NEW YORK STATE BAR ASSOCIATION

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NYSBA

Environmental Law Section

Fall Meeting

The Otesaga Resort
Cooperstown, NY

October 14-16, 2016

Special pricing for Friday's MCLE Transitional Program (1:30 – 4:45 p.m.) is only $75

THIS PROGRAM PROVIDES UP TO **8 MCLE CREDIT HOURS CONSISTING OF 1.5 CREDIT HOURS IN SKILLS** (Transitional), **5.5 CREDIT HOURS IN PROFESSIONAL PRACTICE** AND **1 CREDIT HOURS IN ETHICS** (Transitional)

NYSBA

SCHEDULE OF EVENTS

Friday, October 14

1:00 p.m. — **Registration**

1:30–4:40 p.m. — **CLE FOR TRANSITIONAL ATTORNEYS (Experienced Attorneys Also Welcome!)**

1:30 p.m. — **Welcoming Remarks**

1:35–2:50 p.m. — **Basic Environmental Issue Spotting** (1.5 Skills)

Speaker: **Michael J. Lesser, Esq.,** Sive Paget & Riesel, P.C., New York City

2:50–3:20 p.m. — **Networking Break/Refreshments**

3:20–4:10 p.m. — **Responding to the Environmental Criminal Search Warrant and Beyond** (.5 Professional Practice)

Speaker: **Frederick Eisenbud, Esq.,** Campolo, Middleton & McCormick, LLP, Ronkonkoma, NY

4:15–4:40 p.m. — **The Attorney's Role During and After the Execution of a Criminal Environmental Search Warrant: Avoiding Conflicts and Preserving Client Confidences** (.5 Ethics)

Speaker: **Veronica L. Reed, Esq.,** Law Office of Veronica Reed, Schenectady, NY

6:00–7:00 p.m. — **Welcoming Cocktail Reception (Cash Bar)**

7:00–9:00 p.m. — **Dinner**

Dinner Speaker: **Jeff Katz,** Mayor Cooperstown, NY will discuss issues facing the towns in the area and also discuss his most recently published book on the 1981 baseball season.

Saturday, October 15

IF STAYING AT THE OTESAGA, BREAKFAST IS INCLUDED IN YOUR ROOM RATE. COFFEE/TEA/DECAF/WATER WILL BE AVAILABLE AT THE MEETING.

8:00 a.m. — **Registration**

8:00 a.m.–12:45 p.m. — **GENERAL SESSION**

8:00 a.m. — **Welcoming Remarks**

Lawrence P. Schnapf, Esq.
Environmental Law Section Chair
Schnapf LLC

New York State Bar Association Update

Scott M. Karson, Esq.
Treasurer
New York State Bar Association

8:45–9:35 a.m. — **SEQRA as an Incentive to Sustainable Development – Replacing the Stick with a Carrot. Three Perspectives on DEC's Pending Changes to Part 617**
(1.0 Professional Practice)
These panelists will discuss DEC's proposed amendments to SEQRA regulations.

Moderator: **Daniel A. Ruzow, Esq.,** Whiteman Osterman & Hanna LLP, Albany, NY

Speakers: **Hayley Carlock, Esq.,** Scenic Hudson, Inc., Poughkeepsie, NY

Lawrence H. Weintraub, Esq., NYS Department of Environmental Conservation, Albany, NY

9:35–11:15 a.m. — **E-Waste and Part 360** (2.0 Professional Practice)
This session will discuss the NYS Electronic Equipment Recycling & Reuse Act, and proposed changes to DEC's Part 360 regulations.

SCHEDULE OF EVENTS

Electronic Waste Recycling & Regulation

Moderator: **Michael S. Bogin, Esq.,** Sive Paget & Riesel PC, New York City

Speakers: **Jennifer Andaloro, Esq.,** NYS Department of Environmental Conservation, Albany, NY

Margaret C. Macdonald, Esq., Sive Paget & Riesel PC, New York City

Bill Monteleone, Green Chip, Inc., Brooklyn, NY

DEC's Proposed Changes to the Solid Waste Management Regulations

Moderator: **Robert M. Rosenthal, Esq.,** Greenberg Traurig, LLP, Albany, NY

Speakers: **Resa Dimino,** Principal, RADimino & Associates, Albany

Jennifer L. Maglienti, Esq., NYS Department of Environmental Conservation, Albany, NY

Thomas S. West, Esq., The West Firm PLLC, Albany, NY

11:15–11:25 a.m. **Beverage Break**

11:25 a.m.–12:15 p.m. **Constitutional Convention Panel** (1.0 Professional Practice)
These panelists will discuss the potential for a constitutional convention in 2017 and its implication for the "forever wild" provisions which have been imbedded in Section 1 of the Constitution since 1894, and for the less well-known "conservation bill of rights" in Section 4 added in 1969, after Earth Day.

Panel Chair: **Prof. Nicholas Adams Robinson,** Elisabeth Haub School of Law at Pace University, White Plains, NY

Speakers: **Katherine Leisch, Esq.,** Chubb, New York City

Thomas A. Ulasewicz, Esq., FitzGerald Morris Baker Firth PC, Glens Falls, NY

12:15–12:45 p.m. **Ethics - Lawyers Who Made Headlines** (.5 Ethics)
This session will discuss ethical lapses that have made the news.

Speaker: **Randall C. Young, Esq.,** NYS Department of Environmental Conservation, Watertown, NY

1:30 p.m. **Softball Game at Doubleday Field**
Who's on First...What's on Second???
Join us for an afternoon of fun and camaraderie. Equipment will be provided.
You will need to leave for the field by 1:00 p.m. to be ready to play at 1:30 p.m. Prior sign up is required on the registration form. All ages welcome!

6:00–7:00 p.m. **Cocktail Reception**

7:00–9:00 p.m. **Dinner**

Dinner Speaker: **Peter Ruppar, Esq.** His topic will be Reflections On A Lifetime of Baseball and the Law.

Sunday, October 16

IF STAYING AT THE OTESAGA, BREAKFAST IS INCLUDED IN YOUR ROOM RATE. COFFEE/TEA/DECAF/WATER WILL BE AVAILABLE AT THE MEETING.

8:30 a.m. **Registration**

General Session

9:00 – 10:00 a.m. **Artificial Turf** (1 Professional Practice)
This program will discuss growing concerns about artifical turf, and legal responses.

Speakers: **George A. Rusk, Esq.,** Ecology and Environment, Inc., Lancaster, NY

Cheryl P. Vollweiler, Esq., Traub Lieberman Straus & Shrewsberry LLP, Hawthorne, NY

10:05 a.m. – 12:00 p.m. **Executive Committee Meeting**

IMPORTANT INFORMATION

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider. **Under New York's MCLE rule,** this program has been approved for up to 8 MCLE credit hours. The break down is 1.5 hours in Skills (Transitional), 5.5 hours in Professional Practice and 1.0 hours in Ethics (Transitional).

Discounts and Scholarships: New York State Bar Association members and non-members may receive financial aid to attend this program. This discount applies to the educational portion of the program only. Under this policy, any member of our Association or non-member who has a genuine basis for his/her hardship, if approved, can receive a discount or scholarship, depending on the circumstances. To apply for a discount or scholarship, please send your request in writing to: Lori Nicoll via email: lnicoll@nysba.org or to her attention at New York State Bar Association, One Elk Street, Albany, New York 12207

Accommodations for Persons with Disabilities: NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Lori Nicoll at 518-487-5563

NEW YORK STATE BAR ASSOCIATION
SECTION AND MEETING SERVICES DEPARTMENT
One Elk Street
Albany, NY 12207

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.

Environmental Law Section
Fall Meeting
The Otesaga Resort
Cooperstown, New York
October 14-16, 2016

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NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

Thank you for participating in today's MCLE live program - **Environmental Law Section Fall Meeting (Cooperstown) on 10/14/2016 - 10/16/2016**.

Please note the following important items:

1. In order to receive your MCLE credit, you are required to complete and return to the registration personnel, at the appropriate times, the Verification of Attendance forms you received with your materials.

2. The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback is important to us. We request that you complete your confidential online program evaluation within the next 72 hours, using the following link:

   Online Evaluation Form - MCLE Live Program:
   https://survey.vovici.com/se.ashx?s=109446f3053941c3

If you have any questions or concerns, please feel free to call (518) 487-5500.

Thank you for choosing NYSBA MCLE programs.

Basic Environmental Issue Spotting

PRESENTED BY:
Michael J. Lesser, Esq.

PRESENTATION OUTLINE
Environmental Issue Spotting 101
Presented at the Fall Meeting of
The Environmental Law Section
Of the New York State Bar Association
1.5 MCLE Credit Hrs. (75 Minutes)
October 14-16, 2016 ©
By Michael Lesser, Esq.
mlesser@nycap.rr.com

I. Introduction

The purpose of this presentation is to provide a procedure to identify categories of N.Y.S. Environmental Conservation Law ("ECL") violations based on an inspection video generated by the New York State Department of Environmental Conservation (the "DEC"). The presentation will also explore the common errors that can be drawn from the review of raw environmental evidence and practical suggestions for the further investigation of environmentally impacted pollution sites.

Why is issue spotting important?

- Due diligence in real estate transactions,
- Avoid criminal or civil liability for new owners, lenders, government bodies
- Establishing affirmative defenses to clean-up liability or violations
- Assume "**guilty or not, you have to pay**" applies in most liability situations
- Municipal Land Banks (new state law)
- State Environmental Quality Review Act ("SEQRA"), ECL Article 8, Environmental Assessment Form ("EAF")

Other issues related to this presentation:

- Evidence collection;
- Forensic Sampling;
- 4th and 5th Amendment Search, Seizure and Self Incrimination;
- criminal enforcement.

For purposes of viewing this video, assume the following facts:

- no NYSDEC (state) permits;
- no prior NYSDEC inspections;
- Facility has a local POTW (sewer) permit;
- Facility is engaged in providing metal plating services which use chemicals and materials containing heavy metal compounds and corrosives.

ASSUME All MATERIALS DEPICTED ON THE DVD, SOLID, LIQUID AND GASEOUS ARE HAZARDOUS TO YOUR HEALTH!!!!!

II. Potential Violations, by NYS Environmental Media

Solid Waste - Definitions, Recycling, Releases, Unauthorized disposal?

Unauthorized SW Disposal - 6 NYCRR Part 360-1.5(a)(1)(2),
Unauthorized SWMF - 6 NYCRR Part 360-1.7(a)(1)

Regulated Waste (Industrial Commercial Process)(Transporter Violations)
6 NYCRR Part 364

Hazardous Waste, ECL Article 27, Title 9, 6 NYCRR Part 371

Characteristic Categories (6 NYCRR Part 371.3)
Ignitable
Corrosive
TCLP (toxic leachate test, includes heavy metals)
Reactive

PCB (NY only)

Listed Hazardous Wastes by Industrial Process (Part 371.4)
(HW categories are not mutually exclusive)

Hazardous Waste Management Fed. Delegation
(RCRA derived regulations)

6 NYCRR Parts 372 and 373
Standards for Generators, Transporters, TSDFs,
Permit Requirements for TSDFs and Transporters,
Labeling Requirements, Reports, Manifests, Records Retention,
Financial Assurance, Safety, Storage
(the RCRA "Home Run", approx. 25 multiple facility violations)
http://www.dec.ny.gov/chemical/8770.html

Hazardous Substance Violations, ECL Articles 37, 40
(Product vs. Waste dilemma)
6 NYCRR Parts 595-597, 598
Haz. Sub. releases
Chemical Bulk Storage, Spill Reporting Stds, inspections
tank registrations, closure requirements,
stds for pipes and valves (infrastructure)
Is this a CBS Facility by Definition?
- Above ground tanks on site (185 gallons)
- Non-stationary tanks storing 1,000kg/2,200 lbs
(excludes 55 gallon drums)

- Unclosed tanks
- USTs (any capacity) ?

(excludes PBS, "petroleum and process tanks")

Water Quality Violations – ECL Article 17

Are there water pollutants, point sources, permits, impacted waterways of the state, and releases depicted in the video? **Groundwater is a NY waterway.**

GA Groundwater Permit Standards

6 NYCRR Part 703, 703.5, 703.6 (standards)

[ex. Effluent limit for cyanide is 400 ppb]

ECL §17-0501 (non-point source)

Point Source: "discernable, confined and discrete conveyance"

- ECL 17-0501(16)

ECL §17-0701(1)(a) and (b), unpermitted construction/use

ECL §17-0803

ECL §17-0807(4) [recall city POTW permit]

Air Violations

Are there HAPs? Emission source(s)? Permits? Registrations?

Unpermitted Emission Source, 6 NYCRR Part 201,
Title V Eligible, 6 NYCRR Part 201-6
Minor Facility Registration, 6 NYCRR Part 201-4
Public Nuisance, 6 NYCRR Part 211.2
Generic Opacity Prohibition, 6 NYCRR Part 211.3
PHL Section 225, NYSDOH Nuisances Which m\May Affect Life and Health

Surface Coating Process Regulations, 6 NYCRR Part 228

- 6 NYCRR Part 228.9 - allows for inspections to determine if Part 228 applies if process is not specifically listed in facility table.

III. Reporting and Miscellaneous Violations

- Unauthorized Disposal/ Possession/Transportation of Hazardous Wastes, ECL 27-0914(1-3)

- Failure to Report a Spill? ECL 17-1743, 6 NYCRR Part 597

DEC HOTLINE: 1-800-457-7362 (In NYS)
1-518-457-7367 (Outside NYS)
DEC Tip Line: 1(800) TIPP DEC (for suspected ECL violations)

- Toxic Release Index or TRI, SARA Title 3, MSDS for each chemical

- Failure to make waste determination? (both as a solid and hazardous waste)? 6 NYCRR Part 372.2(a)(2)

- Superfund/ Remediation? Article 27, Title 13, 6 NYCRR Part 375

- CERCLA Natural Resource Damages? 42 USC 9607(f)

- Fish/Wildlife, Lands/Forests/ Tidal or Freshwater Wetland/ Art. 15 waterways

- Federal Violations, Note CERCLA Emergency Clean Up Authority? ($1,000.00, or more per drum removal)

- Local Law Violations? (Hint: recall the local POTW, see V.below)

- ECL Summary Abatement (Imminent threat emergency authority)? ECL 71-0301

- Evidence Seizures (failure to seize garden hose by Blue Lagoon)

- Dye Test to confirm source releases of Blue Lagoon

IV. NY and Federal Labor Law/ Indoor Air Quality Violations

NYSDOH – Indoor Air Quality Stds -
http://www.health.state.ny.us/environmental/indoors/air/guidance.htm

USEPA – Indoor Air Quality Stds
http://www.epa.gov/iaq/pubs/index.html

N.Y.S. Labor Law

§ 299. Ventilation he factory work room excessive heat be created therein, there shall be provided, maintained and operated such special means or appliances as may be required to reduce such excessive heat.

2. All machinery creating dust or impurities in quantities tending to injure the health of employees shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dusts or impurities; such fan shall be kept running constantly while such machinery is in use …….

3. If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any workroom of a factory, in quantities tending to injure the health of the

employees, suction devices shall be provided which shall remove such impurities from the workroom, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released.

§ 875. Definitions. When used in this article:

2. "Toxic substance" means any substance which is listed in the latest printed edition of the national institute for occupational safety and health registry of toxic effects of chemical substances or has yielded positive evidence of acute or chronic health hazards in human, animal or other biological testing.

Material Safety Data Sheets (state MSDS equivalent)

§ 876(4). Subject to the limitations set forth in section eight hundred seventy-seven of this article, any manufacturer, importer, producer or formulator of any toxic substance shipped or transported or sold for any use within the state must provide, upon request, the following information:

(a) the name or names of the toxic substance, including the generic or chemical name;

(b) the trade name of the chemical and any other commonly used name;

(c) the level at which exposure to the substance is determined to be hazardous, if known;

(d) the acute and chronic effects of exposure at hazardous levels;

(e) the symptoms of such effects;

(f) the potential for flammability, explosion and reactivity of such substance;

(g) appropriate emergency treatment;

(h) proper conditions for safe use and exposure to such toxic substance;

(i) procedures for cleanup of leaks and spills of such toxic substance.

US Department of Labor
Occupational Safety and Health Administration http://www.osha.gov/

Definition of Imminent Danger

Section 13(a) of the Act defines imminent danger as ".....any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

Requirements. The following conditions must be met before a hazard becomes an imminent danger:

- There must be a threat of death or serious physical harm. "Serious physical harm" means that a part of the body is damaged so severely that it cannot be used or cannot be used very well.
- For a health hazard there must be a reasonable expectation that toxic substances or other health hazards are present and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency. The harm caused by the health hazard does not have to happen immediately.
- The threat must be immediate or imminent. This means that you must believe that death or serious physical harm could occur within a short time, for example before OSHA could investigate the problem.
- If an OSHA inspector believes that an imminent danger exists, the inspector must inform affected employees and the employer that he is recommending that OSHA take steps to stop the imminent danger.
- OSHA has the right to ask a federal court to order the employer to eliminate the imminent danger.

V. NYS Sewer Regulation (POTW)

NY Model Sewer Law
http://www.dec.ny.gov/chemical/8729.html

- **Section 902 - General Prohibitions**

  No user shall contribute or cause to be contributed, in any manner or fashion, directly or indirectly, any pollutant or wastewater which will interfere with the operation or performance of the POTW. These general prohibitions apply to all such users of a POTW whether or not the user is subject to National Categorical Pretreatment Standards, or any other National, State, or Local Pretreatment Standards or Requirements.

- **Section 1115 – Criminal Penalties (in part)**

- Any person who willfully violates any provision of this Law or any final determination or administrative order of the Superintendent made in accordance with this Article shall be guilty of a Class A Misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than Five Hundred Dollars ($500) nor more than One Thousand Dollars ($1,000), or imprisonment not to exceed one (1) year or both. Each offense shall be a separate and distinct offense, and, in the case of a continuing offense, each day's continuance thereof shall be deemed a

separate and distinct offense.

- Any User who knowingly makes any false statements, representations, or certifications in any application, record, report, plan or other document filed or required to be maintained pursuant to this Law, or wastewater permit, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required under this Law shall be guilty of a Class A Misdemeanor and, upon conviction, shall be punished by a fine of not more than One Thousand Dollars ($1,000.00) per violation per day or imprisonment for not more than one (1) year or both.

- **New Sewer Regulations**
- http://www.dec.ny.gov/regulations/39559.html

- **Sewage Pollution Right to Know Act (ECL 17-0826-a)**
- http://www.dec.ny.gov/chemical/90315.html

- **Sewage Pollution Right to Know Act: Another Regulatory Requirement for POTW Operators, by Michael J. Lesser**
- http://nysbar.com/blogs/environmental/spill%20article_201307291212.pdf

VI. ASTM Phase 1

https://www.astm.org/Standards/E1527.htmhttps://www.astm.org/Standards/E1527.htm

VII. What ECL Violations Did you Spot? Conclusions and Recommendations

Responding to the Environmental Criminal Search Warrant and Beyond

PRESENTED BY:
Frederick Eisenbud, Esq.

"Responding to the Execution of an Environmental Search Warrant and Beyond: Practice Tips"

By: Frederick Eisenbud[1]
Head of the Environmental and Land Use Group
Campolo, Middleton & McCormick, LLP

INTRODUCTION

The focus of this presentation is not specific procedures in the Criminal Procedure Law applicable to search warrants, or procedural steps available to you after a search has been conducted, and criminal charges are filed. Rather, the intent here is to give you practical things to think about that may be helpful to your client if an environmental criminal search warrant issues for your client's place of business.

The specific topics that will be discussed are: (1) What can you do if you learn of the execution of a search warrant in time to get to the property before the search is completed; (2) Are there things you can do after the search warrant is executed to avoid criminal charges from being filed altogether, and (3) If criminal charges are filed, is there a mechanism for successfully arguing to the court that the charges should be dismissed in the interest of justice. "2" and "3" are only applicable if the alleged environmental misconduct did not create seriously adverse environmental conditions, and your client does not have a history of violations.

You may think that such cases do not frequently arise, but you would be mistaken. At least in Region 1 of the DEC, the majority of criminal cases that start with the execution of a search warrant by Environmental Conservation Officers ("ECOs") are cases that should have been handled administratively in the first instance, and never should have been brought criminally at all. In the author's opinion, this occurs because ECOs go to prosecutors to get search warrants, and the prosecutors are not familiar with all the alternative options that are available. Police Officers dealing with Penal Law violations rightfully think simplistically: is there probable cause to believe that a crime has been committed, and that the person or persons that are the target of their investigation are responsible. Environmental crimes arise whenever it can be shown that any provision of the ECL or the DEC's regulations are violated with any of the criminal intents set out in the Penal Law, including criminal negligence. Thus, while virtually any violation of the DEC's regulations CAN be treated as a crime, someone in charge needs to ask, is it appropriate to do so under the facts of the specific case presented? There is always the option of treating the violation administratively, not criminally, but ECOs do not

[1] Frederick Eisenbud graduated from Hofstra University Law School in 1975, where he was Editor-in-Chief of the Law Review. After serving in the United States Justice Department's Criminal Division, Appellate Section as an Honor Law Graduate, he became an Assistant District Attorney in the Office of the Suffolk County District Attorney's Office. In 1984, Fred formed and headed the first full-time Environmental Crime Unit in the State of New York at the local (District Attorney) level, and during his three years had more convictions for environmental crimes than the Attorney General's Office had in the rest of the State combined. He obtained the first two jail sentences in the State of New York for environmental crimes. The focus of his practice for more than 30 years has been on environmental law and land use matters.

seem to consider this option. There is nothing that compels them to bring the facts of their investigation to the Regional Attorney to get his or her opinion as to how the case should be handled. Prosecutors, who are not well trained when it comes to handling environmental crimes, are left with cases which should not have been given to them in the first place. It is your job, as the attorney for the accused, to try and persuade the prosecutor to consider the option of not prosecuting, and to simply leave it to the DEC to handle administratively.

