: A Practical Approach”**
- 2. Some Essential Web Links Relating to the New York Model Rules of Professional Conduct**
- 3. “Some Ethical Aspects of the Business Lawyer’s Job” [reprinted with permission from “Business Lawyers Handbook: What Business Lawyers Do” by Clifford R. Ennico (Biennix 1991-2013)]**
- 4. Form of Retainer Letter – Multiple Clients Forming Corporation or LLC**
- 5. Waiver of Conflict of Interest – Multiple Clients Forming Corporation or LLC**
- 6. Form of Retainer Letter – Hourly Rate**
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- 8. Form of Retainer Letter – Combination of Flat Fee and Hourly Rate**
- 9. Form of Retainer Letter – Percentage Fee**
- 10. Form of Nonrepresentation Letter – Where Retainer Letter Exists**

- 11. Form of Nonrepresentation Letter – Where Retainer Letter Does Not Exist**
- 12. “Marketing the Solo or Small Office Law Practice: Some Real World Tips and Practices” by Cliff Ennico**

## Ethical Considerations for the Business and Transactional Lawyer: A Practical Approach

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## What Business Lawyers Do

- Keep the Client Out of Court!
- What I Spend Most of My Professional Time Doing:
  - Forming business entities (corporations, LLCs);
  - Giving legal advice (and sometimes getting paid for it);
  - Drafting and negotiating contracts;
  - Drafting and negotiating “deals” (er, transactions) for my clients;
  - Communicating with government agencies and regulators
  - Billing clients (my FAAAAAVORITE activity ☺)
  - Marketing the Heck out of my practice

## The Ethical Challenges [Part 1]

- Forming Business Entities
  - “Everybody wants to be my client” [Model Rule 1.13]
  - “You’ve been representing our business for years now, but I’ve got this little thing on the side I need your help with” [Model Rule 1.13(d), 1.7]
  - “Would you consider a barter deal, or perhaps debt or equity in our company?” [Model Rule 1.5]
  - “We’re setting up a subsidiary in Idaho. Can you help us with that?” [Model Rule 5.5, comment 13]

## The Ethical Challenges [Part 2]

- Advising clients
  - “Now, this isn’t really legal advice, but . . . “ [Model Rules 2.1, 5.7]
  - “I’ve never really done this before, but a lot of clients are asking for it . . . “ [Model Rule 1.1]
  - “The law says X, but nobody really enforces it so don’t worry about it” [Model Rule 2.1]
  - “I can’t help you, but my good friend Joe can” [Model Rule 1.1, 1.5]
  - “I’m thinking about hiring you, but could you answer a couple of quick questions for me first?” [Model Rule 1.18]



## The Ethical Challenges [Part 3]

- Drafting and Negotiating Contracts
  - “I want you to protect my interests, but for Heaven’s sake don’t kill the deal! I really need this job . . . “ [Model Rule 1.2(a), 1.3 Comment 1]
    - **Be sure to document your client’s concessions (one of the few really good things about e-mail)**
  - “I’m buying a franchise. There’s some stuff in the franchise agreement I don’t like, but the franchise says it won’t change anything. What can I do about that?” [Model Rule 1.3]
  - “Hey, the other guy made a mistake in my client’s favor . . . “ [Model Rule 4.1]

## The Ethical Challenges [Part 4]

- Drafting and Negotiating “Deals”
  - “I understand you did a great job representing my good friend Joe. I want you to get me the same deal you got him!” [Model Rule 1.6]
  - “I’m not a confrontational person. Can you handle all the negotiations for me?” [Model Rule 5.7]
  - “This other attorney is an idiot; he’ll believe anything I tell him” [Model Rule 4.1]

## The Ethical Challenges [Part 5]

- Interfacing with Government Agencies
  - “I just found out I was supposed to register my company with State X years ago. What do I do?” [Model Rule 1.2(d), 2.1[6]]
  - “The form asks for my home address but I don’t want my home address to be made public . . .” [Model Rule 4.1]
  - “But you TOLD me X wasn’t the case. Now you tell me it is?” [Model Rule 1.3, 1.16]