HELPING A CLIENT THOUGH AN ENVIRONMENTAL SEARCH WARRANT

It may happen in your career that a client who owns a manufacturing facility calls you one day to announce that Environmental Conservation Officers, State Troopers, and a hoard of support folks such as laboratory technicians, have shown up as the doors opened for business with a search warrant. Your client asks you to come to the facility. Unless you are too far away to make a trip reasonable, you should assume that the folks carrying out the search warrant will be there for at least a half day, and probably longer. Go to the facility if you can.

1. Upon arrival, talk with your client, presumably, the president of the company, and get a copy of the search warrant if one was provided to your client. If a copy was not provided, find out who the officer in charge of the warrant is, introduce yourself as the attorney for the corporation, and request a copy of the warrant. This is very important because the warrant will define the scope of the search. Don't assume the officers will stick to the specifics spelled out in the warrant.

    A. For example, I frequently see officers come in and immediately dismantle internal surveillance cameras and DVRs that record what the cameras capture. The reason is obvious – they do not want to have their actions recorded. This is not likely to be authorized by the warrant. Just make note of it for later use.

2. Find out from your client where the employees are, and whether the officers will permit them to leave, or have ordered them to stay together in one or more rooms, or outside the building, until they are interviewed.

    A. Unless the warrant authorizes seizure of employees, which is very unlikely, it is improper for the officers to require the employees to remain until interviewed.

    B. Since no work is going to take place anyway, suggest to your client that he or she permit you to announce to the employees that they should shut down any machinery they were operating, and go home.

    C. You should then talk to the officer in charge about the employees. Tell the officer that the head of the company is authorizing the employees to leave. Further, tell the officer that you would like the opportunity to speak with the employees for the purpose of advising them of their rights, specifically, that they may talk with the officers if they wish to do so, with or without an attorney present, but that they need not do so and can insist on leaving. It is very unlikely that the officer will detain the employees at that point because the Fourth Amendment violation comes so clearly into focus.

D. Why not simply instruct the employees that they should not talk with the officers? You should avoid taking any action that can be construed with interfering with the execution of the warrant, and with the investigation of the officers.[2] They do not have the right to insist that employees talk with them, but they definitely do have the right to talk with anyone willing to do so voluntarily. You are not the employees' attorney. Nevertheless, if you wish, you may advise the employees that if any of them wish to talk with the officers, and would like to have an attorney present, you can sit in if the employee likes. You should make clear, however, that you are representing the corporation and, most likely, the owner, and not the employee. You should also inform the employees that, if they would like to have counsel present before talking with anyone, you can arrange to have separate counsel come to the facility to represent them, and answer any questions they may have. You should ask the owner of the company to pay for such representation, at least during the execution of the search warrant.

E. It is not unusual for officers who participate in the execution of a search warrant to go to the homes of employees late at night to try and coerce them into talking to the officers without an attorney. At the first opportunity presented, usually the day following the search warrant, it is advisable for you to have the owner of the company give a written statement to every employee informing them that officers may go to their homes to talk with them, and to remind them that they may speak with the officers if they want, but that they also have the absolute right not to talk with these officers. In addition, the owner should advise the employees that, if they wish to talk with the officers, but to have an attorney present, arrangements will be made to provide an attorney for the employee (other than the attorney for the company and owner).

F. As a practical matter, employees almost never want to talk with the officers, and will take the opportunity to go home early. They also will be relieved to learn that they need not talk to officers who go to their homes, regardless of what the officers may say to try and persuade them otherwise.

3. At the outset, you should ask the officer in charge whether an Assistant DA or an Assistant Attorney General is working with the officers. Request the name and telephone number of the attorney, and contact that person to introduce yourself. Get the attorney's email, and then, if any misconduct is observed during the execution of the warrant, you should promptly email your complaint to the attorney supervising the officers. Even if it does no good, you have begun to create a record of the conduct of the officers.

4. Meanwhile, the officers are going through file cabinets and computers pursuant to the warrant. Typically, they are authorized to seize hard drives from computers, along with a broad category of documents. This of course can be a disaster for the company,

[2] New York Penal Law § 195.05 defines obstructing governmental administration in the second degree as follows: "A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act ...." The elements of the offense are: 1) intent; 2) obstruction or impairment of a government function, or preventing or attempting to prevent the performance of that function by 3) physical interference. *People v. Stumpp*, 129 Misc.2d 703, 493 N.Y.S.2d 679, 680 (1985). Probable cause to arrest for a violation of § 195.05 may be predicated on, amongst other things, obstructing a lawful search. Id.

which thereafter may have none of the computer and hard files needed to run the business.

A. While it is too late once the search warrant is being executed, you may wish to suggest to your clients in heavily regulated businesses that generate regulated waste that they not only scan all documents, and save everything both on hard drives and external discs, but they also save everything on the cloud. This will permit the business to be up and running quickly after the search warrant is over.

5. The officers are required to leave the owner a receipt "itemizing the property taken". CPL §690.50(4). Frequently, this requirement is honored in the breach, but the information is critical to the ability of the owner to know what must be reproduced. You may request the officer in charge's permission to photograph the folder label on everything taken, and to also photograph the actions of the officers in carrying out the warrant. If you are denied the right to do so, you may have an issue for later because some courts have ruled that the right to photograph or video the actions of peace officers is protected by the First Amendment.[3] However, it is not clear that you are free to record conversations between officers in New York unless you are participating in the conversation. You may wish to advise the officers that you will be recording video only and not audio.[4]

6. Environmental Search Warrants almost always have provisions authorizing the officers to take samples. It is critical that you be able to observe samples being taken to make certain they are being taken properly. You should request the officer in charge's permission to have someone present when samples are taken, and to photograph or videotape or otherwise record each sample. You should discuss how far back the person must be, and you should assure the commanding officer that the person or persons taking pictures or video will not do anything to interfere with the execution of the warrant. If you are able to get a consultant to the site of the warrant fast enough, you may also request permission to take "split samples" so that you can have your lab analyze the same sample that the officers will have analyzed.

A. The commanding officer may well deny you the right to view what the officers are doing, and to take your own samples, and you should record exactly what took place leading up to the refusal to permit you protect your client. In addition, you should email the prosecutor in charge your objection to being denied the right to

[3] *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (Illinois wiretapping statute "likely violates the First Amendment's free-speech and free-press guarantees" when applied to private citizens who videotape police officers performing their duties in public.); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (Recording law enforcement officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern.); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000) (There is "a First Amendment right, subject to reasonable time, manner, and place restrictions, to photograph or videotape police conduct.").

[4] New York's wiretap statute makes it unlawful for a person to engage in "mechanical overhearing of a conversation" without the consent of at least one party. N.Y. Penal Law § 250.05. The definition of "mechanical overhearing" expands the scope of the statute by applying to instances where electronic devices can eavesdrop on "face to face" conversations. *People v. Basilicato*, 64 N.Y.2d 103, 114 (1984), and the term "devices" extends to cellphones. *See, e.g.*, *People v. Badalamenti*, 27 N.Y.3d 423, 432, 54 N.E.3d 32, 37 (2016) (finding that recording a phone conversation with the voice memo application constituted "mechanical overhearing").

observe where samples were taken from, and how they were taken. What you should not do is to interfere with the execution of the search warrant (*see* footnote 2, *supra*)..

AFTER THE WARRANT IS EXECUTED, IF THE FACTS WARRANT A PROACTIVE DEFENSE, DON'T WAIT FOR THE PROSECUTOR TO ACT

After the warrant has been executed, your work, as attorney and counselor, really begins.

1. Contact the prosecutor in charge of the case. Typically, this will be an Assistant Attorney General but it could also be a local Assistant District Attorney. Advise the prosecutor that you represent the corporation and its owner, and that, prior to the case going to a Grand Jury and before any felony or misdemeanor complaints or informations (CPL § 100.05) are filed, you would like to discuss an appropriate disposition with the prosecutor. The prosecutor typically will agree to do so as soon as the laboratory results come back. Confirm your request in writing.

2. Interview the owner of the company to determine if he or she has any idea what the focus of the search warrant is – what was going on that led to the search? Ascertain the regulatory history of the site – were there prior inspections, consent orders, notices of violation, or the like that would have placed your client on notice what was wrong and requiring that the problem be corrected. Get copies of everything the company has and review everything carefully.

3. As quickly as possible, file FOIL requests with all appropriate regulatory agencies for information about actions taken at the site of the search warrant (e.g., US EPA, NYS DEC, County Health Departments, and Fire Marshals). You may wish to also order a report from a company like EDR (http://edrnet.com/) that can provide you with a report of available regulatory information about your site and surrounding properties, frequently within 24 hours or less. However, you should not rely exclusively on such reports, and must check the records of the key regulatory agencies yourself.

4. Have the owner notify employees that its attorney would like to interview all employees who were present for any stage of the search warrant, and that, while they are under no obligation to talk with you, they may do so on company time in a private room on the premises. With the consent of the owner, advise the employees that anything they tell the attorney will not be discussed with the owner. Ascertain whether any employees were "seized" by officers and told they could not leave until they are interviewed, and get as many details as you can as to what was said, and by whom. Ask what they observed throughout the execution of the search warrant in terms of where the officers went, and what was taken, including any physical samples of any kind (e.g., liquid or sludge samples from storm drains). Ask each employee if they are aware of any conduct at work by anyone that they did not believe was proper and get as much information as you can about any such knowledge.

5. Persuade your client that a qualified environmental consultant and engineer should be retained as quickly as possible to perform an investigation of the property to determine if unpermitted discharges caused contamination of soil. The consultant/engineer should be retained by the attorney, and the agreement should be clear that the consultant is retained to assist the attorney to defend the company, and its officers and employees, should criminal charges arise. Note that, if your client owns the property, there may be reporting requirements which arguably the owner of the property will be required to report to the DEC. (*See* 6 NYCRR §§ 613-2.4, 613-3.4, and 613-4.4, effective October 11, 2015). The decision whether to release the results of your investigation should be made by the attorney, and the agreement with the consultant should reflect this.

6. If storm drains and the like are contaminated, you must discuss with your client whether to immediately arrange for remediation, knowing that the results likely will be available to the prosecutor. If heavy contamination was found, so that each day it rains more contaminants will leach towards the water table, you may wish to move ahead with remediation anyway. Depending on your client's history regarding past violations, your recommendation may be that you intend to give the prosecutor all the information that is found, along with all actions taken to bring the company into compliance. Assuming your client agrees to this approach, arrange to have the contaminants pumped out by licensed companies so the waste is taken to a proper facility for disposal. After storm drains and leaching pools are cleaned out, take end-point samples to make certain levels of contamination are within acceptable range.

7. Concurrently with sampling obvious areas of concern, the consultant/engineer should conduct an environmental audit of practices and procedures. The goal here is to identify any potential regulatory violations, and to make changes as quickly as possible to make certain going forward that the client is fully compliant with environmental laws and regulations. During the course of this audit, instruct the consultant/engineer to look for all waste streams that are generated, and how changes in procedures might result in the reduction of the quantity of waste that is generated. Have the consultant/engineer work with the owner to prepare an SOP (Standard Operating Procedures) for the company, and arrange for employee training so they fully understand how to operate without violating laws and regulations. The goal is to bring the company into full compliance, if possible, before the prosecutor is ready to discuss the case.

8. Once you have all the information you need, prepare a list of arguments why this case should be handled administratively by the DEC rather than criminally by the Attorney General or District Attorney. If your client is a bad actor, do not bother, but you may find that your client wants to do the right thing, and no one previously inspected his or her operation to identify areas where correction is required.

   A. The regulatory history is most important. You may find that your client has been

operating for many years without ever being inspected by a regulator. Argue that, as your client did in this case, had an inspection been done, your client would have promptly done whatever was necessary and more to bring the facility into compliance.

B. Assuming the client was not inspected previously, or that the client was inspected but the areas of concern identified as a result of the search warrant were not identified by the previous inspector, look at the impact of your client's actions. Did it cause soil contamination? If it did, but your end point samples demonstrate that the soil below the levels of contamination is within acceptable limits, there is a good argument that the contamination never moved down to groundwater.

C. Now your discussion becomes philosophical: what is the purpose of our administrative system, compared to the purpose of the criminal enforcement system?

(1) The primary goal of administrative regulations is to bring the regulated community into compliance. This is done through inspections, Consent Orders which set out the violations and define specifically what the regulated entity must do in order to come into compliance, and by imposition of penalties. The DEC need not show that regulations or statutes were violated with any particular intent. The primary goal of criminal enforcement, particularly as applied to environmental crimes, should be punishment and deterrence, and should be reserved for the most egregious bad actors.

D. This is the time to discuss any misconduct by the ECOs who executed the search warrant:

(1) Did they violate the Fourth Amendment rights of all employees by requiring them to remain in one or two rooms until they were interviewed, not letting them make calls or even to go to the bathroom, or even worse, did the ECOs keep the employees outside in cold weather until interviewed?

(2) Did they dismantle the surveillance system so their actions would to be recorded, even though the search warrant does not authorize this to be done?

(3) Did the ECOs, potentially in violation of the First Amendment, refuse to permit the actions of the officers during the execution of the search warrant to be photographed or videographed, even though the ECOs were assured that the people taking pictures or video would not interfere in any way with the movement or actions of the ECOs?

(4) Did the ECOs seize documents which the warrant did not authorize them to seize?

(5) Did the ECOs refuse to permit anyone to be present, with our without photography or videography equipment, when samples were taken from around the property? Did they refuse to allow a qualified consultant retained by the owner to take split samples when they were taken?

(6) Is the type of misconduct identified in your case repetitive of the same conduct by these same ECOs on other cases? If so, inform the prosecutor that you are not just looking to quash the evidence obtained during the search, but to have the entire case thrown out in the interest of justice as the only way that the ECOs will be deterred from violating constitutional rights of employees when they execute search warrants.

E. Finally, be prepared to discuss each and every factor a Judge must consider when presented with a motion to dismiss in the interest of justice pursuant to CPL§ 170.40. The factors to be considered on such motion are:

(a) “The seriousness and circumstances of the offense”;

(b) "[T]he extent of harm caused by the offense;

(c) "[T]he evidence of guilt, whether admissible or inadmissible at trial;

(d) "[T]he history, character and condition of the defendant;

(e) "[A]ny exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant";

(f) [T]he purpose and effect of imposing upon the defendant a sentence authorized for the offense”;

(g) "The impact of a dismissal on the safety or welfare of the community”;

(h) “The impact of a dismissal upon the confidence of the public in the criminal justice System”;

(i) "[A]ny other relevant fact indicating that a judgment of conviction would serve no useful purpose”.

F. If you are unable to persuade the prosecutor to decline prosecution in favor of referring the case to the appropriate regulatory agency to proceed with administrative enforcement, you can still make a motion to dismiss pursuant to CPL § 170.40 once criminal charges are filed. Hopefully, the prosecutor will view the case as more trouble than it is worth, and will conclude that not proceeding with criminal charges is the best way to achieve justice in your client’s case.

The Attorney's Role During and After the Execution of a Criminal Environmental Search Warrant: Avoiding Conflicts and Preserving Client Confidences

PRESENTED BY:
Veronica L. Reed, Esq.

ATTORNEY'S ROLE DURING & AFTER THE EXECUTION OF AN ENVIRONMENTAL SEARCH WARRANT

Avoiding Conflicts & Preserving Client Confidences

Environmental Law Section Fall Meeting
October 14, 2016

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Attorneys for corporate/entity clients should consider conflicts and the proper handling of confidential information well before a criminal environmental search warrant, as this case study is intended to show:

1 CASE STUDY

1.1 COVERING A MULTITUDE OF SINS

Acme Pipe Company, a New York Corporation trading on the NYSE, is a pipe fabricator and manufacturer located in Oswego, New York. Acme has 500 employees. The President and CEO Jim Penny also oversees the day-to-day operation, which is led by the Plant Manager Roger Putts.

Acme's manufacturing process results in industrial wastewater. Although the facility is equipped with a wastewater treatment plant, it is seldom running because of its high operational costs. Instead, Acme employees routinely discharge industrial wastewater onto the ground or into the woods on an adjacent lot which also contains a trout stream. Acme business documents indicate that untreated wastewater is stored in "Tank 8". Acme also routinely brings in truckloads of fill to spread over the site contamination. Acme's annual report to shareholders includes statements that it complies with all applicable laws, regulations and permits.

In April, when local residents complained that tap water was frequently brown with visible sediment and that dead fish were a reoccurring phenomenon in the trout stream, a local newspaper began investigating. Shortly thereafter, local residents commenced civil suits for trespass and nuisance, naming Acme and Acme's officers, directors and employees individually, including Jim Penny and Roger Putts.

In May, Acme's in-house corporate counsel, Jenny Dedlock sent an email to various Acme employees notifying them of the civil actions and inviting anyone with concerns to contact her. The email did not include any other information.

Q1. Is this email protected by attorney-client privilege? Is it protected by attorney work product privilege?

1.2 THE INTERLOPERS

Acme's board of directors and management decided to bring in outside counsel for an internal review of its manufacturing practices. Acme hired Iris & Marigold LLP ("Iris"). An Audit Committee was designated and led by Mr. Penny. On March 24th, the Committee met with Iris' counsel and the scope of the Iris review was determined and agreed. The investigation was designated the "Audit".

Q2: Why is it important to establish the scope of the Iris review prior to start of the Audit? Is Iris' status as outside counsel significant?

The Audit Committee determined that Acme would self-report any problems and fully cooperate with government regulators, including the U.S. Environmental Protection Agency (EPA) and New York State Department of Environmental Conservation (DEC), and that Acme would, if necessary, report any findings to Acme's third party auditor, Ernst & Young LLP.

On June 1st, Mr. Penny received an email from Iris attorneys asking him "for an hour of his time to discuss certain aspects of the Audit". On June 2nd, Mr. Penny and the Iris attorneys met as requested in the email. Later, during his criminal trial, Mr. Penny and the Iris attorneys disputed whether or not the discussion was an interview for the purposes of the Audit investigation.

Q3: Mr. Penny testified that he had no recollection of being provided with what type of warning prior to the start of the discussion on June 2nd?

Q4: Mr. Penny believed that the June 2nd conversation with the Iris attorneys was protected by attorney-client privilege. Is he correct?

The Audit revealed several accounting irregularities, OSHA violations and possible violations of various environmental regulations with respect to Acme's handling of its wastewater.

In late June, Iris attorneys advised Mr. Penny that he should secure independent counsel with respect to a possible government investigation and the ongoing civil suit. Mr. Penny retained Allswell & Good to represent him individually.

1.3 A Turn of the Screw

In July, the EPA received an anonymous tip from an Acme employee that the wastewater treatment facility was not operating. Officials from the EPA arrived at the facility for an unannounced inspection. Mr. Penny granted permission for the inspection which subsequently revealed the non-operating treatment facility and a non-existent Tank 8.

In August, Acme restated its earnings to include $2.2 billion in previously undisclosed operating expenses. The SEC and U.S. Attorney's Office commenced formal enforcement and Grand Jury investigations of Acme and its executives, including Mr. Penny.

In August, with Acme's authorization, government investigators interviewed the Iris attorneys, including the attorneys who had the conversation with Mr. Penny in June. The investigation resulted in evidence that Acme and individual employees may have committed various crimes involving environmental pollution, worker safety violations, violations of the Clean Water Act, and misappropriation and divestitures of public funds associated with various contracts held by Acme.

A grand jury issued at 34 count indictment and a search warrant was executed at the Acme plant and offices. The warrant was examined by Jenny Dedlock and multiple paper and electronic records were seized, including 15 laptops.

1.4 Attorney and Client

Mr. Penny's criminal defense attorneys, Allswell & Good, moved to compel the production of the records obtained by search warrant on the grounds that those records contained Mr. Penny's personal emails with Allswell & Good. Allswell & Good argued that because the emails discussed Mr. Penny's representation, they were protected by attorney-client privilege and work-product privilege.

Q6: How should the court find?

In support of their motion, Allswell & Good provided a privilege log that included descriptions and comments stating "Fax Re: EPA Findings, cover sheet" and "Fax: Whistleblower article, self-explanatory" and "Summary of Enclosures, self-explanatory".

Q7: Is the Allswell & Good privilege log sufficient for a court to determine the question of privilege?

1.5 Mr. Penny's Other Records

Mr. Penny kept additional corporate and personal records in his home office in Albany, New York. Shortly after the seizure of Acme's records at the plant, Mr. Penny, asked his personal attorney, Esther Summerson, to move the records to her law office in order to avoid seizure.

Q8: If the records are moved to Attorney Summerson's office are they now protected under the attorney client privilege?

Mr. Penny testified before the Grand Jury that the records existed and that his personal accountant, Mr. Wigmore, used the records to complete Mr. Penny's personal taxes. Mr. Wigmore is not an employee of Acme and is not otherwise retained by the company in any capacity.