## Billing Clients

### **Clients HATE surprise invoices:**

- Get retainer letters with ALL clients, on EVERY important matter
- Post your fees on your Website (and stick to them)
- Bill promptly, and often ☺
- Do a detailed “narrative” bill on all matters
- Never charge for discussing a bill

## Your Retainer Letter

- Your “front line” of defense against ethics claims
- Common provisions
  - What services are (and are not) to be performed
  - Your fee and when payable
  - Interest due on overdue bills
  - Fee estimates, and how you will handle changes in the “scope of work”
  - Upfront retainer, and if/when refundable
  - “Fee not based on success”/no guarantee of satisfaction/result
  - Look to client personally for payment (no reliance on legal entity)
  - When you/client can terminate relationship, and what happens on termination
- If client won’t sign, send a “nonrepresentation letter”

## Marketing Your Practice [Part 1]

- “Hey, while working for another client, I just learned you can do X. Why don’t you consider it as well?” [Model Rule 2.1, Comment 5]
- “Could you please give me references to one or two of your other clients for whom you’ve done similar work?” [Model Rule 1.6, Comment 4]
- Your client newsletter [Model Rule 7.3]
- Your Website [Model Rule 7.1]
- Speaking to local business groups [Model Rule 7.1, Comment 7]
  - “Legal information is not legal advice.”
  - **Watch Out for the Q&A at the end of your program**

## Marketing Your Practice [Part 2]

- Can you use social networking sites such as LinkedIn to market your practice? Yes, as long as:
  - Your clients' confidential information (including their identities as clients) is not disclosed (Model Rule 1.6);
  - You do not directly solicit business on your profile page (Model Rule 7.3); and
  - Your page complies with all provisions of Model Rule 7.1 that apply to your law practice website

## Some Tips for the In-House Lawyer

- Don't become one . . . ☺
  - The businesspeople don't like you because you're not "one of them"
  - The outside lawyers don't like you because you're not "one of them"
- What in-house lawyers do
  - Deal with "mixed law/business" situations
  - Do the things that are too small/routine to be outsourced to outside counsel
  - Act as "modem" between outside counsel and the company's executives/manage outside counsel costs
- Read Model Rule 1.13(b) and Comment 3 and pray that you are never in this situation

## Dealing with Ethics in the “Real World”

- Know the rules, and know them cold
  - Read the Model Rules and Comments
  - Read the ethics opinions in the *NYSBA Journal*
- Get a detailed retainer letter with EVERY client and EVERY new matter – don’t rely on “form” documents (not even mine ☺)
- Build a support network of other (more experienced or retired) attorneys
- When in doubt, “yield not to temptation” . . . there’s plenty of other business out there, even in these difficult times.

## One Last Point

“Whenever I have had sleepless nights over my law practice, got myself into an ethical “grey area”, or took an unnecessary risk, it was without exception because I gave in to the temptation to do something ‘nice’ for someone. Being ethical is essential to success in any profession. But being nice can get you killed. The trick is to know the difference, and remember, no one expects lawyers to be nice.”

-- Cliff Ennico  
October 2, 2013

## One More Last Point

***Never let a lack of knowledge,  
experience or talent get  
in the way of your success!***

***GOOD LUCK !!!!***

## Thank You!

### **THE LEGAL JOB INTERVIEW**

**WINNING THE LAW-RELATED  
JOB IN TODAY'S MARKET**



**CLIFFORD R. ENNICO** Esq.

### **THE PARTNER TRACK**

**SUCCESSING IN  
ANY LAW FIRM**



**CLIFFORD R. ENNICO**

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**12. ETHICAL CONSIDERATIONS FOR BUSINESS AND TRANSACTIONAL LAWYERS**

*Speaker: Clifford R. Ennico, Esq.*

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**FACULTY BIOGRAPHIES**  
(IN ALPHABETICAL ORDER)



## ROBERT J. ANSELL

Mr. Ansell represents institutional lenders, closely held businesses, and individuals in all aspects of commercial disputes. Mr. Ansell has significant trial, arbitration, mediation, and appellate experience in both state and federal court. He currently sits on the Brooklyn Law School Alumni Admissions Board, and is a Director of the Huntington Town Chamber of Commerce. In addition to lecturing for the Bridging the Gap Series, he is the Long Island Chair of the New York State Bar Association's biennial Enforcement of Judgments legal education program, and lectures at various Long Island junior and senior high schools on general contract and business law.