The attorney general served a *subpoena duces tecum* requiring production of all of the records. Pursuant to an agreement between Attorney Summerson and the attorney general, the records were brought to the attorney general's office, where they were to remain unopened pending the outcome of the Allswell & Good motion to quash on the basis of attorney-client privilege.

The Allswell & Good motion was based on Mr. Wigmore's testimony that he used Mr. Penny's records to prepare tax filings and that these records included letters and emails from Jenny Dedlock (Acme corporate counsel).

Q9: Are the records used by Mr. Wigmore protected by attorney-client privilege?

1.6 The Fate of Roger Putts

After he received Jenny Dedlock's May email, Plant Manager Roger Putts stopped by her office for an informal discussion. During that discussion, Mr. Putts made certain exculpatory comments and asked for advice.

Q10: Are Attorney Dedlock's legal opinions admissible?

Plant Manager Roger Putts was charged with various environmental, workplace safety and other crimes and was represented by a criminal defense firm selected and compensated by Acme, also a co-defendant under the same indictment.

Q11: Can Roger Putts be represented by an attorney selected and compensated by Acme?

2 CASE STUDY ANSWERS

A.1 *This email is not protected by attorney-client privilege. Attorney-client privilege is "the oldest of the privileges for confidential communications".* Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."* Upjohn *at 389. Because "the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures – necessary to obtain informed legal advice – which might not have been made without the privilege."* Fisher v. U.S.*, 425 U.S. 391, 403 (1976).*

Examples of protected corporate documents are:

- *A company's written requests for legal advice from its counsel;*
- *In house and outside counsel's legal advice;*
- *Company documents that are based on the substance of counsel's opinion or advice*
- *Reports of attorney-client communications*
- *Drafts of documents prepared by counsel.*

Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 601 (S.D.N.Y. 1991).*

In house and outside counsel's opinions and strategy memoranda are privileged, except when counsel is acting as a regulatory decision-maker instead of a legal advisor. See, Mobil Oil Corp. v. Dept. of Energy*, 102 F.R.D. 1, 9-10 (N.D.N.Y. 1983).*

The email is not protected by attorney work product unless it includes "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). The fact pattern states that the email merely informed employees about the existence of the civil suits, and without more would not be protected. See, Resolution Trust *at 601-602, quoting* Hickman v. Taylor*, 329 U.S. 495, 511 (1947).*

See also, Paul R. Rice, Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 Am. Univ. Law Rev.* 967 (1999) accessed online at: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1334&context=aulr and *Paul R. Rice* Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 Duke Law J. __ (*1998), accessed online at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1026&context=dlj

See also, Dylan L. Ruffi, Attorney-Client Privilege in Corporate Administration: A New Approach*, 9 Brook.J.Corp.Fin&Com.L (2015), accessed online at: http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1032&context=bjcfcl or http://brooklynworks.brooklaw.edu/bjcfcl/vol9/iss2/7/?utm_source=brooklynworks.brooklaw.edu%2Fbjcfcl%2Fvol9%2Fiss2%2F7&utm_medium=PDF&utm_campaign=PDFCoverPages*

A2: *In-house counsel's interview notes and memos are protected if they are prepared and collected by in-house counsel, as part of an investigation to determine alleged illegal activities, so that in house counsel can provide legal advice to the company, and obtained from employees who are "sufficiently aware" of the purpose of the investigation and its confidentiality.* Upjohn *at 394-395. See also, Jason Canales and Cristina I. Calvar, "Keeping Up with* Upjohn*: Preserving Attorney-Client Privilege in Corporate Internal Investigations",* NYSBA Journal*, February 2016 at 10.*

The distinction between in house and outside counsel is not significant after In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) which held that an investigation could be conducted at the direction of either in-house or outside counsel and that the communications would be privileged if it met the "primary purpose" test established by* Upjohn*.*

A3: Prior to interviewing the officers, directors, and employees in house and outside counsel should issue an Upjohn *warning (sometimes called a "corporate* Miranda *warning"). As a best practice, this should be done in writing, reviewed with the interviewee, and acknowledged, in writing, by the interviewee. The warning makes clear that the company's attorneys do not represent the individual; that anything said by the individual to the attorney will be protected by the company's attorney-client privilege subject to waiver of the privilege in the company's sole discretion, and that the individual may wish to consult with his or her own attorney if he or she has any concerns regarding potential personal legal exposures.* Upjohn *at 393-396 (1981).*

A4: It is clear that Acme and its counsel, both in house and outside, have an attorney-client relationship. See, U.S. v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009). Here, Mr. Penny is alleging that he also has an attorney-client relationship with Acme's outside counsel. In some circumstances, the reasonable belief of the individual is enough to create an attorney-client relationship, but not a personal attorney-client privilege over the company's records, including the interview notes. See, e.g.,* In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998).*

It is worth noting that at the commencement of the Audit, the Committee stated its intention to turn over relevant information and fully cooperate with government regulators and its third party auditor, Ernst & Young LLP.

The June 16, 1999 Memo from Deputy Attorney General Eric H. Holder to All Component Heads and United States Attorneys states that a "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors" in determining whether to charge the corporation with a crime. A corporation's cooperation is demonstrated by a "willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges." See, §VI available online at: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

This was narrowed by the "Yates" memo issued by Deputy Attorney General Sally Quillian Yates on September 9, 2015 (available here: https://www.justice.gov/dag/file/769036/download). Corporate cooperation is now demonstrated by a corporation "completely" disclosing "all relevant facts about individual misconduct" including identifying "all individuals involved in or

responsible for the misconduct at issue" and providing "all facts relating to that misconduct." Id*. at §1. Corporations now have an affirmative requirement to "learn of such facts" and "provide the Department with complete factual information about individual wrongdoers" as a threshold requirement when seeking credit for cooperating with the government.* Id.

A6: *Generally, a defendant has no constitutional right to discovery in a criminal case.* Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). There are exceptions intended to protect a defendant's right to due process. Under Federal Rules of Criminal Procedure 16, a defendant can move for production of tangible objects belonging to him and documents and objects "material to the preparation of defense" and/or that the government intends to offer at trial. Fed. R. Crim. P. 16(a)(1)(E)(i)-(iii).*

When the government seizes company records pursuant to a search warrant, it will very likely seize items protected by attorney-client privilege. In light of this, the government agency will establish a "Filter Team" and "Filter Review" process that insures that only non-privileged materials are released to the government's trial team. The application for the search warranty should include an affidavit explaining the process by which the government will review the materials. See, e.g., In re Grand Jury Subpoena, *No. 15-35434 (9th Cir. July 13, 2016) (Fastcase Federal 9th Circuit)*.

When the federal rule applies, "attorney-client privilege is strictly construed." Ruehle *at 609. the party invoking attorney-client privilege must demonstrate that there was client and counsel communication which was intended to be and was in fact kept confidential, and for the purposes of obtaining or providing legal advice.* U.S. v. Construction Products Research, Inc., *73 F.3d 464, 473 (2d Cir. 1996) citing* Fisher *at 403,* U.S. v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995),* U.S. v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990). A party invoking work-product privilege must show that the documents were prepared principally or exclusively to assist in anticipation of or in ongoing litigation. Fed. R. Civ. P. 26(b)(3);* Bowne of New York City Inc., v. AmBase Corp.*, 150 F.R.D. 465, 471 (S.D.N.Y. 1993).*

New York's attorney-client privilege is codified in CPLR §4503. The information must be "confidential communication" made to an attorney for the purpose of obtaining legal advice or services. Matter of Priest v. Hennessy*, 51 NY 2d 62, 69 (1980). The burden of proving privilege is on the asserting party and "even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy required disclosure."* Id.*, citations omitted.*

A7: *A privilege log must be adequately detailed and should "identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure."* Construction Products Research *at 473 quoting* Bowne of New York City *at 474. The party seeking the protection of privilege should also supply affidavits or deposition testimony for other required information which will provide detail sufficient to support the application for privilege.* Id. *If the court is not provided with enough information to support the privilege claim, than the claim will be rejected.* Id.

A8: *No, documents do not acquire protection merely by being turned over to an attorney. The documents would be protected only if they were otherwise protected by privilege before passing into the attorney's possession.* Colton v. U.S.*, 306 F.2d 633 (2d Cir. 1962).*

A9: *Here, Mr. Wigmore testified that he had access to the Jenny Dedlock letters and emails after the advice had already been made and that he reviewed the documents for purposes unrelated to legal advice. The Second Circuit held in* In re Horowitz, that *"[s]ubsequent disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of privilege." 482 F.2d 72, 81 (1973).*

Courts have found it dispositive when record keeping lacks special efforts to segregate and preserve privileged and protected documents from other routine documents, and have found that privilege does not exist. Id. *at 82. The New York Lawyer's Code of Professional Responsibility, Canon 4 states that a lawyer should preserve the confidences of a client, which is defined by New York Rules of Professional Conduct as information protected by attorney-client privilege and other information gained in the professional relationship that a client requests be kept confidential or disclosure of which would be embarrassing or detrimental to the client. Rule 1.6.*

A10: *Jenny Dedlock's legal opinions which she provided in the role of corporate counsel, even when the opinions are provided to individual employee defendants in their capacity as employees are privileged unless waived by the company. The company, as an entity, and its counsel have an attorney-client relationship. See,* Ruehle *at 607. However, as discussed above with regard to Mr. Penny's relationship with the Iris attorneys, Mr. Putts does not have an individual attorney-client relationship and he does not have a personal attorney-client communication privilege.*

Prosecutors may seek to oppose the privilege on the basis of the crime-fraud exception if the communication between Jenny Dedlock and Roger Putts was in furtherance of an intended or present illegality and if there was some relationship between the communications and the illegality. See, U.S. v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996). Evidence must exist that there is reasonable cause to believe that the attorney's services were utilized in the furtherance of an ongoing unlawful scheme.* U.S. v. Zolin*, 491 U.S. 554, 572 (1989). Once that threshold showing is made, a court may engage in* in camera *review of the documents to determine "whether allegedly privileged attorney-client communications fall within the crime-fraud exception."* Zolin *at 574.*

A11: *There is a potential conflict of interest if an individual is represented by a criminal defense firm selected and compensated by the individual's company when the company is also a co-defendant. See,* Prisque v. U.S.*, No. 14-1213 (D.N.J., Jan. 19. 2016) (Fastcase New Jersey District Court). The individual defendant must make a knowing and voluntary waiver of his right to conflict-free counsel.* Glasser v. U.S.*, 315 U.S. 60, 70-71 (1942). A knowing and voluntary waiver will insulate a conviction from later attack on this ground.* Flanagan v. U.S.*, 465 U.S. 259 (1984).*

3 TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

4 About the Author

Veronica Reed is a family law attorney focused on special education, children's civil rights, family law and injured-at-school cases. The Law Office of Veronica Reed opened in March 2016. Based in downtown Schenectady the practice provides a range of legal services and representation for upstate New York parents and children before the NYS Education Department, NYS Department of Health, and in Family, State and Federal Court.

Ms Reed's 20-year corporate career with General Electric, Kawasaki, Booz Allen Hamilton, and MTA New York City Transit predominately focused on commercial contracts and claims for national and international construction and manufacturing projects. After law school, Ms Reed was a defense litigator in New York City for Fisher & Fisher and Traub, Lieberman, Straus & Shrewsberry, LLP, practicing in the areas of education, professional liability, employment discrimination and practices, premises liability, and CGL and PL insurance coverage. She represented religious and educational institutions and commercial clients in all phases of litigation in New York City and downstate counties and in Eastern and Southern U.S. District Courts.

Ms Reed holds a BA from Seattle Pacific University and a JD from New York Law School. She was admitted to practice in New York in 2005. She is admitted to practice in multiple U.S. District Courts.

Veronica's profile is available on Avvo, Linkedin and the Law Office website at www.kidsworklife.com.

SEQRA Panel

PRESENTED BY:
Daniel A. Ruzow, Esq.
Hayley Carlock, Esq.
Lawrence H. Weintraub, Esq.

Timed Outline

SEQRA as an Incentive to Sustainable Development – Replacing the Stick with a Carrot. Three Perspectives on DEC's Pending Changes to Part 617

Moderator: Daniel A. Ruzow, Esq., Whiteman Osterman & Hanna LLP, Albany, NY

Speakers: Hayley Carlock, Esq., Scenic Hudson, Inc., Poughkeepsie, NY

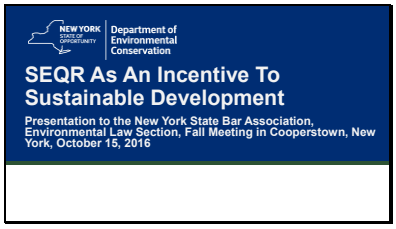
Lawrence H. Weintraub, Esq., NYS Department of Environmental Conservation, Albany, NY

8:40 am	Introductions and overview *Moderator*
8:45 am	Discussion of the goal of "sustainability" in permitting decisions and how goal has historically been part of the State Environmental Quality Review Act Description of DEC's proposals to further the goal of sustainability using the Type II list of actions in the SEQR regulations *Presenter: Lawrence H. Weintraub*
9:05 am	Environmental advocacy group perspective on using SEQR to further the goal of sustainability and DEC's proposals *Presenter: Hayley Carlock, Esq.*
9:15 am	Moderator comments and colloquy
9:20 am	Audience pespectives
9:35 am	END

SEQR AS AN INCENTIVE FOR SUSTAINABLE DEVELOPMENT

Presentation to the New York State Bar Association, Environmental Law Section, Fall Meeting in Cooperstown, New York, October 15, 2016

Slide 1



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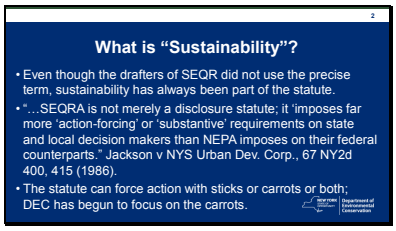
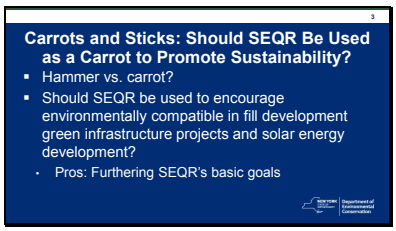


There are multiple definitions of "sustainability." They include the following one: "Sustainability is the simultaneous pursuit of environmental quality, economic prosperity and social well-being for present and future generations. It includes environmental justice and concern for the health of natural ecosystems and maintaining biodiversity." DEC/OGS, Greening NYS, Fourth Progress Report on State Green Procurement and Agency Sustainability, p. 4, available at http://www.ogs.ny.gov/EO/4/.
ECL § 8-0103(8). "…all agencies [shall] conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

Slide 3



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See 6 NYCRR 617.5 (c) (1) and (2).

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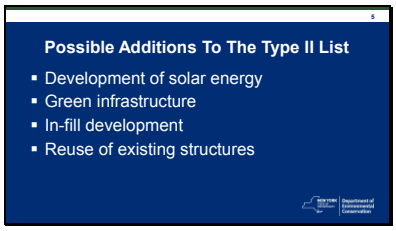

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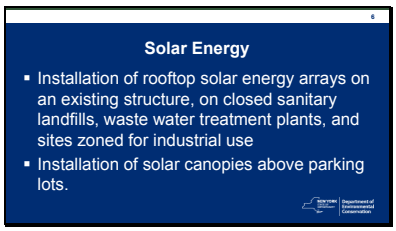

These Type II actions would encourage placement of solar panels and arrays in areas that have already been disturbed or on structures that already exist. They would also further the goals of the initiative "Reforming the Energy Vision" or "REV" and in particular the NY-Sun initiative to grow the solar energy industry in New York. Solar arrays can have visual impacts and they can be land intensive. Solar arrays can also have an impact on the visual character of designated historic structures or districts. However, since this Type II action will utilize only existing structures, previously disturbed sites or sites zoned for industrial use it would minimize such impacts such that they would not be significant.

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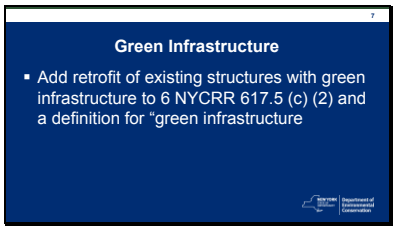

Green infrastructure practices include permeable pavement; bio-retention; green roofs and green walls; stormwater street trees and urban forestry programs; downspout disconnection; and stormwater harvesting and reuse in retrofit situations.

Slide 8

Development of sites that have been previously disturbed and that have existing infrastructure would categorically result in significantly less environmental impact than developing undisturbed sites (that are not located in downtown or main street areas). The proposed Type II actions would create a regulatory incentive for redevelopment of existing sites in downtown and main street areas already served by public infrastructure, which has clear environmental benefits over Greenfield sites that have not been already developed.

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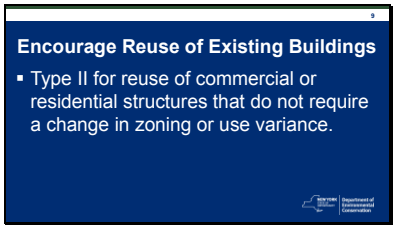
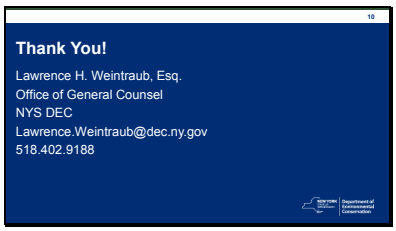


The built environment of New York State contains many structures that are currently vacant or abandoned. Many of these structures could be reused for housing or commercial development. Returning a vacant residential or commercial structure to a productive use can reduce blight, improve the vitality and live-ability of a neighborhood and return structures to municipal tax rolls.

Slide 10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Thank You!
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List of Statutes, Regulations and Cases (to be discussed)

SEQRA as an Incentive to Sustainable Development – Replacing the Stick with a

Carrot. Three Perspectives on DEC's Pending Changes to Part 617

Moderator: Daniel A. Ruzow, Esq., Whiteman Osterman & Hanna LLP, Albany, NY

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Hayley Carlock, Esq., Scenic Hudson, Inc., Poughkeepsie, NY

Statutes

ECL §8-0113

Regulations

6 NYCRR §617.5

Cases

West Village Committee, Inc. v. Zagata, 171 Misc.2d 454 (Sup. Ct. Albany Co. 1996)*, affd in part, revd in part* 242 AD2d 91 (3 Dept. 1998), *lv den.* 92 NY2d 802 (1998).

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January 26, 2012

Steven Russo
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12207

RE: SEQRA Reform

Dear Mr. Russo:

This letter follows up from the meeting we attended in New York City and the ongoing discourse regarding how to make the SEQRA process more efficient without sacrificing its purpose and effectiveness.

Scenic Hudson believes there is great power in the interdependence of economic prosperity and environmental protection. Scenic Hudson's president Ned Sullivan is proud to serve as a member of the Mid-Hudson Regional Economic Development Council, and we strongly support the region's strategic plan vision:

> "From our historic urban centers and scenic waterfronts to rich rural farmland, we will preserve an unparalleled quality of life for all Mid-Hudson Valley residents by creating a competitive, pro-business climate that cultivates a highly skilled, diverse workforce; encourages investment; nurtures entrepreneurism; promotes academic excellence and scientific discovery; fosters cluster development; fortifies infrastructure; advocates environmental stewardship; expands existing companies of all sizes, while attracting others from out-of-state – resulting in unprecedented employment and economic opportunities that reach beyond our region to benefit all New Yorkers."

.
And so it is critical to everyone involved in shaping the region's economic future that the regulatory process for development projects helps us to realize this vision. To that end, we hope that you will consider the following ideas as strategies that will help achieve these interconnected goals.

Implement the Recommendations from 2009-2010 Region 3 SEQRA Dialogue

In 2009 and 2010, a diverse group of Mid-Hudson Valley stakeholders was convened to address the above issues and agreed on nine recommendations to make SEQRA more efficient and more effective. The initiative was chaired by Jonathan Drapkin, Pattern for Progress; Ned Sullivan, Scenic Hudson; and William C. Janeway, Regional Director NYS DEC. The working group of 11 members represented business, planning, and environmental interests.

The working group developed consensus recommendations, which Scenic Hudson fully supports as critical first steps in making SEQRA operate more efficiently and effectively. Please find below summaries of the nine recommendations that came out of the dialogue, as well as more specific suggestions from Scenic Hudson on how the recommendations can be implemented in order to maximize SEQRA's efficiency without sacrificing its environmental objectives.

Recommendations of 2009-2010 Region 3 SEQRA Dialogue

(1) Provide Incentives for Planning

Incentives should be provided to help communities develop comprehensive plans and local waterfront revitalization programs (LWRP). Examples of such incentives include expanding state indemnification for challenges to comprehensive plans and providing technical assistance to local officials developing such plans. Further, more extensive use of the GEIS can build consensus around priority development and resource protection opportunities, thereby circumventing conflict and controversy and helping to expedite approval processes.

It was agreed that greater local government comprehensive planning would help to address and partially shift reliance on SEQRA as a means of dispute resolution and would promote consensus building through:

- Public involvement, as early involvement is essential and increases the availability of a significant range of effective consensus-building techniques;
- Environmental resource inventorying and identification – also an essential aspect of any quality plan; and
- Increasing marketplace and fiscal predictability for the applicant through defining desirable and undesirable development activities and locations.

Scenic Hudson's Recommendation for Implementation: Use the Tenets of the Smart Growth Public Infrastructure Policy Act to Enhance Certainty and Facilitate Decision-making

In general, changes to SEQRA should provide incentives for projects that are consistent with the New York State Smart Growth Public Infrastructure Policy Act (the "Act"). Projects that are consistent with the Act should be prioritized for quicker review and there should be a presumption that such projects can move forward with minimal delay.

Identification of priority growth areas based on the tenets of the Act should be established in comprehensive plans to delineate areas in and around existing built areas and where infrastructure exists as well as places where conservation should be prioritized in order to protect agricultural lands, aquifer recharge areas, biodiversity resources, recreational opportunities and/or sensitive viewsheds. This approach will make information readily available to municipalities, stakeholders and developers and can provide a baseline for evaluation. It will also ensure that cumulative community and region-wide impacts are taken into account, rather than the parcel-by-parcel assessment that is typical of SEQRA today.

Having this information available up-front can facilitate a more efficient and transparent SEQRA process by providing a baseline for environmental assessment that applicants, lead agencies and the public can refer to during evaluation. This can reduce time-consuming disputes and uncertainty as to whether and where development should occur in a municipality by adding predictability to the process.

(2) Expand SEQRA Education and Training for Lead Agencies

SEQRA educational training opportunities should be expanded in partnership with other agencies and private stakeholders. Tools made available on the DEC website and the use of modern information technology (including the web) should be increased. Creating a detailed technical assistance manual and making it easily available online would allow both agencies and private stakeholders to implement SEQRA in a more efficient and effective manner and decrease the uncertainty that sometimes surrounds the process. This would lead to more informed decision-making by lead agencies and increase predictability for applicants.

The report indentified three specific ways that education and training could help make the process run more smoothly:

- Create a user-friendly technical manual to provide uniform guidelines for issues such as water testing, species data, and air quality relevant to the region. It was suggested that a timeline and time-checks tool should be included to clarify standards for lead agencies.

- A DEC Region 3 ombudsman (staff person and hotline phone number/email) is a much needed resource for technical assistance. Such an individual also would be well positioned to assist applicants and consultants by directing them to data and studies already compiled for a particular part of the region, e.g. through the Hudson River Estuary Program, watershed maps, previously documented habitat studies, etc.

  Given limited resources, a volunteer "academy" of trainers might be more feasible in the interim. The report suggests that Region 3 could work with planners, attorneys and other interested parties to coordinate a group of available SEQR experts and trainers to provide classes at conferences and symposia held periodically throughout the region. It will be critical for DEC to insure that a consistent and balanced message is delivered.

- Region-specific online resources could be enormously beneficial and relatively inexpensive to maintain. Examples included Patricia Salkin's Albany Law School blog "*Law of the Land*" and other resources of other academic institutions such as Pace Law School, both of which provide potential links to relevant SEQRA related issues.

Scenic Hudson's Recommendation for Implementation: Enhance Access to Information for Developers, Decision-makers and the Public

DEC must ensure that local agencies have all the information they need to lead to informed, consistent decisions. A web-based database containing this information in a user-friendly format would be ideal. Examples of such information include: maps of geographic zones identified and categorized by their ecological sensitivity; data correlating environmental and economic impacts; information on the state of water quality and the state of ecological health/biodiversity; a comparative look at local and regional development trends across the state; and public infrastructure information. This information should be publically accessible, pooled in an intuitive and organized fashion, and comparative. Having relevant information easily accessible to agencies, developers and the public in one place will decrease the time spent gathering this information and minimize disputes regarding the natural effect of resources at risk.

(3) Produce Regional SEQRA Guidance for SEQRA Practitioners

Develop a guidance manual for all SEQRA practitioners with regard to substantive and procedural issues, including timelines, scoping, public hearings, mitigation, assessment methodology, reasonableness and other issues. The manual would address substantive and procedural issues, including the following:

- Citizen participation: required early outreach by agency/applicant to community; guidance on citizen participation throughout the process.
- Determination of significance: guidance on what is a "relevant area of environmental concern" and how to determine the "significance" of a potential impact.
- Scoping: Specific guidance on producing relevant but appropriately comprehensive EIS scopes. Recommend scoping as a required "best practice."
- Information setting forth agreed upon methodologies to assess and evaluate environmental impacts, such as: cultural resources; traffic; fiscal impact; air; stormwater; wetlands; endangered, threatened and special concern plant and animal species; open space conservation, etc.
- Guidance on SEQRA fees so that lead agencies can: 1) be mindful of the statutory caps for what an applicant can be charged; 2) make a good faith effort to not exceed these caps, and; 3) be sensitive to the need to have and follow a budget.
- Best procedural practices; guidance about reasonable timeframes and administration; guidance on what constitutes completeness, etc.

(4) Increase Availability of DEC Staff to Provide SEQR Advice and Help to communities

Consistent with Number 2 above, establish a "DEC SEQRA Circuit Rider," "Specialist" or "Ombudsman," and SEQR phone number to provide communities with guidance and advice regarding implementation. Provide resources for state and local agencies enabling DEC and others to be more proactive, involved and responsive to coordinating agencies and stakeholder requests.

In Regions 3 and 4, DEC should work closely with NYSDOS, the Hudson River Valley Greenway, County and local planning entities to reestablish a SEQRA assistance unit available to provide advice and non-binding suggestions regarding SEQRA procedural questions. The office or individual would also assist with training and updating and expanding DEC SEQRA guidance.

The report also suggested:

- Promoting the use of a regional DEC phone number and email box for SEQRA questions.
- Expanding resources to state agencies to support SEQRA decision making
- Expanding resources to local agencies to assist with SEQRA
- Providing matching grants to support regional, intermunicipal and local planning
- Expanding technical services that the DEC provides to the region's municipalities

Scenic Hudson's Recommendation for Implementation: Enhance Access to Information

Local decision-makers need something they can reference to assess the value of a particular environmental asset. For example, they should use natural resource inventories (NRIs) and scenic inventories with values attached as a basis for informed decision-making; in fact, there is already funding set aside for this purpose through state and federal grant programs, including through the Hudson River Estuary Program when funding is available and through federal agencies including the US Forest Service and US Fish and Wildlife Service. Many municipalities are unaware of these grant opportunities and don't take advantage of them. Agencies could use NRIs to assess the importance of resources on a local and regional basis and to see trends of how things are changing through time. This would lead to fewer

surprises to developers, local officials and residents, thereby increasing predictability and reducing contentiousness in SEQR proceedings.

Independent research and consultant costs should be paid for by a percentage of permit fees assessed on a developer for larger projects with potential for great environmental impact as is permitted pursuant to 6 NYCRR § 617.13(a). This would increase the ability of cash-strapped municipalities to adequately review complex environmental studies. There are some municipalities that already use fees for this purpose, but many don't. Such a use of permit fees would allow valuable information and analysis to be available to lead agencies and the public and would likely cost the developer less than litigation that could result if the requisite "hard look" is not taken due to a lack of funding and expertise available to the lead agency.

(5) Emphasize Timelines in the SEQR Review Process

Lead agencies should publicly discuss and set forth regulatory and anticipated timeframes based upon comparable projects in the region at the earliest possible stage.

SEQR guidance documents should be developed for lead agencies and others on the subject of timelines. These documents would present examples of anticipated timelines for less complex to more complex projects with emphasis on an adequate public review completed within a reasonable timeframe. Lead agencies should be urged to implement SEQR consistent with the spirit of the law, including conducting reviews "as expeditiously as possible."

6 NYCRR Section 617.14, which explicitly permits a local list of Type 1 and 2 actions, appears to be underutilized and could aid the SEQR process by enabling local procedures to be set to provide for more sensible and reasonable timeframes. In addition, local agency guidelines could be established for areas such as scoping, determinations of significance and evaluation of impacts.

Scenic Hudson's Recommendation for Implementation: Establish Guidelines for Timelines, but Not Strict Deadlines

Adequate opportunity for public comment is a key ingredient of SEQRA, and the complexity and length of many applications and DEISs mean that strict timelines would severely constrain the public's ability to participate in some cases. However, the lead agency should be aware of and set forth for the developer and the public reasonable anticipated timeframes based on similar projects to assist the developer in knowing how long it might expect the SEQRA process to take in a given case, and also to serve as a blueprint for the agency to follow as closely as practicable to move the review along in an expeditious manner. Often, new information or inadequate responses by the applicant lead to delay, and in such cases adherence to strict timelines would inappropriately allow projects to go forward without a full environmental review of all significant issues.

In addition, Scenic Hudson supports incentives to prevent unreasonable delays by either project proponents or lead agencies, such as alternative dispute resolution (ADR) if parties cannot agree to a "completeness" determination after a long period of time. ADR could be paid for on a cost-sharing basis, and would be less expensive for all parties than resorting to litigation. These measures would lead to increased efficiency without sacrificing the ability of the public to meaningfully participate in the SEQR process.

(6) Encourage Early Dialogue Among Stakeholders and Improved Use of Scoping

Explore providing new incentives to encourage early dialogue among project proponents, review agencies and key stakeholders, including improved use of scoping.

Projects that are fully designed without prior discussion with members of the public – and without an openness to make modifications – are the most prone to experience lengthy delays. Therefore, an early, pre-application dialogue among applicants, lead agencies and stakeholders offers the best chance to head off delay and opposition during the formal SEQRA review. The report recommended that pre-application meetings be encouraged to establish communication between project proponents, review agency (or agencies) and stakeholders early in the process to develop better projects, and potentially more timely and less expensive review processes.

SEQRA public hearings should be coordinated to take place in tandem with other review processes, such as Department of State Coastal Consistency Review, and repeated adjournments and unnecessarily lengthy hearings should be avoided as long as interested stakeholders have adequate opportunity to comment on relevant information identified in the scope.

Effective scoping to focus on the material environmental impacts and avoid issues that have already been studied or are irrelevant should be emphasized.

Scenic Hudson's Recommendation for Implementation: Mandatory, Targeted Scoping

The scoping process should be mandatory for SEQRA actions, including limiting areas to be studied to those identified as relevant and significant and requiring that impact analysis methodologies should be identified and agreed-upon in advance. The earlier the public can have input into a project, the more efficient the process will be. Absent scoping, a developer spends a lot of time and money creating a detailed plan before ever putting it before the public, which can lead to public distrust of the process and can make for a more expensive and time-consuming process. With appropriate scoping, a project can be designed so that it is more acceptable to the public in the first place. However, there needs to be a mechanism by which new issues can later be identified and added to the scope, if they meet a threshold of relevance and significance.

(7) Employ Greater Use of Mediation to Resolve Disputes

The report stressed the need to use ADR during the SEQR process. It was also suggested that DEC (or others) could play a role in resolving disputes. For example, the DEC Regional Working Group could serve as an ADR entity to resolve disputes at any juncture in the process. Services could be by mediated agreement or binding arbitration at the option of parties.

Scenic Hudson's Recommendation for Implementation: SEQRA Process Interim Appeals and Mediation

A task force or appeals board comprised of representatives from the Department of State Coastal Resources staff (for coastal regions of the state) and DEC should be convened to hear appeals of decisions/determination in the middle of the SEQR process. Stakeholders, developers and interested agencies alike could appeal to this board, whose members should be impartial and have expertise in relevant areas. This would be an intermediate step before having to resort to expensive and time-consuming litigation. A cost-sharing mechanism could be employed to pay for the ADR process, which would be less expensive than litigation. While there may be some disputes that will advance to litigation anyway, many may be resolved much more quickly and inexpensively by such an appeals board.

(8) Designate a Point Person for Large Regional Priority Project Reviews

For larger scale state-recognized regionally important projects, designate a senior level staff person from the state to convene and host a pre-application meeting with all involved agencies, the applicant and key stakeholders.

Occasionally, large-scale, regionally important projects are proposed that represent state or regional environmental, sustainability and economic development priorities. For example, regionally significant Empire State Development projects could be candidates for such designation. The report recommended that when the State recognizes a project as such, a senior level executive staff person for the appropriate State agency should be designated to assist, but not supersede the authority of, local agencies. A pre-application meeting would be held to get all involved agencies, the applicant and key stakeholders together to facilitate improved communication and coordination with regard to SEQRA and respective permit reviews. The report also suggested that local agencies should explore opportunities to appoint a similar "point person" for smaller, more typical project proposals.

Scenic Hudson Recommendation for Implementation: Create Separate Tracks for Review of Local Projects and Developments of Regional Impact

Several states, including Florida, New Hampshire and Georgia, have created a process separate from the normal project review for "developments of regional impact" or "DRIs." DRIs are generally defined as large-scale developments that are likely to have regional effects beyond the local government jurisdiction in which they are located. These states have established procedures for review of these projects designed to improve communication between affected governments and to provide a means of revealing and assessing potential benefits and impacts of large-scale developments before conflicts relating to them arise. Such a region-wide planning scheme would increase consistency with the principles of the Smart Growth Infrastructure Act.

At the same time, local government autonomy is preserved since the host government maintains the authority to make the final decision on whether a proposed development will or will not go forward. Projects can be DRIs based on their aggregate size or if they are likely to impact or enhance a resource of regional or statewide interest. This approach would help avoid conflicts between interested municipalities and ensure that such large-scale developments were designed in a manner amenable to all affected communities.

(9) Establish a DEC Regional Hudson Valley Catskill Working Group

A diverse, voluntary DEC Regional Working Group should be established to assist with implementation of recommendations, including but not limited to development of a SEQR Guidance Manual and evaluation of any changes that are tried.

The report recommended that a working group be established to improve implementation of the SEQR process in the Hudson Valley without compromising environmental protection or public participation. It was suggested that Pattern for Progress and Scenic Hudson work with DEC to structure and coordinate formation of the group as well as oversee its ongoing activities. The composition of the group would be representative of stakeholder interests in the region; environmental, economic, government and citizen. Meetings would be open to the public.

It was acknowledged that the group would need funds to perform its tasks – particularly the production of the best practices manual and (if appropriate) dispute resolution services. It is suggested that these funds

could be raised from both grant sources and private sector contributions and that the regulated community would financially support this because it is an effort to make the process more predictable and inject more certainty.

The group's work should include promoting the Technical Assistance Manual to Hudson Valley agencies. Every decision-making agency in the Valley should adopt the Manual and agree to utilize and follow its guidance. The Technical Assistance Manual should, in effect, become the standard for SEQRA compliance in Region 3 and be relied upon by all parties in the event of dispute. Deviations from the Manual would need to be explained and documented. DEC, DOS, The Hudson Valley Greenway, ESD and other agencies would be invited to cooperate and assist with this work, and creation of the advisory manual.

Scenic Hudson's Recommendation for Implementation

This recommendation was developed within the particular context of the Region 3 Dialogue and is focused on the Hudson Valley/Catskill region. However, the idea of having regional working groups across the state, to address problems specific to each region, is applicable statewide and would help to implement changes to SEQR in ways appropriate to each region. Each region has a unique set of obstacles to overcome and priorities for growth and development and should therefore have its own working group; guidance and procedures that may work well in the Hudson Valley could be unnecessary or impractical in the North Country, for example.

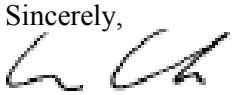
Conclusion

Given the extensive palette of recommendations that was offered as a result of a lengthy, collaborative process involving SEQRA practitioners representing diverse perspectives, these recommendations should receive first priority in the State's efforts to make SEQRA more efficient and effective. Through experience in Region 3, we know that these recommendations have the support of SEQRA practitioners who believe they will make the SEQR process more efficient and friendly to applicants and public agencies alike without sacrificing environmental protection and sustainable development principles.

We would welcome the opportunity to meet to discuss these recommendations further. Please let us know if that would be of interest.

Thank you for your consideration and please contact the undersigned with any questions.

Sincerely,



Hayley Carlock, Esq.
Scenic Hudson, Inc.

cc: Ned Sullivan
Steve Rosenberg

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land ■ parks ■ advocacy

SAVING THE LAND THAT MATTERS MOST

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August 10, 2012

By Email
Jack Nasca
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Albany, New York 12233-1750
depprmt@gw.dec.state.ny.us

Dear Mr. Nasca:

Please accept the following comments on behalf of Scenic Hudson, Inc. ("Scenic Hudson") on the Draft Scope for the Generic Environmental Impact Statement ("GEIS") on the Proposed Amendments to the State Environmental Quality Review Act ("SEQRA").

Scenic Hudson is a not-for-profit organization working to protect and restore the Hudson River as an irreplaceable national treasure and a vital resource for residents and visitors. An advocate for the valley since 1963, today we are the largest environmental group focused on the Hudson River Valley. Scenic Hudson combines land conservation, citizen-based advocacy and sophisticated planning tools to create environmentally healthy communities, champion smart economic growth, open up riverfronts to the public and preserve the valley's inspiring beauty and natural resources.

Scenic Hudson is pleased to see many positive changes proposed in the draft scope that will streamline the SEQR process without sacrificing meaningful environmental review. Mandatory scoping, incentives to encourage development in urban areas rather than greenfields and to encourage green infrastructure projects, extension of the timeframe for the filing of Final Environmental Impact Statements ("FEIS"), and reducing some of the thresholds for Type I actions are all excellent steps that will lead to a more efficientand effective SEQRA process.We commend the Department of Environmental Conservation ("DEC") for conducting the stakeholder outreach that took place over the last year, as the constructive discussions resulted in many positive proposed changes that both increase efficiency and environmental protection in the SEQRA process.

However, Scenic Hudson has some remaining concerns with the proposed amendments that are critical to address before we can say that the proposed amendments are something that will be truly beneficial.

Type I Actions

Unlisted Actions Within or Contiguous to an Historic Resource

The Draft Scope proposes to amend 6 NYCRR Part617.4(b)(9) to add to the list of Type I actions,"an Unlisted action that exceeds 25% of any threshold in that section occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places, or that has been proposed by the New York State

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Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that is listed on the State Register of Historic Places ."[1]

We understand the desire to exclude from SEQRA review smaller scale actions sited near historic resources, but this one-size-fits-all approach would certainly result in detrimental alteration of the context of culturally and economically important historic resources.

A better approach would be amending Part 617 to consider potential impacts to historic resources in a manner similar to Critical Environmental Areas ("CEA"). Currently, once designated as a CEA, the potential impact of any Type I or Unlisted Action on the environmental characteristics of the CEA becomes a relevant area of environmental concern and must be evaluated in the determination of significance prepared pursuant to Part 617.

To ensure impacts to historic resources are fully evaluated, the action should be designated as Type I, and if upon completion of a Full Environmental Assessment Form ("EAF") it is determined that impacts to the historic resource would occur, a narrowly scoped DEIS should be prepared that focuses on the particular impact to the historic resource.

In addition to the well-established public policy that recognizes the value of historic sites to our state's culture, historic sites also play an important role in supporting state and local economies through heritage-based tourism. Maintaining the context of New York's renowned historic sites is an important driver of state and local economies, and ensuring that impacts to historic resources are avoided or mitigated to the maximum extent practicable is an important function of the SEQRA process.

Type II Actions

Minor Subdivisions

The Draft Scope proposes to add "minor subdivisions" of 10 acres or less and defined as minor under a town, village or city's adopted subdivision regulations or subdivision of four or fewer lots, whichever is less, in municipalities with adopted subdivision regulations, to the Type II list.

Even a "minor subdivision" can have a significant environmental impact in certain areas. While in many cases exempting these actions from SEQRA review may not present a problem, the cumulative impact of even a few subdivisions on sensitive visual resources or coastal areas could result in a significant erosion of aesthetic and environmental quality. Especially given that scenic and coastal areas are often subject to increased development pressure, these important qualities could be put at risk by what might in other areas be considered an inconsequential subdivision. The community character of small hamlets and villages could be dramatically impacted by a "minor subdivision".

To avoid these unintended consequences, subdivisions meeting the definition of "minor" should not be added to the Type II list if they are located within a Scenic Area of Statewide Significance

[1]Draft Scope for the Generic Environmental Impact Statement on the Proposed Amendments to the State Environmental Quality Review Act, July 11, 2012, at pages 3-4.

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("SASS"),within any of New York State's designated coastal zones, or within or adjacent to designated historic resources. This will allow for small subdivisions to only require SEQRA review when they are located in

particularly sensitive areas where a seemingly minor project could have a devastating effect on the state's scenic and/or coastal resources.

Recommendations of County or Regional Planning Entity

The Draft Scope also proposes that recommendations of a county or regional planning entity made following referral of an action pursuant to General Municipal Law Sections 239-m or 239-n be added to the Type II list.

Scenic Hudson acknowledges that actions such as the adoption or amendment of Comprehensive Plan are not well suited to review under SEQRA, and recognizes that use of a valuable and proactive planning tool such as a Comprehensive Plan should be encouraged. However, given that it is possible that a planning entity could recommend adoption of a Comprehensive Plan or zoning ordinance that could encourage significant destruction of environmental, scenic and cultural resources, such an action should still be subject to a "hard look" at significant environmental impacts. DEC should propose an alternate mechanism for the review of Comprehensive Plans before this action is added to the Type II list and exempt from SEQRA review.

Scoping

Information Submitted Following the Completion of the Final Scope

The Draft Scope proposes revising Part 617.8(h) to prohibit a lead agency from rejecting a DEIS as inadequate based on information that is submitted after the completion of the final scope and not included by the project sponsor in the DEIS.

While inefficiency arises when numerous minor issues are brought up after the scoping process is complete, there are occasions when legitimately new information arises that was unknown at the time of scoping and has a significant bearing on the environmental impact of a proposed project. In cases where this new information was not known or reasonably available during the scoping process and is of a significant nature, it must be a proper basis for rejection of the DEIS as inadequate, even if it was not included in the final scope.