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Mr. Bateman is a partner at Ruskin Moscou Faltischek, where he is co-chair of the firm's Health Law Regulatory and Transactional Group. He is also co-chair of the White Collar Crime and Investigations Group and a member of the Corporate Governance Practice Group.

Mr. Bateman's work primarily involves representing health care professionals and companies in the areas of federal and state criminal and regulatory matters such as Medicare/Medicaid fraud and professional disciplinary proceedings. He is active in developing and implementing corporate compliance programs for hospitals and other health care providers and in white collar criminal defense including government funded and private insurance fraud and abuse cases.

Prior to joining the Firm, Mr. Bateman was a trial attorney with the Suffolk County District Attorney's Office where he investigated and prosecuted cases in the areas of felony street crimes, organized crime, narcotics, sex crimes and political corruption. Mr. Bateman is a former chair of the New York State Bar Association Health Section Committee, and is a member of the New York State Bar Association, the Suffolk County Bar Association and the Suffolk County Criminal Bar Association.



## **W. RUSSELL CORKER, Esq.**

Mr. Corker (Russ) graduated from Boston University School of Law in 1974. He has been a trial lawyer for 39 years. After 3 years as an Assistant District Attorney in Nassau County, he began his civil career representing doctors and hospitals in medical malpractice actions, before switching over to represent plaintiffs in medical cases. In 1980, he began lecturing on trial practice, and since that time has given numerous lectures on all aspects of litigation, as well as publishing numerous articles and chapters in several books on litigation. He was the senior litigation partner in a law firm before opening his own office in 2012.

**CLIFFORD R. ENNICO** ([www.cliffennico.com](http://www.cliffennico.com)) is widely considered to be one of America's leading experts on the legal and tax problems facing entrepreneurs and privately-owned businesses.

A native of Yonkers, New York, Ennico is best known as the former host of *MoneyHunt*®, a fast-paced reality TV show for entrepreneurs that aired on PBS nationwide from 1994 to 2003. His weekly syndicated newspaper column, *Succeeding in Your Business*™, known as the “Ann Landers of the business world”, appears in dozens of major newspapers and business Websites throughout North America ([www.succeedinginyourbusiness.com](http://www.succeedinginyourbusiness.com)). He also hosts the "Protecting Your Business" channel for the Small Business Television Network ([www.sbtv.com](http://www.sbtv.com)), and is a frequent contributor to *Entrepreneur* and other small business magazines.

Ennico is the author of several books on entrepreneurship and small business management, including *Small Business Survival Guide* (Adams Media, 2005) and *The eBay Business Answer Book* (AMACOM, \$19.95), and speaks nationwide on the legal and tax issues facing early stage startups ([www.succeedinginyourbusiness.com](http://www.succeedinginyourbusiness.com)).

As a lawyer, Ennico has represented over 15,000 entrepreneurial companies and small businesses in his 28-year career. Formerly associated with the New York City law firms of Willkie Farr & Gallagher and Thacher Proffitt & Wood, Ennico currently practices small business law in his own practice in Fairfield, Connecticut.

Ennico is the author or editor of several legal treatises for Thomson/West, including:

- o *Closely-Held Corporations: Forms and Checklists*, a one-volume handbook for lawyers representing closely-held corporations;
- o *Forms for Small Business Entities*, a comprehensive collection of legal forms and checklists for lawyers representing partnerships, limited partnerships, corporations and limited liability companies (LLCs);
- o *Basic Legal Forms with Commentary*, a collection of legal forms and checklists for solo practitioners and lawyers practicing in small firms;
- o *Basic Legal Transactions*, a step by step practice guide to a wide variety of business, estate planning, real property and family law transactions; and
- o the Business Corporation Law (BCL) and Not-for-Profit Corporation Law (N-PCL) volumes of *West's McKinneys Forms*, the leading legal forms guide for New York State corporate lawyers.