If new information, which was unknown and not easily discoverable during the scoping process, comes up after the final scope is complete, it must be considered in order for a proper "hard look" at environmental impacts to be taken. The proposed amendment to Part 617.8(h) should be narrowed so that there is a mechanism for these issues to be evaluated.

Preparation of EIS

While Scenic Hudson supports extending the timeframe for filing FEIS's to 180 days from the lead agency's acceptance of the DEIS, it is not acceptable for this 180 day period to trigger automatic

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acceptance of the FEIS as complete if the lead agency has not yet acted. An absolute cut-off of the timeframe for completion of the FEIS could result in incomplete and inadequate review of environmental impacts of proposed actions and alternatives. The draft scope doesn't recognize the time needed to review complex technical material or the frequent need to hire technical experts to supplement municipal staff and citizen planners. Particularly in cases of large, complex proposals, this arbitrary 180-day cutoff will lead to woefully inadequate environmental review and presents an incentive for project proponents to load unsophisticated lead agencies with volumes of information they have no hope of wading through within 180 days.

Conclusion

Scenic Hudson supports DEC's efforts to create more efficient environmental review, but such review must also be effective in maintaining small-town character, the context of historic sites, and the environmental integrity of sensitive areas. Heritage- and recreation-based tourism are important drivers of the state and local economies and should not be compromised for the sake of efficiency. Scenic Hudson believes the recommendations provided above strike an appropriate balance between efficiency and meaningful environmental review.

Thank you for the opportunity to comment and please feel free to contact the undersigned with any questions or concerns.

Respectfully submitted,

Hayley Carlock, Esq.
Scenic Hudson, Inc.

Adirondack Council
Capital Region Action Against Breast Cancer (CRAAB!)
Catskill Mountainkeeper
Citizens' Environmental Coalition
Clean and Healthy New York
Environmental Justice Action Group of Western New York
Environmental Advocates of New York
Group for the East End
Hudson River Sloop Clearwater
Long Island Environmental Voters Forum
Long Island Pine Barrens Association
New York City Environmental Justice Alliance
New York Lawyers for the Public Interest
New York Public Interest Research Group
New York State Nurses Association
Riverkeeper
Sierra Club Atlantic Chapter

August 10, 2012

Mr. Jack Nasca
Director, Division of Environmental Permits and Pollution Prevention
N.Y.S. Department of Environmental Conservation
625 Broadway
Albany, New York 12233-1750

Sent via e-mail to: depprmt@gw.dec.state.ny.us

Re: Draft Scope for the GEIS on Proposed Amendments to 6 NYCRR Part 617 - State Environmental Quality Review Act (SEQRA)

Dear Mr. Nasca:

Thank you for the opportunity to review and comment on the draft scope for the Generic Environmental Impact Statement (GEIS) on proposed amendments to the 6 NYCRR Part 617 regulations that implement the State Environmental Quality Review Act (SEQRA).

Our groups represent state, regional and local organizations dedicated to protecting the health and the environment of New York's citizens. We have significant concerns about the impacts of many of the proposed "streamlining" amendments to SEQRA, which we believe must be identified and addressed as part of the scope of the GEIS. In addition, the GEIS must consider alternatives to the proposed action, including that of taking no action.

General Comments

According to the Draft Scope, "the principal purpose of the amendments is to streamline the SEQR process without sacrificing meaningful environmental review." The GEIS should include a fact-based rationale for why the DEC believes that streamlining the SEQRA regulations is necessary and how such an action will "prevent or eliminate damage to the environment and enhance human and community resources" in accordance with the law (ECL 8-0101).

The proposed amendments would eliminate environmental review for a potentially significant number of proposed actions, limit the content of environmental impact statements (EISs) to whatever is raised in the scoping process, and set an arbitrary cut-off date for the EIS process to conclude. Yet the Draft Scope states that "The Department has not identified any significant adverse environmental impacts from the proposed amendments." The DEC did not file an Environmental Assessment Form for this action or provide any other documentation to support this statement.

The Draft Scope cites the DEC's "30+ years of experience" as the basis for many of these proposed changes. This is not sufficient for a proper review of the potential impacts. **The GEIS should include a complete assessment of the potential adverse environmental impacts resulting from any expansion of the Type II list of actions, any reductions in the Type I list of actions, any restrictions on the scoping process, and any reductions in the timeframes for conducting environmental reviews.** This assessment should include statistics on the number of projects that could be affected by the rule change and the ranges of types of projects. Where the regulations propose reducing or eliminating SEQRA review, the GEIS should identify scenarios of projects with potentially significant adverse impacts that might be affected.

Moreover, the Final Scope should identify those impacts that will be assessed in the GEIS. 6 NYCRR Section 617.8 requires the project sponsor (DEC) to submit a draft scope that contains the items listed in Section 617.8(f), including the potentially significant adverse impacts identified both in a positive declaration **and as a result of consultation with the other involved agencies and the public**, as well as initial identification of mitigation measures and reasonable alternatives to be considered. The Draft Scope circulated for comment fails to meet these regulatory requirements. **The Final Scope of the GEIS must include all of the items listed in 6 NYCRR Section 617.8(f).**

In considering the potential adverse impacts of the proposed amendments, the DEC should analyze the effects of previous changes to the SEQRA regulations. It is widely recognized, for instance, that after the Type II list of projects exempted from SEQRA was expanded in 1996 to include construction of nonresidential structures under 4,000 square feet in floor area, there was a dramatic increase in development proposals for structures just below that size threshold. This was such a widespread occurrence that this section of the SEQRA regulations is commonly referred to as the "Stewart's loophole," after the convenience store chain which took full advantage of this exemption.

Under the proposed amendments, this loophole could be expanded by up to tenfold, depending on the size of the municipality. According to the Draft Scope, the rationale for this expansion of the Type II list is to provide "a regulatory incentive for …sustainable development." This is not an appropriate use of SEQRA, nor is SEQRA an effective tool for promoting sustainable

development. The purpose of SEQRA is to identify and mitigate the significant environmental impacts of proposed actions in New York State. It is not intended as a planning tool or a mechanism for developing or implementing land use policy.

Finally, the description of the proposed action in the Draft Scope is inconsistent and incomplete. For instance, the language for the proposed definitions has not been included, while other proposed amendments are spelled out in great specificity. **Complete and consistent information about the proposed action should be included in the Final Scope**.

Changes To The Type I List

The proposed amendments to lower the thresholds in the Type I list for residential subdivisions and parking will lead to more environmental review in New York and therefore we support these proposed changes.

The proposal to bring the threshold reduction for historic resources in line with other resource-based items on the Type I list will result in less environmental review and reduced protection for historic buildings, structures, facilities and sites in New York. The Draft Scope cites as its rationale for this change "the fact that the new Full EAF now requires much more information [and] it would be very onerous and potentially expensive for a project sponsor to have to complete a Full EAF for a relatively minor activity." **The GEIS should include a complete assessment of the potential adverse impacts on New York's historic resources as a result of this change.** Simply because the form might be onerous is not an acceptable rationale for weakening protections for sensitive resources. In its consideration of alternatives, the GEIS should evaluate whether the new EAF forms are in need of modification.

One of the alternatives the GEIS should look at is expanding the Type I list to include additional actions that are currently unlisted. This would reduce confusion about how to classify certain proposed actions, which can be time-consuming and contentious, and thus help to streamline the SEQRA review process while increasing environmental review.

Expansion Of Type II List

The proposed amendments dramatically expand the "Type II" list of actions in New York that would be exempt from SEQRA review. The Notice of Intent states that the purpose of expanding the Type II list is "to encourage development in urban areas vs. development in greenfields and to allow green infrastructure projects." The Draft Scope further states that "the overall goal is to provide a regulatory incentive for project sponsors to further the State's policy of sustainable development."

Exempting projects from SEQRA review is neither an effective nor a prudent mechanism for incentivizing smart growth. The purpose of SEQRA is to review the environmental impacts of proposed actions and to mitigate significant adverse impacts. A project that truly adheres to smart growth principles will not have significant adverse impacts, and therefore should encounter no difficulties in the environmental review process. **Conversely, many of the actions that would escape SEQRA review as a result of the proposed exemptions could have significant adverse environmental impacts.**

While the Draft Scope states that "the additions to the Type II list are based on discussions that DEC has conducted with representatives from state agencies, environmental organizations, business, etc." it fails to note that during stakeholder discussions this spring, a number of environmental groups objected to many of the proposed additions. Among the most serious concerns were the proposed exemptions for projects under a certain size threshold based upon the population of the municipality, exemptions for subdivisions below a certain size threshold, and exemptions for the sale, auction, leasing or transfer of public land.

The proposed Type II actions would dramatically expand the existing "Stewart's loophole" of 4,000 square feet. Depending on the size of the municipality, the threshold exemptions would range from projects under 8,000 feet or 10 units or less in a population under 20,000, to projects under 40,000 square feet (almost an acre in size) or 50 units or less in a population over 150,000. While the intent is to steer projects to locations where there is existing infrastructure such as water, sewerage and roads, this exemption could actually exacerbate sprawl development. The DEC is making the erroneous assumption that communities exceeding these population thresholds have "municipal centers," a term that is used in the proposed regulations but is not defined in the Draft Scope and has no definition in land use law. Many towns in New York have populations in excess of the proposed size thresholds but no densely-populated center. The proposed regulations would allow actions to proceed without SEQRA review as long as the infrastructure is completed by the time they are occupied.

Even if the regulations achieve the desired goal of steering development towards urban centers with existing infrastructure, it is does not mean that there are no potential significant adverse impacts associated with the actions. **The GEIS must consider the full range of projects that could fall under these proposed exemptions and analyze the potential impacts.** Development in congested urban centers needs to take into account the impacts of increased air pollution, traffic, and other environmental hazards, particularly in environmental justice communities. Likewise, even smaller subdivisions could have significant adverse environmental impacts.

The DEC should not predetermine whether or not a project will have adverse environmental impacts. As a home rule state, the community is in the best position to determine the potential significance of an action. The GEIS should explore how local decision-making can be improved and enhanced through increased training, technical assistance, and better guidelines.

Scoping Revisions

While the proposed amendments give the appearance of improving the scoping process by requiring scoping for all EISs, the revisions in fact severely restrict the content of EISs and limit the ability of the public and lead agencies to address issues that are identified after the conclusion of the scoping process.

Rarely is there full public awareness of a proposed action at the scoping stage. A case in point is this GEIS. Many people and organizations only became aware of the SEQRA streamlining review process this week and yet, despite the valuable input they could have provided, the DEC refused to grant requests for an extension of the public comment period on the scope of this GEIS. Under the proposed revisions, if they fail to meet the August 10th comment deadline,

their information – however relevant or significant – would not affect the scope of the review or the content of this GEIS.

Furthermore, the proposed amendments dictate that "scoping should result in EISs that are only focused on relevant, significant adverse impacts" (emphasis added). A lead agency should retain the discretion to expand the scope of the EIS to include all the information it deems necessary to adequately review a proposed action.

The GEIS should evaluate alternatives to the proposed regulations that would result in greater public participation in the scoping process. Such changes should include enhanced notification requirements and provisions for automatically granting extensions of public comment periods upon request.

Timetable For Completing Environmental Impact Statements

The proposed regulations undermine the goals and intent of SEQRA by establishing an arbitrary cut-off point for SEQRA reviews. Under this proposal, if a final FEIS is not prepared within 180 days after the lead agency's acceptance of the draft EIS, the review process comes to a halt and the EIS is deemed complete. Capping the time frame for completion of the EIS will almost certainly result in incomplete and inadequate review of environmental impacts of proposed actions and alternatives. This proposal doesn't recognize the time needed to review complex technical material or the frequent need to hire technical experts to supplement municipal staff and citizen planners. The only justification the DEC provides for this change is to "provide certainty for when the EIS process will end."

This change will benefit project applicants but not the general public or the environment, since it provides no certainty that adverse impacts will be adequately identified, assessed or mitigated. Moreover, the DEC's proposed automatic expiration of the final review period in fact incentivizes project applicants simply to let the clock run out and not address matters raised in the DEIS, thus undermining the very purpose of SEQRA.

Environmental Justice Impacts

It is deeply troubling that environmental justice organizations were not included in stakeholder meetings held this spring on the proposed streamlining regulations. Environmental justice communities stand to be disproportionately impacted by these proposed regulations. The proposed Type II threshold exemptions will encourage development in municipal centers while exempting such development from environmental review. Such actions could lead to increased air pollution, traffic, noise, and other adverse environmental and public health impacts in low-income and minority communities that are already overburdened with pollution. In addition, the proposed changes to the scoping process, which place much greater burden on citizens to raise issues of concern at the earliest stages of the review process, may adversely impact environmental justice communities more significantly than the population at large.

This proposed streamlining of SEQRA appears at odds with Governor Cuomo's commitment in the 2011 Power NY Act, which seeks to increase protections for overburdened communities from increased pollution levels from the siting of power plants by requiring a comprehensive environmental review, including cumulative impacts.

The GEIS must include an analysis of the environmental justice impacts of the proposed regulatory changes, particularly the Type II threshold exemptions and the scoping changes. The GEIS should also evaluate whether the proposed regulatory changes are consistent with the DEC's Environmental Justice Policy (Commissioner Policy 29 or CP-29), which provides guidance for incorporating environmental justice concerns into the DEC's application of SEQRA, and assess how they would impact its implementation.

Alternatives Analysis

Since this GEIS is being prepared relatively early in the decision making process, the DEC has the opportunity to explore a full range of alternatives to the proposed action, including the no action alternative. The goal should be to make SEQRA a more effective tool for local government decision-makers, not to merely streamline the process for developers.

Beginning such a broad process with such specific language to review is a mistake. We have identified a number of flaws and concerns with the proposed regulatory language. Through the GEIS process, the DEC has an opportunity to take a step back, set the proposed regulatory language aside, and conduct a much broader and more rigorous analysis of where and how the SEQRA process could be improved. **The DEC should use fact-based analyses of projects subject to SEQRA over the past 30+ years to distinguish between issues in need of reform and anecdotal claims of the burdens posed by SEQRA.**

The DEC should not move forward with adopting these proposed draft regulations.

Thank you for your consideration of these comments.

Sincerely,

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New York Public Interest Research Group

Eddie Bautista
Executive Director
New York City Environmental Justice Alliance

Christina Giorgio, Staff Attorney, Environmental Justice
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Manna Jo Greene
Councilwoman, Town of Rosendale
Environmental Director, Hudson River Sloop Clearwater

Daniel Mackay
Councilperson
Town of New Scotland

Joseph A. Gardella, Jr.
Chair, City of Buffalo Environmental Management Commission
John and Frances Larkin Professor of Chemistry, University at Buffalo, SUNY

FINAL SCOPE
for the
Generic Environmental Impact Statement (GEIS)
on the
Proposed Amendments
to the
State Environmental Quality Review Act (SEQRA)

6 NYCRR - Part 617

PREPARED BY THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF ENVIRONMENTAL PERMITS & POLLUTION PREVENTION
November 28, 2012

1.0 Description of the Action & Environmental Setting

The New York State Department of Environmental Conservation (DEC) proposes to amend the regulations that implement the State Environmental Quality Review Act ("SEQR", Part 617 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York . The principal purpose of the amendments is to improve and streamline the SEQR process without sacrificing meaningful environmental review. The changes being proposed are modest in nature, not intended to change the basic structure of an environmental review, build on the changes made to the environmental assessment forms and are within the authority of the DEC to implement without seeking additional legislative action. SEQR applies to all state and local agencies in New York State when they are making a discretionary decision to undertake, fund or approve an action.

DEC has proposed changes to the SEQR regulations, which it does not expect to have a significant impact on the environment. However, given the importance of the SEQR regulations in general in all areas of environmental impact review, DEC has chosen to use a generic environmental impact statement (GEIS) as the means to discuss the objectives and the rationale for the proposed amendments, present alternative measures which are under consideration and provide the maximum opportunity for public participation.

2.0 Summary of Proposed Amendments to 6 NYCRR Part 617

617.2 DEFINITIONS

- Add definition of "Green Infrastructure"
- Add definition of Minor Subdivision"
- Add definition of "Municipal Center"
- Add Definition of "Replacement in Kind"
- Add definition of "Substantially Contiguous"

- Revise definitions of:
  - "Negative Declaration"
  - "Positive Declaration"

617.4 TYPE I ACTIONS

- Reduce number of residential units in items 617.4(b)(5)(iii), (iv) & (v);
- Reduce number of parking slots for municipalities with a population under 150,000; and
- Reduce the threshold reduction for historic resources [617.4(b)(9)] in line with other resource based items on the Type I list and add eligible resources.

617.5 TYPE II ACTIONS

- Add new Type II actions to encourage development on previously disturbed sites in municipal centers and to encourage green infrastructure projects;
- Add new Type II actions to encourage the installation of solar energy arrays;
- Add new Type II action that allows for the sale, lease or transfer of property for a Type II action;
- Add new Type II action for minor or small scale subdivisions;
- Add a new Type II actions to make the disposition of land by auction a Type II action; and
- Add a new Type II action to encourage the renovation and reuse of existing structures.

617.8 SCOPING

- Make scoping mandatory;
- Provide greater continuity between the environmental assessment process, the final written scope and the draft environmental impact statement (EIS) with respect to content;
- Strengthen the regulatory language to encourage targeted EISs;
- Clarify that issues raised after the completion of the final written scope cannot be the basis for the rejection of the draft EIS as inadequate.

617.9 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

- Add language to require that adequacy review of a resubmitted draft must be based on the written list of deficiencies; and
- Revise the timeline for the completion of the FEIS.

617.12 DOCUMENT PREPARATION, FILING, PUBLICATION AND DISTRIBUTION

- Add language to encourage the electronic filing of EISs with DEC.

617.13 FEES AND COSTS

- Add language to require that a lead agency provide the project sponsor with an estimate of review cost, if requested; and
- Add language to require that a lead agency provide the project sponsor with a copy of invoices or statements for work done by a consultant, if requested.

3.0 Discussion of Proposed Changes and Alternatives

The following discussion provides the objectives and rationale for the major proposed changes and the alternatives under consideration. It also includes preliminary express terms. The pre-draft text amendments show proposed language deletions as bracketed ([XXXX]) and new language as underlined (XXXX). This language is being provided to stimulate consideration and comment on the preliminary changes

3.1 Type I List

3.1.1 Preliminary Text Amendment:

- 617.4(b)(5)(iii) in a city, town or village having a population of [less than]150,000 persons or less, [250] 200 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 150,000 persons but less than 1,000,000, [1,000]500 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;
- 617.4(b)(5)(iv) in a city, town or village having a population of greater than 1,000,000, [2,500] 1000 units to be connected (at the commencement of habitation) to existing community or public water and sewage systems including sewage treatment works;

Objectives and Rationale: The Department proposes to reduce some of the thresholds for residential subdivisions. Experience has shown that the thresholds for some of the Type I items for residential construction are rarely triggered because they were set too high in 1978. There is scant information in the 1978 draft and final EIS that demonstrates any basis for the selection of the thresholds other than the numbers in a rural and urban area should be different. The proposed change will bring the review of large subdivision into conformance with current practice. Large subdivisions are frequently the subject of an EIS and by nature when proposed on new sites often have one or more potentially significant impacts on the environment due to the need for the expansion of infrastructure such as water, sewer and roads needed to serve the new development.

Alternatives: The “no action” alternative would retain the current numbers which were established in 1978. There is no substantive record supporting the numbers that were selected in 1978. Other suggested alternatives include reducing the number or threshold to a lower number of lots that would trigger Type I classification.

3.1.2 Preliminary Text Amendment:

- 617.4(b)(6)(iii) in a city, town or village having a population of 150,000 persons or less, parking for 500 vehicles;
- 617.4(b)(6)(iv) in a city, town or village having a population of 150,000 persons or more, parking for 1000 vehicles;

Objectives and Rationale: The Department proposes to add a threshold for parking spaces for communities of less than 150,000 persons. A common and often recommended measurement is one parking space per 200 square feet of gross floor area of a building. For communities of less than 150,000 persons the applicable Type I threshold for the construction of commercial or industrial facilities is 100,000 square feet of gross floor area. This equates to 500 parking spaces.

Alternatives: The "no action" alternative would retain the current Type I threshold at 1000 vehicles for all municipalities without regard to size. Other suggested alternatives include reducing the number of parking spaces for all communities to 500 or less vehicles.

3.1.3 Preliminary Text Amendment:

- 617.4(b)(9) any Unlisted action that exceeds 25 percent of any threshold in this section [(unless the action is designed for the preservation of the facility or site)] occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National or State Register of Historic Places, or that has been [proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that is] determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places (The National Register of Historic Places is established by 36 Code of Federal Regulation (CFR) Parts 60 and 63, 1994 (see section 617.17 of this Part));

Objectives and Rationale: The Department proposes to bring the threshold reduction for historic resources in line with other resource based items on the Type I list. On the existing Type I list any Unlisted action, regardless of size, that occurs wholly or partially within or substantially contiguous to a historic resource is automatically elevated to a Type I action. This results in very minor actions being elevated to Type I. Other resource based Type I items such as those addressing agriculture and parkland or open space result in a reduction in the Type I thresholds by 75%. Given the fact that the new Full EAF, which will be effective on April 1, 2013, requires much more information on historic resources it would be unduly onerous for a project sponsor to have to complete a Full EAF for a relatively minor activity. Also, the new Short EAF now contains a question regarding the presence of historic resources so the substance of the issue will not escape attention. This change does not change the substantive requirements of a SEQR review. This listing has been expanded to include properties that have been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation eligible for listing. This change would make SEQR consistent with both State and Federal Historic Preservation legislation.

Alternatives: The "no action" alternative would retain the current Type I item. Other suggested alternatives include the following: exclude projects that are subject to review under Section 106 of the National Historic Preservation Act of 1966 or 1409 of the State Historic Preservation Act and delete the entire listing but require that when a listed property may be impacted by a project that the determination of significance must include an evaluation of the potential for impact to the attributes that are the basis for the listing.

3.2 Type II List

The Department proposes to broaden the list of actions that will not require review under SEQRA. This will allow agencies to focus their time and resources on those projects likely to have significant adverse impacts on the environment. The additions to the Type II list are based on discussions that DEC has conducted with representatives from state agencies, environmental organizations, business and the experience of staff in the Division of Environmental Permits.

A second and more important reason for many of the proposed additions to the Type II list is to try and encourage environmentally compatible development. Many of the additions attempt to encourage development on previously disturbed sites in municipal centers with supporting infrastructure and encourage green infrastructure projects and solar energy development. Others proposed items will remove obstacles encountered by municipalities when developing affordable housing in cooperation with not-for-profit organizations. The overall goal is to provide a regulatory incentive for project sponsors to further the State's policy of sustainable development.

3.2.1 Preliminary Text Amendment:

- The acquisition, sale, lease, annexation or transfer of any ownership of land to undertake any activity on this list.

Objectives and Rationale: One of the basic concepts of SEQR is the "whole action". Having the land transaction of a proposed activity subject to review under SEQR when the activity itself is listed as a Type II action violates this concept. This quirk has also resulted in affordable housing projects like those sponsored by not-for-profit agencies being subjected to SEQR review for the transfer of land from the municipality to the not-for-profit when the activity involved the construction of a one, two or three family residence which is a Type II action. Adding this item to the Type II list will remove a potential stumbling block to the construction of affordable housing and clarify.

Alternatives: The "no action" alternative would remove this item from the Type II list. Other suggested alternatives include adding acquisition of land by fee or easement for public open space or passive recreation.

3.2.2 Preliminary Text Amendment:

- Disposition of land, by auction, where there is no discretion on the part of the disposing agency on the outcome.

Objectives and Rationale: A municipality or a state agency may acquire land through foreclosure or other means where the land reverts to the agency due to a failure of the owner to remain current on property taxes. State law requires that the municipality or agency dispose of this land through a public action to the highest qualified bidder. The municipality or agency has no discretion but to abide by the results of the auction. Currently, agencies are required to perform a SEQR review since the sale, lease or other transfer of greater than 100 acres is a Type I action and amounts under 100 acres are classified as Unlisted actions. The environmental assessments under these circumstances are fairly meaningless since the agency has no idea of what the ultimate use of the property will be by the new owner at the time of the auction. The

only guide the agency can use is zoning or the lack of zoning. In addition, the subsequent development of the property will generally result in an environmental review if the proposed action requires a discretionary permit or approval from a state or local agency

Alternatives: The "no action" alternative would remove this item from the Type II list and continue to require a SEQR review prior to the disposition of land by auction. Other suggested alternatives: expand this proposed listing to allow for disposition of land by any means as a Type II action, limit the item by including the phrase "unless such action meets or exceeds the criteria found in 617.4(b)(4) of this Part."

3.2.3 Preliminary Text Amendment:

- In a city, town or village with an adopted zoning law or ordinance, reuse of a commercial or residential structure not requiring a change in zoning or use variance unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8), (9), (10), and (11) of this Part.

Objectives and Rationale: The built environment of New York State contains many structures that are currently vacant. For example, the City of Albany has recently determined that there are 809 vacant buildings in the city. These vacant structures, if not properly maintained, contribute to urban blight and are an under used resource. Many of these structures could be reused for housing or commercial development rather than developing a greenfield site. Since these properties generally have existing infrastructure the suite of potential environmental issues is very limited and are routinely handled under the existing local land use reviews. Returning a vacant residential or commercial structure to a productive use can reduce blight, improve the vitality and live-ability of a neighborhood and return structures to the tax role.

Alternatives: The "no action" alternative would remove this item from the Type II list and continue to require a SEQR review prior to the proposed reuse of a vacant or abandoned structure. Other suggested alternatives: Expand this provision to apply to all structures including industrial uses.

3.2.4 Preliminary Text Amendment:

- Lot line adjustments and area variances not involving a change in allowable density [replacing existing items 12 and 13 in 6 NYCRR 617.5(c)].

Objectives and Rationale: Individual setback and lot line variances and area variances for single, two- or three- family homes are currently Type II actions. This proposed revision would expand the applicability to all types of structures so long as the proposed lot line adjustment or area variance does not change the allowable density. These types of variances are subject to the review and approval of zoning boards which are required under state law to consider environmental factors in their decision to either issue or deny the requested relief.

Alternatives: The "no action" alternative would remove this item from the Type II list and continue the current situation which would restrict area variance to only one-, two- and three-family residences.

3.2.5 Preliminary Text Amendment:

- In cities, towns and villages with adopted subdivision regulations, subdivisions defined as minor under the municipality's adopted subdivision regulations, or subdivision of four or fewer lots, whichever is less, involves ten acres or less, and provided the subdivision does not involve the construction of new roads, water or sewer infrastructure, and was not part of a larger tract subdivided within the previous 12 months.

Objectives and Rationale: The municipal enabling laws for subdivision plat review (e.g., Town Law §276) authorize municipalities to define subdivisions as major or minor. Minor subdivisions, as defined in many municipal subdivision regulations, usually consist of four or fewer lots or two lots. The municipal enabling laws provide a sufficient grant of authority to municipalities to consider the typical and expected environmental impacts of minor subdivisions. Under such circumstances and the ability of municipalities to condition or deny approvals along with the additional caveats for numbers of acres, connection to utilities, and no construction of new roads, provides assures that such actions would not have a significant effect on the environment.

Alternatives: The "no action" alternative would remove this item from the Type II list and continue to require a SEQR review for minor subdivisions. An alternative would be to disallow the small or minor subdivision Type II when there are sensitive environmental features on the site (e.g., designated critical environmental areas or other identifiable resources). Other alternatives would be to make the Type II item less restrictive by removing one or more of the conditions, e.g., 1) removal of the restriction on establishment of new roads since the restriction may impede context sensitive design for small subdivisions, or 2) removal of the restriction on acres.

3.2.6 Preliminary Text Amendment:

- The recommendation of a county or regional planning entity made following referral of an action pursuant to General Municipal Law, sections 239-m or 239-n.

Objectives and Rationale: This is one of the most frequently asked questions by town and county planners. Since these reviews under 239-m & n are not binding and can be overturned by a majority plus one vote by the municipality they have been interpreted as not triggering SEQR.

Alternatives: The "no action" alternative would remove this item from the Type II list.

3.2.7 Proposed Text Amendment:

- On a previously disturbed site in the municipal center of a city, town or village having a population of less than 20,000, with adopted zoning regulations, construction or expansion of a residential or commercial structure or facility involving less than 8,000 square feet of gross floor area where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community owned or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads.

- On a previously disturbed site in the municipal center of a city, town or village having a population of greater than 20,000 but less than 50,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 10,000 square feet of gross floor area where the project is subject to site plan review, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new public roads;

- On a previously disturbed site in the municipal center of a city, town or village having a population of greater than 50,000 but less than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 20,000 square feet of gross floor area where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new roads.

- On a previously disturbed site in the municipal center of a city, town or village having a population of greater than 150,000, with adopted zoning regulations, construction or expansion of a commercial or residential structure or facility involving less than 40,000 square feet of gross floor area where the project is subject to review under local land use regulation, and will be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works which have the capacity to provide service and does not involve the construction of new roads.

Objectives and Rationale: Building a structure on a previously disturbed lot with existing road, sewer and water infrastructure substantially reduces the number and severity of potential impacts that must be considered in an environmental review. The four proposed Type II actions that allow for a sliding scale of development depending on population levels are intended to serve as an incentive for development on previously disturbed sites within existing municipal centers. Development of sites that have been previously disturbed and that have existing infrastructure result in less environmental impact than developing undisturbed greenfield sites and these impacts can be readily addressed through the land use review process. Also, the notion that development should be encouraged and funneled into existing sites in municipal centers with existing infrastructure that supports such development, has become part of the State's public policy.

Alternatives: The "no action" alternative would remove these items from the Type II list. Other suggested alternatives include changing the population numbers and the amount of allowed development for each item and the addition of more environmental conditions under which the development would not be allowed such as prohibiting use of this item when the project includes demolition or if site is located substantially contiguous to a designated or eligible historic structure or district.

3.2.8 Preliminary Text Amendment:

- Replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading of buildings to meet building, energy, or fire codes, or to incorporate green building infrastructure techniques, unless such action meets or exceeds any of the thresholds in section 617.4(b)(6),(8),(9),(10) and (11) of this Part.

Objectives and Rationale: The inclusion of upgrades of existing building to meet new energy codes is consistent with the current intent of the item. Also, the current item on replacement, rehabilitation or reconstruction is limited to "in kind" construction. This allows for some limited deviations from the existing structure but could be interpreted to preclude the use of green infrastructure in place of the existing more conventional development techniques. Installation of green roofs or other green infrastructure techniques can substantially improve energy efficiency and reduce generation of runoff. The addition of the specific Type I thresholds provides additional clarity for the application of this item and places limits on the size of the replacement, rehabilitation or reconstruction that could be undertaken as a Type II action.

Alternatives: The "no action" alternative would return the item to its current wording in the regulation. Another alternative would be to not include the provision regarding green building infrastructure techniques.

3.2.9 Preliminary Text Amendment:

- Installation of rooftop solar energy arrays on an existing structure that is not listed on the National or State Register of Historic Places or determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places, or installation of less than 25 megawatts of solar energy arrays on closed sanitary landfills.

Objectives and Rationale: The installation of solar energy arrays can substantially reduce energy costs and the generation of greenhouse gases. The rooftops of many commercial and industrial facilities are already home to a myriad of heating ventilation and air conditioning (HVAC) equipment. This is just another type of HVAC system. This provision would not allow installation on designated historic structures. The redevelopment of a closed sanitary landfill as a solar energy site would return a currently under used site to a productive use. Many closed sanitary landfills currently generate energy from the combustion of methane gas and have the necessary infrastructure in place to connect to the electrical grid.

Alternatives: The "no action" alternative would remove this item from the Type II list. Other suggested alternatives: delete the restriction for designated historic properties, place a limit on the size of roof top installations and reduce the size of an installation on closed sanitary landfills.

3.2.10 Preliminary Text Amendment:

- Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State Register of Historic Places or determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places.

Objectives and Rationale: The current Type II item [617.5(c)(7)] that precludes the installation of radio communication and microwave transmission facilities as a Type II action has generated a substantial number of questions on the SEQR classification for installation of antennas and repeaters on existing structures. These antenna and repeaters can in many locations be installed on existing buildings and preclude the construction of a new tower.

Alternatives: The "no action" alternative would remove this item from the Type II list and continue to require a SEQR review prior to the installation of cellular antennas and repeaters on existing structures. Other suggested alternatives include: adding the phrase "structure or district" to the proposed listing to prohibit the applicability of this item in a designated historic district, prohibit the installation of cellular antennas or repeaters within 500 feet of a designated historic structure or district and require that all cellular antennas and repeaters that are located within 500 feet of a historic structure or district be camouflaged to reduce visibility.

3.2.11 Preliminary Text Amendment:

- Brownfield site clean-up agreements under Title 14 of ECL Article 27.

Objectives and Rationale: This item would clarify that the development and implementation of a brownfield clean-up agreement is a Type II action. The DEC has considered these types of agreements and clean-ups as civil or criminal enforcement proceedings [617.5(c)(29)]. As more agencies start to enter into these agreements it will clarify the correct SEQR classification for these activities.

Alternatives: The "no action" alternative would remove this item from the Type II list.

3.3 Scoping

3.3.1 Preliminary Text Amendment:

- 617.8(a) - The primary goals of scoping are to focus the EIS on potentially significant adverse impacts and to eliminate consideration of those impacts that are irrelevant or [non] not significant. Scoping should result in EISs that are only focused on relevant, significant, adverse impacts. Scoping is [not] required for all EISs [. Scoping] and may be initiated by the lead agency or the project sponsor.
- 617.8(f)(2) - the potentially significant adverse impacts identified both in Part III of the environmental assessment form [positive declaration] and as a result of consultation with the other involved agencies and the public, including an identification of those particular aspect(s) of the environmental setting that may be impacted;
- 617.8(f)(7) - A brief description of the prominent issues that were raised during scoping and determined to be not relevant or not environmentally significant or that have been adequately addressed in a prior environmental review[.] and the reason(s) why those issues were not included in the final written scope.
- 617.8(h) - The project sponsor may incorporate information submitted consistent with subdivision 617.8(g) of this section into the draft EIS at its discretion. Any substantive information not incorporated into the draft EIS must be considered as public comment on the draft EIS. Information submitted following the completion of the final scope and

not included by the project sponsor in the draft EIS cannot be the basis for the rejection of a draft EIS as inadequate.

Objectives and Rationale: The Department proposes to:

(1) Require public scoping for all EISs. Currently scoping is not mandatory but all parties have come to accept the importance of public scoping as a tool to focus an EIS on the truly substantive and significant issues. Seeking public input early in the EIS process helps to ensure that all of the substantive issues are identified prior to the preparation of the draft EIS.

(2) Place more emphasis on using the EAF as the first step in scoping. The revised EAFs are much more comprehensive than the previous versions. This should allow the lead agency to assess, in a thorough fashion, all of the potential impacts and to establish a basis for determining those issues that need additional scrutiny in an EIS and issues that do not require any further analysis and can be excluded from the EIS scope. Scoping can then be used to determine the depth and type of assessment that will be required in the draft EIS.

(3) Provide clearer language on the ability to target an EIS. All parties agree that many EISs are currently filled with information that does not factor into the decision. This is driven by the defensive approach agencies and project sponsors take in developing the EIS record. In pursuit of the "bullet proof EIS" the tendency is to include the information even though the environmental assessment has already concluded that the issue is not substantive or significant.

(4) Provide better guidance on the basis for accepting or rejecting a draft EIS for adequacy. The current regulations give to the project sponsor the responsibility for accepting or deferring issues following the preparation of the final written scope. A lead agency cannot reject a draft EIS as inadequate if the project sponsor has decided to defer an issue and treat it as a comment on the draft EIS. Language would be added to clarify that the decision of the project sponsor cannot serve as the basis for the rejection of a draft EIS as not adequate to start the public review process.

Alternatives: The "no action" alternative would result in scoping remaining an optional procedure. Other suggested alternatives: provide the lead agency with the authority to include "late items" after the preparation of the final scope and require that scoping must include a public meeting.

3.4 PREPARATION AND CONTENT OF ENVIRONMENTAL IMPACT STATEMENTS

3.4.1 Preliminary Text Amendment:

- 617.9(a)(2) The lead agency will use the final written scope[,if any,] and the standards contained in this section to determine whether to accept the draft EIS as adequate with respect to its scope and content for the purpose of commencing public review. This determination must be made [in accordance with the standards in this section] within 45 days of receipt of the draft EIS. Adequacy means a draft EIS that meets the requirements of the final written scope and section 617.9(b) of this Part.

(i) If the draft EIS is determined to be inadequate, the lead agency must identify in writing the deficiencies and provide this information to the project sponsor.
(ii) The lead agency must determine whether to accept the resubmitted draft EIS within 30 days of its receipt. The determination of adequacy of a resubmitted draft EIS must be based solely on the written list of deficiencies provided by the lead agency following the previous review.

- 617.9(a)(5) - Except as provided in subparagraph (iii) of this paragraph, the lead agency must prepare or cause to be prepared and must file a final EIS, within [45 calendar days after the close of any hearing or within 60] 180 calendar days after the lead agency's acceptance of the draft EIS[, whichever occurs later].

[(i) No final EIS need be prepared if:
(a) the proposed action has been withdrawn or;
(b) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance with section 617.12 of this Part.]
(i) If the Final EIS is not prepared and filed within the 180 day period, the EIS shall be deemed complete on the basis of the draft EIS, public comment and the response to comments prepared and submitted by the project sponsor to the lead agency. The response to comments must be submitted to the lead agency a minimum of 60 days prior to the required filing date of the final EIS or this provision does not take effect.
(ii) The lead and all involved agencies must make their findings and can issue a decision based on that record together with any other application documents that are before the agency.
[(a) if it is determined that additional time is necessary to prepare the statement adequately; or
(b) if problems with the proposed action requiring material reconsideration or modification have been identified.]
(iii) No final EIS need be prepared if:
(a) the proposed action has been withdrawn or;
(b) on the basis of the draft EIS, and comments made thereon, the lead agency has determined that the action will not have a significant adverse impact on the environment. A negative declaration must then be prepared, filed and published in accordance section 617.12 of this Part.

Objectives and Rationale: The Department proposes to add language to require that the adequacy review of a resubmitted draft must be based on the written list of deficiencies and revise the timeline for the completion of the FEIS.

Determining the adequacy of a draft EIS, which is the province of the lead agency, is a challenging step of the EIS process. If the document has been rejected as not adequate, the lead agency must provide a written list of the identified deficiencies that the project sponsor needs to correct. When the document is re-submitted the second review must be based on the list of

deficiencies that were identified in the first round of review. This is an issue of fairness and will lead to a more efficient process. The goal is to provide a document that is adequate to start the public review.

The current language regarding the timeframe for the preparation of the final EIS is unrealistic. It requires that the final EIS be prepared within 45 days after the close of any hearing or within 60 days of the filing of the draft EIS. Rarely, if ever, are these timeframes met. The Department proposes to extend this timeframe and provide certainty for when the EIS process will end.

Currently in SEQR any timeframe may be extended by mutual agreement between a project sponsor and the lead agency [See 617.3(i)]. So for large complex projects where the lead agency and the applicant agree that additional time is necessary to prepare the final EIS there is already a provision that would allow the six month clock to be extended. This provision would also not apply to direct actions of an agency.

Alternatives: The "no action" alternative would result in no change to the current language on determining adequacy and the timeframe for preparation of a final EIS. Other suggested alternatives are as follows: Require that the submitted draft EIS be determined complete if it contains all items listed in the final scope and require default acceptance of the submitted draft EIS if the lead agency exceeds the time provided for acceptance; require the applicant to submit a demand letter before the default acceptance is triggered; or add language that would create a narrow exception to the final timeframe where an action is subject to a trial-like adjudicatory hearing which by law becomes part of the record.

3.5 SEQR Fees

3.5.1 Preliminary Text Amendment:

617.13(e) [Where an applicant chooses not to prepare a draft EIS, t] The lead agency shall provide the applicant, upon request, with an estimate of the costs for preparing or reviewing the draft EIS calculated on the total value of the project for which funding or approval is sought. The applicant shall also be entitled, upon request to, copies of invoices or statements for work prepared by a consultant.

Objective and rationale: The Department proposes to clarify existing fee assessment authority by amending language to provide project sponsors with the ability to request an estimate of the costs for reviewing the EIS and a copy of any invoices or statement of work done by any consultant for the lead agency. This is primarily an issue of fairness and disclosure. A project sponsor should have the right to receive an estimate of the lead agency's costs for the review of the EIS along with written documentation to support such fees. Currently, the lead agency must provide an estimate to the project sponsor when they take on the responsibility for the preparation of the EIS.

Alternatives: The "no action" alternative would remove this item from the Fees section. Other suggested alternatives: require that a fee be collected for all EIS and the EIS be prepared by a third party hired by the lead agency.

4.0 Issues Not Included in the Final Scope

A total of 37 comments letters were received during the public comment period that expired on August 10, 2012. The following is a brief discussion of the major issues that were considered for inclusion in the final scope of the regulatory changes but were dismissed from further consideration in this rule making.

4.1 Allow Conditioned Negative Declarations to be used for Type I Actions

This issue has been debated since the changes to SEQR made in 1987 that recognized the use of conditioned negative declarations (CND) and allowed them to be used for actions classified as Unlisted. It was rejected in 1987, reconsidered and rejected again in 1995. There are three primary concerns regarding the expansion of CNDs to Type I actions. First, Type I actions are presumed, to require the preparation of an EIS. Second, as it stands, the CND process adds an arguably unnecessary level of procedural complication to SEQR and the DEC does not favor carrying it over to Type I actions (which are by definition often the most environmentally significant types of actions. Third, the DEC questions whether it has the statutory authority for expanding the use of CNDs to Type I actions. The 1995 Final Generic EIS on the changes to SEQR has a complete discussion of this issue.
http://www.dec.ny.gov/docs/permits_ej_operations_pdf/finalgeis.pdf

4.2 Establish a Board or Council to Review SEQR Decisions

This issue has been raised by many parties over the years. It would establish an independent board or council that could, on request, review disputes and issue opinions on the proper implementation of SEQR. The make-up of the body, whether the determination was advisory or mandatory and identifying what parties could seek a review are elements that would have to be established. This issue has been rejected because it is outside of the scope of this regulatory action. Establishing a board or council that could issue a binding decision would require legislation and a change to Article 8 of the Environmental Conservation Law.