His books for law students and young lawyers include *The Legal Job Interview: Winning the Law-Related Job in Today's Market*; *Your Legal Career: Finding Success and Satisfaction as a Lawyer* and *Business Lawyer's Handbook: An Introduction to the Corporate Counsel's Life and Work* ([www.legalcareer.com](http://www.legalcareer.com)). His next two books, *How to Make Law Review* and *How to Make Partner*, will be released later this year by Kaplan Publishing ([www.kaplan.com](http://www.kaplan.com)).

Ennico holds a B.A. degree, *magna cum laude*, from Dartmouth College, and received his J.D. degree from Vanderbilt University School of Law, where he was Articles Editor of the *Vanderbilt Law Review*. He is a member of the Connecticut Bar Association, the New York State Bar Association, and the Fairfield County Bar Association.

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- Bar Admissions: New York, 1989; U.S. District Court, Eastern and Southern District of New York, 1989. New Jersey, 1989; U.S. Supreme Court, 2004.
- Education: State University of New York at Oswego (B.S., magna cum laude, 1986); Western New England School of Law, (J.D., 1989).
- Activities: Executive Committee Member, New York State Bar Association's Tort, Insurance and Compensation Law Section; Appointed and serves as a New York State Civil Court Arbitrator.
- Awards Received: New York State Bar Association's Tort and Insurance Law Section's Young Lawyer Award.
- Publications: Vehicle Transportation Claims Affecting the Business Owner and Insurers, NYSBA, Torts, Insurance & Compensation Law Section Journal, (Spring 2002 ); Dissecting the Deposition: Practical Considerations for the Effective Litigator, NYSBA, Torts, Insurance & Compensation Law Section Journal (Summer, 2003); Dissecting the Deposition: More Than Just a Set of Questions, NYSBA Journal (July 2003).
- Lectures: "Motor Vehicle Accidents-a Look at Liability Issues and Coverage Concerns", NYSBA (1998); "A review of the Workers' Compensation Claim and Effective Handling", Lorman Education Services (1999); "Winning Your Case at the Deposition", NYSBA (2000 and 2001); "A Review of New York Transportation Claims", Roadway Express (2001); "A Primer on Automobile Litigation", NYSBA (2000 and 2001); "Winning Your Case at the Deposition", NYSBA (2001); "Managing the Litigation Process", American Claims Exhibition Annual Conference (2002); "Evaluating Damages in Automobile Liability", NYSBA (2003), "An analysis of Legal Billing", American Claims Exhibition Annual Conference (2003); "Practical Skills-Basic Tort and Insurance Law", NYSBA (2003); "Litigation Update", NYSBA (2004); "Negotiating Strategies", Progressive Insurance Company (2004); "Dissecting the Deposition - Winning the Case Early", NYSBA Annual Meeting (2004). "Successful Strategies for Automobile Litigation", NYSBA (2004); "Federal Civil Practice: A Primer", NYSBA (2005); "Practical Skills - Basic Tort Insurance Law Practice", NYSBA (2006); "Law School for Insurance Claims Professionals", NYSBA (2006); "Update on Trucking Litigation and Claims", NYSBA (2006); "The Examination Before Trial - A Primer on Depositions in Tort and Personal Injury Cases", NYSBA (2007); "Handling a No-Fault Case", NYSBA (2007); "Keeping Current with Automobile Litigation", NYSBA (2008); "Bridging the Gap", NYSBA (2009).
- Concentrations: Direct insurance defense cases, including automobile, premises, construction, product liability and coverage disputes. Municipal, criminal and compensation law.
- Recent Accomplishments: Robert A. Glick Recognized as a Super Lawyer  
Robert A. Glick in October, 2008 was listed as a Super Lawyer selected in the State of New York. Super Lawyers is a published listing of outstanding lawyers from more than 50 practice areas who have attained a high degree of pure recognition and professional achievement.

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Ellyn S. Kravitz is of counsel to Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP. She specializes in elder law, special needs planning, estate planning, estate administration, guardianship, and veterans' benefits. Ellyn is an authority on issues affecting adults and children with disabilities, and our senior population.

Ellyn is certified as an elder law attorney by the National Elder Law Foundation as accredited by the American Bar Association. She has been accredited by the U.S. Department of Veterans Affairs to present and prosecute claims for veterans' benefits.

She was named as a "New York Super Lawyer" by Law & Politics magazine in 2009, 2010, 2011 and 2012. She was included in the list of Top Women Attorneys in the New York Metro Area for 2012 in the New York Times Magazine.

She is a member of the New York State Bar Association and the National Academy of Elder Law Attorneys (NAELA). She is member of Executive Committee of the Elder Law Section of the New York State Bar Association and the current Vice Co-Chair of the Guardianship Committee. She was former co-chair of the Estate and Tax, the Legal Education and Health Care Committee. She served as past Co-Chair of the Elder Law Committee of the Westchester County Bar Association. Ellyn is also a member of the Estate Planning Council of New York City, Inc.

Ellyn is a member and former co-chair of the Legal Advisory Board of the Long Island Alzheimer's Foundation. She serves on the Legal Advisory Committee of the Evelyn Frank Legal Resources Program of Selfhelp Community Services, Inc. She also serves on the Benefit Committee of the Kellner Family Pediatric Liver Disease Foundation.

She is a frequent presenter to both consumer and professional groups and has provided input to state and national programs addressing legal, financial and other related matters involving persons with disabilities and our senior population.

Ellyn received her Juris Doctor degree from the New England School of Law and her LL.M. in estate planning from the University of Miami. She received her undergraduate degree from the University of Michigan.



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**Vincent R. Martorana** is Counsel in the Corporate & Securities Group with Reed Smith's New York office. His practice includes the representation of clients in domestic and cross-border mergers, stock and asset acquisitions and divestitures, joint ventures, strategic alliances, licensing arrangements, corporate restructurings, private equity investments, and securities offerings. He also regularly provides advice on corporate governance and state laws governing business entities (including Delaware and New York corporate, partnership, and limited liability company law). Vincent has represented a wide range of clients—from start-up and early-stage companies to well-established enterprises—in various industries, including technology, healthcare, pharmaceutical products, consumer products, and energy.

Vincent has extensive experience providing advice on contract drafting, analysis, and interpretation relating to disputes, settlements, and negotiated transactions. He has presented his continuing legal education contract-drafting courses for in-house legal departments and at various other venues, including Practising Law Institute, Strafford Webinars, The Business Development Academy, the National Academy of Continuing Legal Education, the American Bar Association, the New York State Bar Association, the New York City Bar Association, the New York County Lawyers Association, the Brooklyn Bar Association, the Suffolk County Bar Association, and the Westchester County Bar Association.

He is also the author of *Drafting Points* ([www.draftingpoints.com](http://www.draftingpoints.com)), a blog that is dedicated to contract-drafting issues.

Vincent received a J.D. from the University of Chicago Law School and a B.S. in Economics (with concentrations in Finance and Operations & Information Management), *magna cum laude*, from the Wharton School at the University of Pennsylvania.

## George R. McGuire

Mr. McGuire is a Registered Patent Attorney and Chair of the firm's Intellectual Property and Technology Practice Group. He concentrates his practice in all facets of Intellectual Property Law, including, for example, patent and trademark preparation and prosecution, litigation involving intellectual property issues, patent and trademark clearance opinions, patent novelty, validity and (non)infringement opinions, due diligence investigations in merger and acquisition, asset purchase, or other financial transactions, proceedings before the Board of Patent Appeals and Interferences and the Trademark Trial and Appeal Board, negotiations and drafting of technology transfer and license agreements, and computer law matters. Mr. McGuire practiced for five years as a Patent Agent before receiving his law degree.

In addition to his practice, Mr. McGuire is also an Adjunct Professor at Syracuse University Law School where he teaches Computer Law, Internet Law, and Entertainment Law, and has taught and lectured on Trademark and Unfair Competition Law, Intellectual Property and Technology Transfer.