4.3 DEC Should Develop a Best Practice Manual

The suggestion has been raised that DEC should prepare a “Best Practices Manual” to establish the recommended or required practices that should be applied for issues that are frequently involved in the environmental review of an activity. This issue would not require a regulatory change so long as the practices were not required to be used by agencies. The suggestion has great appeal. DEC has, for many years, made available a SEQR Handbook to help SEQR practitioners’ with the process questions. A workbook to help users prepare and review the revised EAF forms is in preparation but it will not contain standard methodologies for the conduct of a traffic study, air analysis, wetland survey, etc. New York City (NYC) has taken this approach for activities that are subject to environmental review under the City Environmental Quality Review Act (CEQRA) and this manual is a great source of information. Preparing a best practice manual to cover even the most common environmental issues that could be fairly applied to the varied environments in New York State would be an expensive task which is currently beyond the fiscal capabilities of the DEC.

4.4 Rely on a Licensed Professional to Attest to the Accuracy of the Review

The issue was raised that the regulations should allow or require a lead agency to rely on the expertise of licensed professionals in the resolution of issues during an environmental review. If a licensed professional is willing to attest to the completeness and accuracy of an environmental impact review by affixing his or her stamp on the plan/assessment, that issue should not be the subject of additional scrutiny or debate by the lead agency or interveners. Making this change would significantly undermine the powers of the lead agency and much of the fact-finding that is part of the SEQR process. Although a licensed professional may have arrived at a conclusion there is no guarantee that the selected approach is the most environmentally compatible approach or that the professional is in fact correct or objective. Allowing other experts and the public the opportunity to review and offer comment is a healthy process. Obviously, the conclusions of a licensed professional should carry significant weight in the resolution of an issue. But, it should not be the only determining factor. Giving deference in this fashion would require legislation and a change to Article 8 of the Environmental Conservation Law.

Electronic Waste Recycling & Regulation

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Recycling Electronics in NY
An Overview

Maggie Macdonald
Associate

Why is Recycling Electronics Important?

- Electronics contain potentially harmful materials & valuable commodities
  - Recycling 1 million cell phones yields 35,000 lbs copper, 772 lbs silver, 75 lbs gold & 33 lbs palladium
- Improper disposal of electronics, including open dumping or burning, can contaminate air, soil and water & negatively impact human health
- E-waste generation is increasing

Regulatory Overview

- New York State Electronic Equipment Recycling & Reuse Act
- Federal CRT Rule
- Voluntary Certification to Independent Standards

New York State Electronic Equipment Recycling & Reuse Act

- Enacted in 2010
- Established disposal ban for "covered electronic equipment" in phases
- Creates convenience standard & performance goals
- Regulated entities:
  - Manufacturers, collectives, recyclers, consolidation facilities, collection sites, retailers, haulers, waste management facilities, consumers

Covered Electronic Equipment

- Computers
  - Including laptops, desktops, tablets & e-readers
- Computer peripherals
  - Monitors
  - Electronic keyboards
  - Electronic mice or similar pointing devices
  - fax machines
  - scanners
  - Printers
- Small scale servers
- Televisions
- Small electronic equipment
  - VCRs
  - DVRs
  - Portable digital music players
  - DVD players
  - Digital converter boxes
  - Cable or satellite receivers (including digital media receivers)
  - Electronic or video game consoles

Federal CRT Rule

- CRTs marked for disposal are hazardous waste under RCRA due to leaded glass
- Recycled CRT glass and used CRTs are not solid or hazardous waste under RCRA if certain conditions are met
  - Export requirements
  - Storage, labeling, transporting, accumulation & processing requirements
- NYSDEC CRT Policy

Image from EPA: https://www.epa.gov/hw/cathode-ray-tubes-crts-0

Independent Certification Standards

Qualities	R2 Responsible Recycling	E-Stewards
Program Owner	Sustainable Electronics Recycling International	Basel Action Network
Export Restrictions	Allows export to some non-OECD with appropriate documentation	No exports to non-OECD countries
Other Requirements	ISO 14001 & OHSAS 18001	ISO 14001
Fees	$1500 per site licensing fee	Based on revenues

Questions?

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NEW YORK
STATE OF
OPPORTUNITY

Department of
Environmental
Conservation

NYS Electronic Equipment Recycling and Reuse Act

Enforcement, Achievements and Challenges and Regulations

October 15, 2016

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NYSDEC
Albany, NY
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CIVIL ENFORCEMENT (ECL §71-2729)

- 4 categories of penalties:
  - Consumer violations - $100.00 penalty per violation;
  - Solid waste carters and solid/hazardous waste management facilities - $250.00 penalty per violation
  - Manufacturers, collection sites, consolidation facilities, recycling facilities:
    - Failure to file a report, registration, fee or surcharge - $1,000 per day
    - Other violations - $1,000 for first; $2,500 for the second; $5,000 for the third
  - Retailers - $250 for first; $500 for second; $500 for third

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

ENFORCEMENT EFFORTS

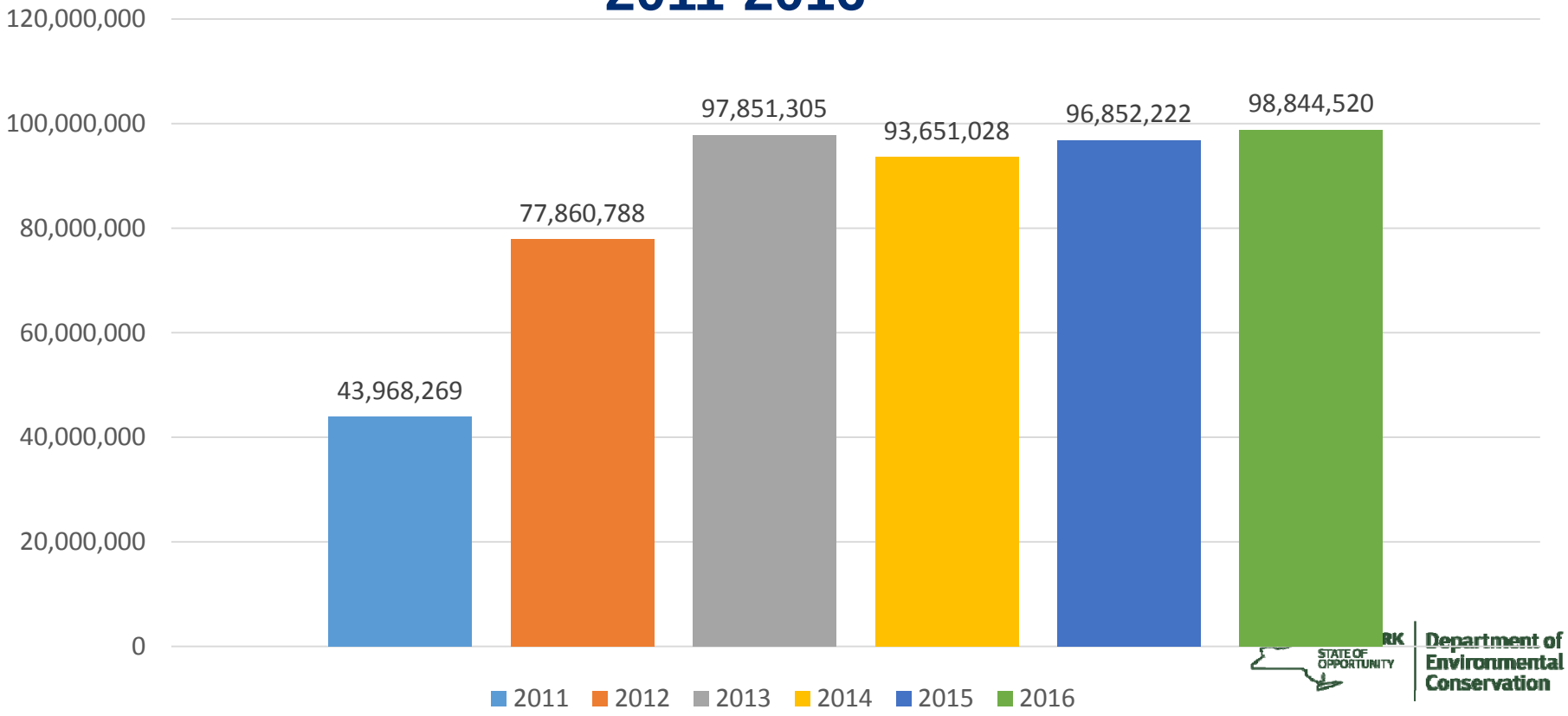
2012-2013 – Department focused on assisting and educating regulated entities on compliance issues.

2014 – Department issues notices of violations to 23 Manufacturers that failed to file annual report. Registrations of 4 manufacturers were revoked.

2015 – Department issued notices of violations to 10 manufacturers that failed to file annual report. Registrations of 5 manufacturers were revoked.

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Statewide Recycling & Reuse Goal in Lbs. 2011-2016



Program Performance (2011-2015)

Statewide Goal vs. Reported Collection

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Recycling Surcharges (2012 - 2015)

Program Year	2012	2013	2014	2015
Manufacturers	10	9	10	10
Pounds under-collected	90,512	466,461	523,512	139,605
Surcharges issued	$41,922.30	$176,536.50	$242,848.70	$67,747.90
Surcharges paid	$41,922.30	$176,536.50	$239,571.20	$53,356.40

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Program Achievements

- Recycling rate increases in each program year:
  - 2011 – 2.3 lbs. per capita
  - 2012 – 4 lbs. per capita
  - 2013 – 5 lbs. per capita

- Total collected from 2011-2013: **221,813,671 lbs.**

- Enhanced recycling/reuse infrastructure throughout the state

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Program Challenges

- Manufacturer/Collective Program Compliance
- Cathode Ray Tube (CRT) Management
- DEC Implementation Challenges

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Manufacturer/Collective Program Compliance

- Acceptance Program Shortfalls:
  - Only meet minimal convenience requirements
  - Continuous brand/one-for-one collection
  - Program partnerships, contracts and agreements
  - Annual report non-submittal and incompleteness
  - Updating of critical program and contact information

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Cathode Ray Tubes (CRTs)

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

CRT Glass Management

- Inadequate capacity to process discarded CRTs – large backlog
- 2013 North America in 2013 processing capacity of 128,000 tons/year compared to a needed capacity of as much as 390,000 tons/year.
- Due to the lack of processing capability and increased costs for proper CRT management, stockpiles of CRTs are being created.
- Potential new CRT processors – Texas, New York, and Virginia

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

DEC Implementation Challenges

- Unregistered manufacturers & other entities
- Data gathering, entry & verification
- Out-of-state entity tracking
- Timely acceptance standard distribution
- Compliance efforts

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Regulations

- Stakeholder meetings held October 2016
- Potential areas to be covered:
  - Surcharge waiver procedures/criteria
  - Premium services
  - Withdrawal from the program
  - Acceptance credit program
  - Covered electronic equipment
  - Continuous acceptance program requirements

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Thank You!

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Fore more information visit DEC's E-waste Recycling Website:
http://www.dec.ny.gov/chemical/65583.html

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

www.greenchiprecycling.com

Bill Monteleone

Managing Partner

History of GreenChip

- Founded in 2012
- First R2 Recycler in New York City
- Based out of Brooklyn NY
- Certifications include:
  - R2:2013
  - ISO 1400:2004
  - OHSAS 18001:2007

Services offered include:

- E-waste recycling and pickups

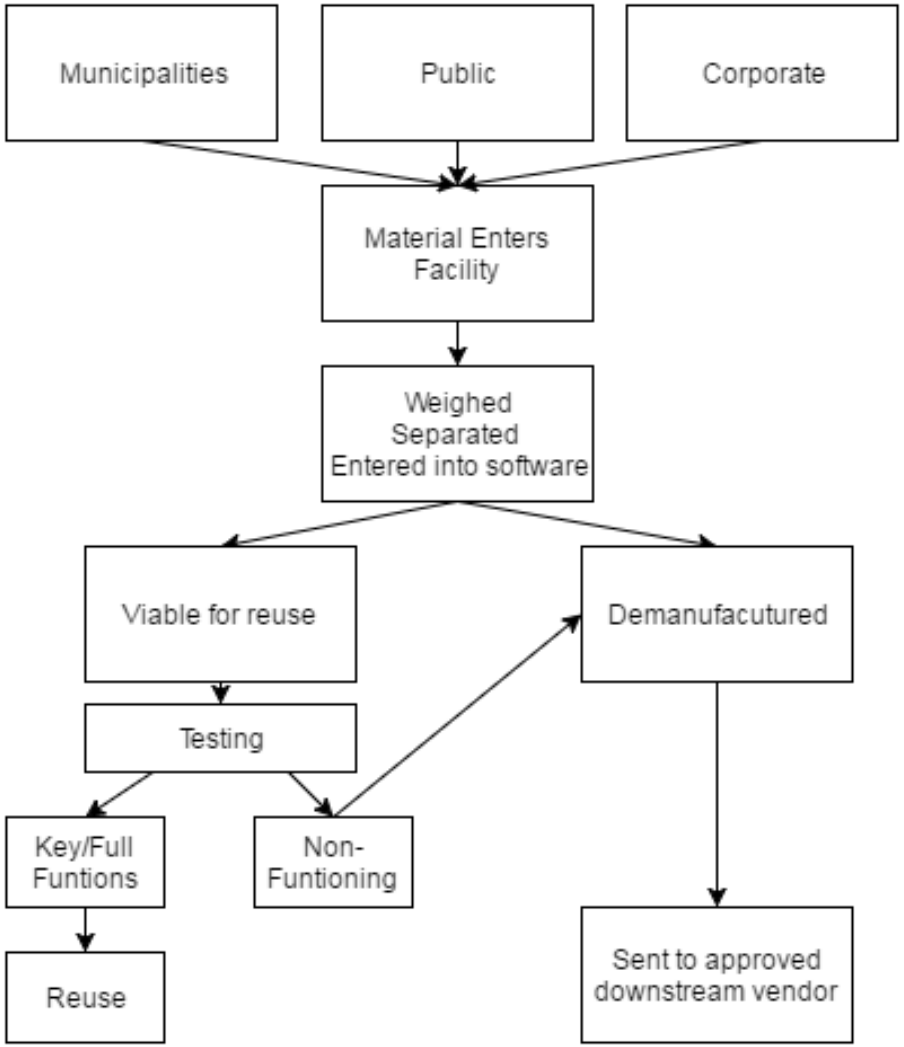
Services offered include:

- Hard drive shredding and sanitization

Services offered include:

- ITAD (IT Asset Disposition)

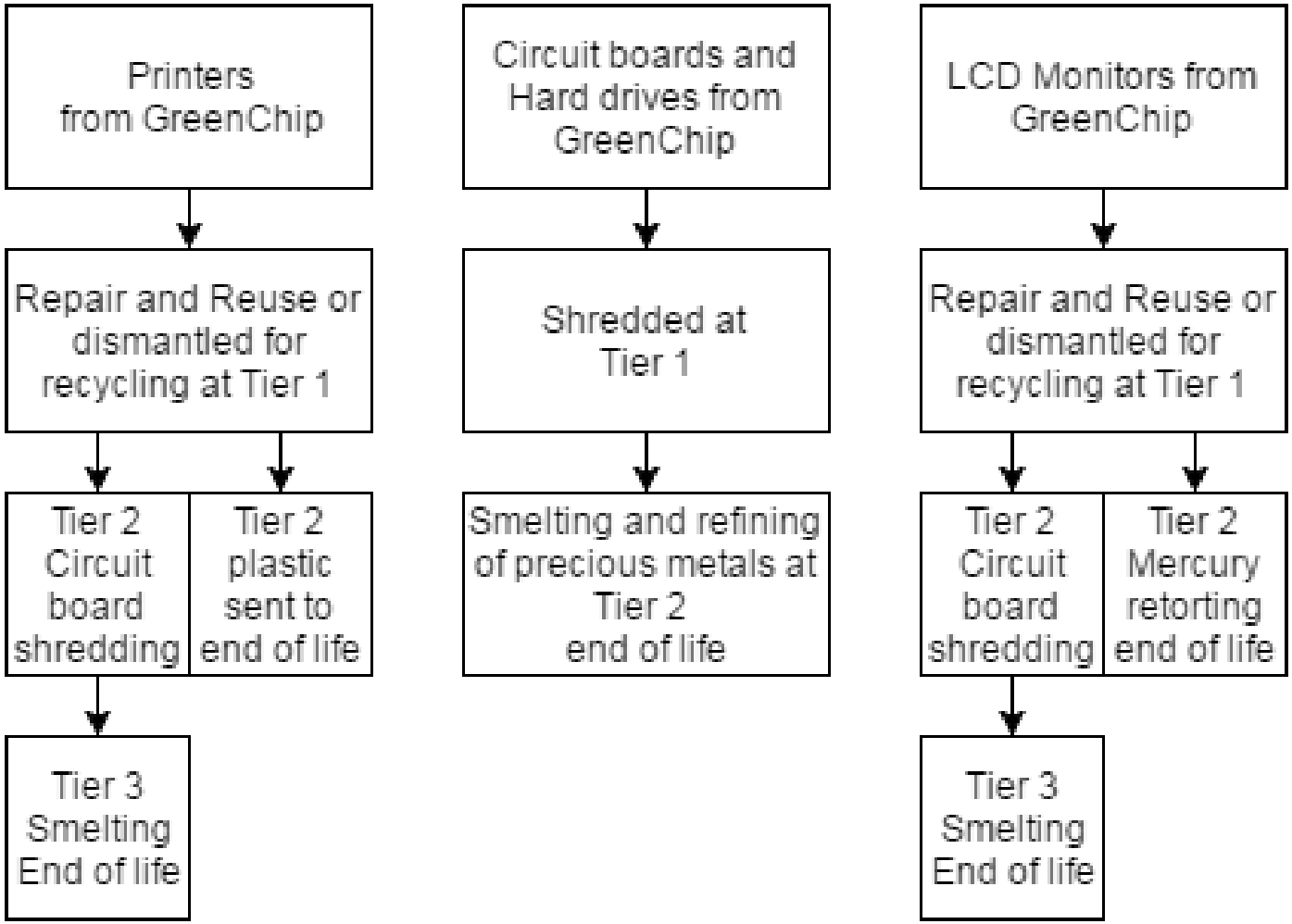
Flow of material through GreenChip



Flow of material through GreenChip

- Material enters facility and is tracked through proprietary software
- Items are weighed and separated by commodity type
- Equipment is inspected and designated for demanufacturing or reuse
- Equipment for reuse is tested under R2:2013 Provision 6 guidelines.
- Demanufactured equipment sent to approved downstream vendor

Flow of material downstream



Flow of material downstream

- Track Focus Materials until end of life
- Downstream vendors are audited and evaluated to ensure they meet our Focus Material Plan and can properly recycle
- Do not export to non-OECD countries
- Do not send materials to landfill

Environmental, Occupational Health & Safety

- R2:2013 is a more holistic approach to recycling
- Encompasses worker health and safety in addition to responsible recycling
- Creates a foundation for management system

NYS E-Waste Recycling & Reuse Act

- Shift in Market, low commodity values
- Many recyclers went out of business
- CEE (Covered Electronic Equipment)
- OEMs (Original Electronic Manufacturers)

Industry Forecast

- Can't rely on commodity value
- Traditional recycling methods don't work for electronic recycling
- Reuse and resale
- Working with OEMs

ENVIROMENTAL CONSERVATION LAW ARTICLE 27 TITLE 26

ELECTRONIC EQUIPMENT RECYCLING AND REUSE

§ 27-2601. Definitions.

As used in this title:

1. "Cathode ray tube" means a vacuum tube or picture tube used to convert an electronic signal into a visual image.

2. "Computer" means an electronic, magnetic, optical, electrochemical or other high-speed data processing device performing a logical, arithmetic or storage function, including a laptop computer and desktop computer, and includes any cable, cord, or wiring permanently affixed to or incorporated into such product, and may include both a computer central processing unit and a monitor; but such term shall not include an automated typewriter or typesetter, a portable hand-held calculator, a portable digital assistant, server, or other similar device.

3. "Computer peripheral" means a monitor; electronic keyboard; electronic mouse or similar pointing device; facsimile machine, document scanner, or printer intended for use with a computer; and includes any cable, cord, or wiring permanently affixed to or incorporated into any such product. Computer peripheral shall not include any document scanner or printer which weighs one hundred pounds or more.

4. "Consumer" means a person located in the state who owns or uses covered electronic equipment, including but not limited to an individual, a business, corporation, limited partnership, not-for-profit corporation, the state, a public corporation, public school, school district, private or parochial school or board of cooperative educational services or governmental entity, but does not include an entity involved in a wholesale transaction between a distributor and retailer.

5. "Covered electronic equipment" means: a computer; computer peripheral; small electronic equipment; small-scale server; cathode ray tube; or television, as defined in this section. "Covered electronic equipment" does not include any motor vehicle or any part thereof; camera or video camera; portable or stationary radio; household appliances such as clothes washers, clothes dryers, refrigerators, freezers, microwave ovens, ovens, ranges or dishwashers; equipment that is functionally or physically part of a larger piece of equipment intended for use in an industrial, research and development or commercial setting; security or anti-terrorism equipment; monitoring and control instrument or system; thermostat; hand-held transceiver; telephone of any type; portable digital assistant or similar device; calculator; global positioning

system (GPS) receiver or similar navigation device; a server other than a small-scale server; a cash register or retail self checkout system; a stand-alone storage product intended for use in industrial, research and development or commercial settings; commercial medical equipment that contains within it a cathode ray tube, a flat panel display or similar video display device, and is not separate from the larger piece of equipment; or other medical devices as that term is defined under the Federal Food, Drug and Cosmetic Act.