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Justinian Honorary Law Society  
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Member, American Intellectual  
Property Law Association  
Member, Rochester Intellectual  
Property Law Association  
Elected to the 2003 Class of 40 Top  
Business and Community  
Leaders under the age of 40 in  
Central New York

Listed in:

The Best Lawyers in America<sup>®</sup>  
2010-2011, Intellectual Property  
Law

New York Super Lawyers<sup>®</sup> 2007-  
2010, Intellectual Property;  
Intellectual Property Litigation

Who's Who in America

Who's Who In American Education

Who's Who in American Law

Who's Who in Emerging Leaders

Thomas O'Hern is a partner in the Albany law firm of Gerstenzang, O'Hern, Hickey, Sills and Gerstenzang. Tom went to the University of Bridgeport Law School and was admitted to practice in New York in 1986. He is a member of The Albany County Bar Association, New York State Bar Association, The Northern District of New York Federal Bar Association, and is a Life member of the New York State Association of Criminal Defense Attorneys, as well as a former board member of that association.

Since 1992 Tom has been a CLE speaker for the New York Bar Association speaking on such topics as Handling the DWI CASE in New York, Plea Bargaining, Traffic Trials, DWI Trials, Local & Federal Court Practice, Tom has been on the New York State Bar Association Trial Academy faculty since the inception of that program. Tom has spoken for the New York State Association of Criminal Defense Attorneys, The New York State Office of Court Administration, The Albany County Bar Association, The Essex County Magistrates Association, and the Saratoga and Albany County District Attorneys annual Officer Training Programs on such topics as the Ten Myths of DWI, Picking a Jury in a DWI case and cross examination of the field sobriety testing officer, annual legal updates, among other issues.

Tom's practice is limited to State and Federal Criminal Defense.

## DEBORAH A. SCALISE

Deborah A. Scalise is a partner in the firm *SCALISE & HAMILTON, LLP* in Scarsdale, New York. The Firm focuses its practice on the representation of professionals (lawyers, judges, accountants, doctors, dentists, pharmacists, social workers, and government employees) in professional responsibility and ethics matters, and white-collar criminal matters. Before entering private practice, Ms. Scalise held the position of Deputy Attorney General in Charge of Public Advocacy for the Westchester Region for more than two years and was responsible for cases involving consumer frauds, civil rights, public integrity and environmental concerns. Prior to that, she was the Deputy Chief Counsel to the Departmental Disciplinary Committee for the First Judicial Department. In her nine years at the Committee, she litigated complex disciplinary matters including, investigations, hearings and appellate review of attorney ethical misconduct. In addition, she served as an Assistant District Attorney in Kings County for three and a half years where she handled economic crimes and arson cases. Ms. Scalise received a Juris Doctor from Brooklyn Law School and a Bachelor of Arts from John Jay College of the City University of New York. Ms. Scalise also earned a Master of Arts Degree in Forensic Psychology from the John Jay College of the City University of New York.

Ms. Scalise is active in several bar associations and is currently the Immediate Past President of the White Plains Bar Association. She served two terms as Vice President to Women's Bar Association of the State of New York (WBASNY), where she also serves as the Chair of the Professional Ethics Committee. She is a Past President of the Westchester Women's Bar Association (WWBA) where she Co-chairs the Grievance/Ethics as well as the Website Committees. She serves as Outreach Co-chair for both the White Plains Bar and the WWBA and is actively involved in educational programs for students including Take Your Children to Work Day as well as Law Day. She is a member of the American Bar Association and served on the Public Sector Lawyer's Division and Ethics and CLE Committees. She is also a member of the New York State Bar Association where she serves as the Chair of the Continuing Legal Education Committee and as a Member of the Attorney Professionalism Committee and is also a member of the New York County Lawyers Association where she is a Board Member of its Ethics Institute. She is also a member of the Westchester County Bar Association where she served as Co-chair of the Ethics and Professional Responsibility Committee for two years. As a member of the New Rochelle Bar Association, she serves as a Small Claims Court Arbitrator in the New Rochelle City Court. She is also a member of the Brooklyn Columbian Lawyers Association and the Eastchester Bar Association.

Ms. Scalise has coordinated and/or lectured in Continuing Legal Education Programs for the: Appellate Division, First Department; New York State Bar Association: Practicing Law Institute; Women's Bar Association of the State of New York; Westchester Women's Bar Association; Brooklyn Women's Bar Association; Rockland County Women's Bar Association; Pace University Law School CLE Program; St. John's University Law School CLE Program; Fordham Law School CLE Program; CUNY Law School CLE Program; New York State Trial Lawyers Association; New York Civil and Criminal Trial Attorneys Association; New York State Association of Disciplinary Attorneys; New York County Supreme Court Arbitrators; and Westchester County Bar Association. She has also been a faculty member of the Cardozo Law School Intensive Trial Advocacy Program and a guest lecturer on professional responsibility and ethics at Brooklyn Law School, Columbia Law School, Cardozo Law School, Pace Law School and John Jay College.

Ms. Scalise was a contributing author for a chapter in the recently published Oxford University Press's *The New York Rules of Professional Conduct: Opinions, Commentary, and Case Law*. This two volume hardcover set provides attorneys with access to the most current case law, opinions, and in-depth commentary governing ethical conduct. Ms. Scalise has also authored several articles related to professional responsibility and ethics issues for among others, the *New York State Bar Association's Journal*; the *WBASNY newsletter*; the *Westchester County Bar Journal*; and the *New York State Trial Lawyer's Bill of Particulars*. She was profiled in the American Bar Association's Student Lawyer Magazine in its February 2005 issue. In 2012 Ms. Scalise received the *Marilyn Menge Award from WBASNY* and in 2009 Ms. Scalise received the *Westchester County Above the Bar Pace Setter Award*.



Mindy H. Stern is managing partner of Schoeman Updike Kaufman Stern & Ascher LLP, a boutique New York City law firm where she concentrates in real estate, estate planning and estate administration.

Ms. Stern is Secretary of the Real Property Law Section of the New York State Bar Association, and is a member of that Section's Executive Committee. She also Chairs the Committee's Task Force creating a scholarship fund in memory of the Association's deceased former President, Lorraine Power Tharp, and is a member of the Executive Committee's Task Force regarding attorney escrow accounts and a member (and former Co-Chair) of the Section's committee on Not For Profit Entities and Concerns. Ms. Stern currently serves as a member of the Association of the Bar of the City of New York's delegation to the House of Delegates of the New York State Bar Association, and she is a past Chair of the Association of the Bar of the City of New York's Committee on Real Property Law, as well as a former Secretary of the Association's Committee on Cooperatives and Condominiums.

Ms. Stern is an Adjunct Professor at Benjamin N. Cardozo School of Law, where she teaches a Real Estate Contract Drafting course. She has lectured for the New York State Bar Association, Practicing Law Institute, the Real Estate Institute of New York University, and the Association of the Bar of the City of New York and authored numerous articles on a variety of real estate related topics. She is a member of the American College of Real Estate Lawyers, has been voted by her peers to be a New York Super Lawyer since 2008, and was named one of Real Estate Weekly's 100 Women Real Estate Leaders for the 21<sup>st</sup> Century.

## **Jenifer M. Wharton, Esq.**

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Jenifer M. Wharton is a partner in our family law, custody, matrimonial and divorce law firm and was born in Schenectady, New York. Ms. Wharton graduated from the State University of New York at Albany with a B.A. degree in 1991 and from Albany Law School with a Juris Doctor degree in 1994. Ms. Wharton is admitted to the New York Bar and the U.S. District Court for the Northern District of New York. Ms. Wharton is a member of the New York State Bar Association Family Law Section and the Schenectady County Bar Association and presently is Vice President of the association. Ms. Wharton has lectured on matrimonial, family and divorce law for continuing legal education programs sponsored by the New York State Bar Association Family Law Section and also the Schenectady County Bar Association. She has been an attorney advisor for the Schenectady County Bar Association mock trial program, has been a judge for the Albany Law School family law moot court competition and taught trial techniques for mock trial participants. Ms. Wharton serves on the Board of Directors of Family and Child Services of Schenectady, Inc. Ms. Wharton is a member of the International Academy of Collaborative Professionals. She is also a member of the Collaborative Divorce Association of the Capital District. In addition to handling all divorce, matrimonial and family law cases, and in addition to trial work, Ms. Wharton is also trained in handling Collaborative Divorce cases.

Contact Ms. Wharton or another of our family law, divorce, and custody attorneys in the Albany, Schenectady, and Saratoga region for a confidential consultation.