6. "Electronic waste" means covered electronic equipment that has been discarded or is no longer wanted by its owner, or for any other reason enters the waste collection, recovery, treatment, processing, or recycling system. For purposes of section 27-2611 of this title, "electronic waste" does not include the case, shell, or other enclosure of covered electronic equipment from which incorporated assemblies, sub-assemblies, components, materials, wiring, circuitry and commodities have been removed.

7. "Electronic waste collection site" means a facility at a fixed or temporary site at which electronic waste is accepted from consumers and temporarily stored for more than five days in a calendar year before such waste is transported to an electronic waste consolidation facility or electronic waste recycling facility. Electronic waste collection sites include, but are not limited to, dedicated sites and facilities for the acceptance of electronic waste, and retail stores and outlets, municipal or private electronic waste collection sites and not-for-profit donation sites that have agreed to accept electronic waste.

8. "Electronic waste consolidation facility" means a facility that receives and stores electronic waste for the purpose of organizing, categorizing or consolidating items of electronic waste before such waste is transported to an electronic waste recycling facility. Electronic waste consolidation facilities include, but are not limited to, facilities of brokers acting as intermediaries between electronic waste buyers and sellers, and regional centers at which electronic waste is organized, categorized or consolidated after being transported to such centers from electronic waste collection sites or other electronic waste consolidation facilities.

9. "Electronic waste recycling facility" means a facility at which electronic waste is recycled.

10. "Label" means a marker on the surface of covered electronic equipment conveying information; for the purposes of this title, labels must be permanent and can be attached, printed, engraved or incorporated in any other permanent way that is obvious and visible to users of the product.

11. "Manufacturer" means a person who: (a) assembles or substantially assembles covered electronic equipment for sale in the state; (b) manufactures covered electronic equipment under its own brand name or under any other brand name for sale in the state; (c) sells, under its own brand name, covered electronic equipment sold in the state; (d) owns a brand name that it licenses to another person for use on covered electronic equipment sold in the state; (e) imports covered electronic equipment for sale in the state; or (f) manufactures covered electronic equipment for sale in the state without affixing a brand name. "Manufacturer" does not mean a person who assembles or substantially assembles, and sells less than one thousand units of covered electronic equipment annually in this state, or whose primary business is the sale of covered electronic equipment which is comprised primarily of rebuilt, refurbished or used components. If more than one person is a manufacturer of a brand of covered electronic equipment, any such person may assume

responsibility for obligations of a manufacturer of that brand under this title. If none of those persons assumes responsibility for the obligations of a manufacturer under this title, any and all such persons jointly and severally may be considered to be the responsible manufacturer of that brand for purposes of this title.

12. "Manufacturer's brands" means a manufacturer's name, brand name or brand label, and all manufacturer's names, brand names and brand labels for which the manufacturer has a legal right or interest, including those names, brand names, and brand labels of companies that have been acquired by the manufacturer or in which the manufacturer asserts a legal interest such as trademark, license, service mark, or patent.

13. "Monitor" means a separate visual display component of a computer, whether sold separately or together with a computer central processing unit, and includes a cathode ray tube, liquid crystal display, gas plasma, digital light processing or other image projection technology, greater than four inches when measured diagonally, and its case, interior wires and circuitry, and any cable cord or wiring permanently affixed thereto or incorporated into such product.

14. "Person" means any individual, business entity, partnership, company, corporation, not-for-profit corporation, association, governmental entity, public benefit corporation, public authority, firm, organization, or any other group of individuals, or any officer or employee or agent thereof.

15. "Recycle" means to separate, dismantle or process the materials, components or commodities contained in electronic waste for the purpose of preparing the materials, components or commodities for use or reuse in new products or components thereof, but not for energy recovery or energy generation by means of combustion, gasification, pyrolysis or other means. Recycling includes the manual and mechanical separation of electronic waste to recover materials, components or commodities contained therein for the purpose of reuse or recycling, and changing the physical or chemical composition of electronic waste to segregate components for purposes of recycling those components.

16. "Retailer" means a person who sells covered electronic equipment to a person in the state through any means, including, but not limited to, transactions conducted through retail sales outlets, mail, catalogs, the telephone or the internet, or any electronic means. "Retailer" does not include a person who sells or offers for sale fewer than ten items of covered electronic equipment during a calendar year.

17. "Reuse" means the use of electronic waste that is tested and certified to be in good working order and which was removed from the waste stream for use for the same purpose for which it was manufactured, including the continued use of whole systems or components.

18. "Sell" or "sale" means any transfer for consideration of title or the right to use, from a manufacturer or retailer to a person, including, but not limited to, transactions conducted through retail sales outlets, catalogs, mail, the telephone, the internet, or any electronic means; this includes transfer of new products or used products that may have been refurbished by their manufacturer or manufacturer-approved party and that are offered for sale by a manufacturer or retailer, but does not include consumer-to-consumer second-hand transfer. "Sell or sale" does not include: (a) the transfer of used covered electronic equipment or a lease of covered electronic equipment; or (b) wholesale transactions among a manufacturer, wholesaler and retailer.

19. "Small electronic equipment" means any portable digital music player that has memory capability and is battery-powered, video cassette recorder, a digital video disc player, digital video recorder, digital

converter box, cable or satellite receiver, or electronic or video game console, and includes any cable, cord, or wiring permanently affixed to or incorporated into any such product.

20. "Small-scale server" means a computer that typically uses desktop components in a desktop form factor, but is designed primarily to be a storage host for other computers. To be considered a small-scale server, a computer must have the following characteristics: designed in a pedestal, tower, or other form factor similar to those of desktop computers such that all data processing, storage, and network interfacing is contained within one box or product; intended to be operational twenty-four hours per day and seven days a week, and unscheduled downtime is extremely low, such as on the order of hours per year; is capable of operating in a simultaneous multi-user environment serving several users through networked client units; and designed for an industry accepted operating system for home or low-end server applications.

21. "Television" means a display system containing a cathode ray tube or any other type of display primarily intended to receive video programming via broadcast, cable or satellite transmission, having a viewable area greater than four inches when measured diagonally.

§ 27-2603. Manufacturer collection; recycling surcharge.

1. (a) Beginning April first, two thousand eleven, a manufacturer of covered electronic equipment must accept for collection, handling and recycling or reuse electronic waste for which it is the manufacturer. Such waste shall count toward the amount of electronic waste required to be accepted pursuant to subdivision four of this section.

(b) Beginning April first, two thousand eleven, a manufacturer of covered electronic equipment must accept for collection, handling and recycling or reuse one piece of electronic waste of any manufacturer's brand if offered by a consumer with the purchase of covered electronic equipment of the same type by a consumer. Such waste shall count toward the amount of the electronic waste required to be accepted pursuant to subdivision four of this section.

2. Beginning April first, two thousand eleven, each manufacturer must accept for collection, handling and recycling or reuse the manufacturer's acceptance standard as specified in subdivision four of this section.

3. Statewide recycling or reuse goal. (a) For the period from April first, two thousand eleven through December thirty-first, two thousand eleven, the statewide recycling or reuse goal for electronic waste shall be the product of the latest population estimate for the state, as published by the U.S. Census bureau multiplied by three pounds multiplied by three-quarters.

(b) For calendar year two thousand twelve, the statewide recycling or reuse goal for all electronic waste shall be the product of the latest population estimate for the state, as published by the U.S. Census bureau multiplied by four pounds.

(c) For calendar year two thousand thirteen, the statewide recycling or reuse goal for all electronic waste shall be the product of the latest population estimate for the state, as published by the U.S. Census bureau multiplied by five pounds.

(d) For calendar year two thousand fourteen and annually thereafter, the statewide recycling or reuse goal for all electronic waste is the product of the base weight multiplied by the goal attainment percentage. For the purposes of this paragraph, "base weight" means the greater of:

(i) the average weight of all electronic waste collected for recycling or reuse during the previous three calendar years as reported to the department pursuant to paragraph (b) of subdivision one of section 27-2617 of this title; or (ii) the three year average of the sum of all electronic waste collected for recycling or reuse during the previous three calendar years based on information reported to the department pursuant to paragraph (b) of subdivision one, paragraph (b) of subdivision two and paragraph (b) of subdivision three of section 27-2613 of this title.

(e) The "goal attainment percentage" means:

(i) ninety percent if the base weight is less than ninety percent of the statewide recycling or reuse goal for the previous calendar year;

(ii) ninety-five percent if the base weight is ninety percent or greater, but does not exceed ninety-five percent of the statewide recycling or reuse goal for the previous calendar year;

(iii) one hundred percent if the base weight is ninety-five percent or greater, but does not exceed one hundred five percent of the statewide recycling or reuse goal for the previous calendar year;

(iv) one hundred five percent if the base weight is one hundred five percent or greater, but does not exceed one hundred ten percent of the statewide recycling or reuse goal for the previous calendar year; and

(v) one hundred ten percent if the base weight is one hundred ten percent or greater of the statewide recycling or reuse goal for the previous calendar year.

4. Manufacturer acceptance standard. (a) For the period April first, two thousand eleven through December thirty-first, two thousand eleven and annually thereafter, each manufacturer's acceptance standard is the product of the statewide recycling or reuse goal under paragraph (a), (b), (c) or (d) of subdivision three of this section, as appropriate, multiplied by that manufacturer's market share pursuant to paragraph (b) of this subdivision.

(b) Each manufacturer's market share of electronic waste shall be determined by the department based on the manufacturer's percentage share of the total weight of covered electronic equipment sold as determined by the best available information, including, but not limited to, state sales data reported by weight. Beginning April first, two thousand eleven, and every calendar year thereafter, the department shall provide each manufacturer with a determination of its market share of electronic waste which shall be the quotient of the total weight of the manufacturer's covered electronic equipment sold to persons in this state based on the average annual retail sales during the preceding three calendar years, as reported under sections 27-2605 and 27-2617 of this title divided by the total weight of all manufacturers covered electronic equipment sold to persons in this state based on the average annual retail sales during the preceding three calendar years, as reported under sections 27-2605 and 27-2617 of this title.

5. In the absence of a waiver by the department pursuant to subdivision three of section 27-2615 of this title, beginning in calendar year two thousand thirteen, a manufacturer that fails to meet its manufacturer's acceptance standard for the previous calendar year as required by subdivision four of this section shall be subject to a recycling surcharge, determined as follows:

(a) If a manufacturer accepts at least ninety percent but less than one hundred percent of its manufacturer's acceptance standard as required by subdivision four of this section, the surcharge shall be thirty cents multiplied by the number of additional pounds of electronic waste that should have been accepted by such manufacturer.

(b) If a manufacturer accepts at least fifty percent but less than ninety percent of its manufacturer's acceptance standard as required by subdivision four of this section, the surcharge shall be forty cents multiplied by the number of additional pounds of electronic waste that should have been accepted by such manufacturer.

(c) If a manufacturer accepts less than fifty percent of its manufacturer's acceptance standard as required by subdivision four of this section, the surcharge shall be fifty cents multiplied by the number of additional pounds of electronic waste that should have been accepted by such manufacturer.

6. The recycling surcharge shall be paid to the department with the annual report required pursuant to section 27-2617 of this title.

7. Beginning with calendar year two thousand fourteen, if a manufacturer accepts more than its manufacturer's acceptance standard as required by subdivision four of this section, the excess weight may be used as electronic waste acceptance credits and may be sold, traded, or banked for a period no longer than three calendar years succeeding the year in which the credits were earned; provided, however, that no more than twenty-five percent of a manufacturer's obligation for any calendar year may be met with recycling credits generated in a prior calendar year.

§ 27-2605. Manufacturer electronic waste registration and responsibilities.

1. A manufacturer shall submit a registration on a form prescribed by the department to the department by January first, two thousand eleven, along with a registration fee of five thousand dollars. The department may require such form to be filed electronically. Such registration shall include:

(a) the manufacturer's name, address, and telephone number;

(b) the name and title of an officer, director, or other individual designated as the manufacturer's contact for purposes of this title;

(c) a list identifying the manufacturer's brands;

(d) a general description of the manner in which the manufacturer will comply with section 27-2603 of this title, including specific information on the manufacturer's electronic waste acceptance program in the state, and a current list of locations within the state where consumers may return electronic waste;

(e) sales data reported by weight for the manufacturer's covered electronic equipment sold in this state for the previous three calendar years, categorized by type to the extent known. If the manufacturer cannot provide accurate state sales data, it must explain why such data cannot be provided, and estimate state sales data by (i) dividing its national sales data by weight by the national population according to the most recent census and multiplying the result by the population of the state, or (ii) another method approved by the department;

(f) a statement disclosing whether: (i) any covered electronic device sold in this state exceeds the maximum concentration values established for lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBBs), and polybrominated diphenyl ethers (PBDEs) under the restriction of hazardous substances directive (RoHS) pursuant to 2002/95/EC of the European Parliament and Council and any amendments thereto and if so, a listing of any covered electronic equipment that is not in compliance with such directive; or (ii) the manufacturer has received an exemption from one or more of those maximum concentration

values under the RoHS directive that has been approved and published by the European Commission; and

(g) any other information as the department may require.

2. A manufacturer's registration is effective upon acceptance by the department and must be updated within thirty days of any material change to the information required by subdivision one of this section.

3. Any person who becomes a manufacturer on or after January first, two thousand eleven shall register with the department prior to selling or offering for sale in the state any covered electronic equipment, and must comply with the requirements of this title.

4. No later than April first, two thousand eleven, a manufacturer shall not sell or offer for sale electronic equipment in the state unless the manufacturer has registered with the department and maintains an electronic waste acceptance program through which the manufacturer, either directly or through an agent or designee, accepts electronic waste from consumers in the state for recycling. The manufacturer shall ensure that retailers are notified of such registration.

5. The electronic waste acceptance program shall include, at a minimum:

(a) collection, handling and recycling or reuse of electronic waste pursuant to section 27-2603 of this title in a manner convenient to consumers. The following acceptance methods shall be considered reasonably convenient: (i) mail or ship back return programs; (ii) collection or acceptance events conducted by the manufacturer or the manufacturer's agent or designee, including events conducted through local governments or private parties; (iii) fixed acceptance locations such as dedicated acceptance sites operated by the manufacturer or its agent or designee; (iv) agreements with local governments, retail stores, sales outlets and not-for-profit organizations which have agreed to provide facilities for the collection of electronic waste; (v) community collection events; and (vi) any combination of these or other acceptance methods which effectively provide for the acceptance of electronic waste for recycling or reuse through means that are available and reasonably convenient to consumers in the state. At a minimum, the manufacturer shall ensure that all counties of the state, and all municipalities which have a population of ten thousand or greater, have at least one method of acceptance that is available within such county or municipality. The department may establish additional requirements to ensure convenient collection from consumers;

(b) information on how consumers can destroy all data on any electronic waste, either through physical destruction of the hard drive or through data wiping;

(c) a public education program to inform consumers about the manufacturer's electronic waste acceptance program, including at a minimum: (i) an internet website and a toll-free telephone number and written information included in the product manual for, or at the time of sale of, covered electronic equipment that provides sufficient information to allow a consumer of covered electronic equipment to learn how to return the covered equipment for recycling or reuse, and in the case of manufacturers of computers, hard drives and other covered electronic equipment that have internal memory on which personal or other confidential data can be stored, such website shall provide instructions for how consumers can destroy such data before surrendering the products for recycling or reuse; (ii) advertisements and press releases if any; and

(d) any other information as required by the department in accordance with regulations promulgated pursuant to this article.

6. A manufacturer shall maintain records demonstrating compliance with

this title and make them available for audit and inspection by the department for a period of three years.

7. A manufacturer may satisfy the electronic waste collection requirements of this section by agreeing to participate in a collective electronic waste acceptance program with other manufacturers. Any such collective electronic waste acceptance program must meet the same requirements as an individual manufacturer. Any collective electronic waste acceptance program must include a list of manufacturers that are participating in such program along with other identifying information as may be required by the department. Such program shall submit a registration to the department along with a registration fee of ten thousand dollars.

8. A manufacturer shall be responsible for all costs associated with the implementation of the electronic waste acceptance program. The manufacturer shall not charge consumers for the collection, handling and recycling and reuse of electronic waste, provided that such prohibition shall not apply to a charge on business consumers or to charges for premium services. This prohibition shall not apply to a manufacturer's contract with a consumer for the collection, handling, recycling or reuse of electronic waste that was entered into prior to the effective date of this section. For purposes of this subdivision, "business consumer" means a for-profit entity which has fifty or more full time employees or a not-for-profit corporation with seventy-five or more full time employees, but not a not-for-profit corporation designated under section 501(c)(3) of the internal revenue code. For purposes of this subdivision, "premium services" means equipment and data security services, refurbishment for reuse by the consumer, and other custom services as may be determined by the department.

§ 27-2607. Retailer requirements.

1. At the location of sale of covered electronic equipment, a retailer shall provide purchasers of covered electronic equipment with information, if any, about opportunities for the return of electronic waste that has been provided to the retailer by a manufacturer.

2. Beginning April first, two thousand eleven, no retailer shall sell or offer for sale in the state any covered electronic equipment unless the manufacturer and the manufacturer's brands are registered with the department pursuant to section 27-2605 of this title. If the retailer purchased covered electronic equipment from a manufacturer who fails to register by January first, two thousand eleven, or prior to the date the manufacturer withdrew its registration or the registration was revoked by the department, the retailer may continue to sell the covered electronic equipment for one hundred eighty days after April first, two thousand eleven, or the date the registration was withdrawn or revoked.

§ 27-2609. Labeling.

Beginning April first, two thousand eleven, a manufacturer may not offer for sale in the state or deliver to retailers for subsequent sale covered electronic equipment unless it has a visible, permanent label clearly identifying the manufacturer of that equipment.

§ 27-2611. Disposal ban.

1. Beginning April first, two thousand eleven, no manufacturer, retailer, or owner or operator of an electronic waste collection site, electronic waste consolidation facility or electronic waste recycling facility in the state shall dispose of electronic waste at a solid waste management facility or hazardous waste management facility, or place electronic waste for collection which is intended for disposal at a solid waste management facility or hazardous waste management facility.

2. Beginning January first, two thousand twelve, no person except for an individual or household shall place or dispose of any electronic waste in any solid waste management facility, or place electronic waste for collection which is intended for disposal at a solid waste management facility or hazardous waste management facility in this state. Persons engaged in the collection of solid waste for delivery to a solid waste management facility shall provide written information to users of such facility on the proper methods for the recycling of electronic waste.

3. Beginning January first, two thousand fifteen, no individual or household shall place or dispose of any electronic waste in any solid waste management facility, or place electronic waste for collection which is intended for disposal at a solid waste management facility or hazardous waste management facility in this state.

4. Beginning January first, two thousand twelve, an owner or operator of a solid waste management facility or hazardous waste management facility shall educate users of such facility on the proper methods for the management of electronic waste. Such education shall include:

(a) providing written information to users of such facility on the proper methods for recycling of electronic waste; and

(b) posting, in conspicuous locations at such facility, signs stating that electronic waste may not be disposed of at the facility.

§ 27-2613. Electronic waste collection, consolidation and recycling.

1. Electronic waste collection sites. No later than January first, two thousand eleven, each person who owns or operates an electronic waste collection site in the state shall:

(a) register with the department on a form prescribed by the department. The department may require such form to be filed electronically. The registration shall include: (i) the name, address, and telephone number of the owners and the operators of the electronic waste collection site; and (ii) the name, address, and telephone number of the electronic waste collection site. Any person who commences the operation of an electronic waste collection site on or after January first, two thousand eleven shall register with the department at least thirty days prior to receiving any electronic waste at such collection site. A registration is effective upon acceptance by the department. In the case of collection sites operated by a retailer, a single registration listing the name, address, and telephone number of the individual collection sites may be submitted covering all their collection sites;

(b) beginning March first, two thousand twelve, each person operating an electronic waste collection site shall submit to the department an annual report for the period of April first, two thousand eleven through December thirty-first, two thousand eleven and each calendar year thereafter, on a form prescribed by the department. The department may require annual reports to be filed electronically. Annual reports shall

include, but not be limited to, the following information: (i) the quantity, by weight, of electronic waste received from consumers in the state; (ii) the name and address of each person to whom the electronic waste collection site sent electronic waste during the reporting period, along with the quantity, by weight, of electronic waste that was sent to each such person; and (iii) the weight of electronic waste collected on behalf of or pursuant to an agreement with each manufacturer during the reporting period. All quantities of electronic waste reported by the collection site must separately include electronic waste generated by New York state consumers and electronic waste received from or shipped outside the state;

(c) manage electronic waste in a manner that complies with all applicable laws, rules and regulations;

(d) store electronic waste (i) in a fully enclosed building with a roof, floor and walls, or (ii) in a secure container (e.g., package or vehicle), that is constructed and maintained to minimize breakage of electronic waste and to prevent releases of hazardous materials to the environment;

(e) remove electronic waste from the site within one year of the waste's receipt at the site, and maintain records demonstrating compliance with this requirement.

2. Electronic waste consolidation facilities. (a) No later than January first, two thousand eleven, each person who operates an electronic waste consolidation facility in the state shall register with the department on a form prescribed by the department. The department may require such form to be filed electronically. The registration shall include: (i) the name, address and telephone number of the owner and the operator of the facility; and (ii) the name, address and telephone number of the electronic waste consolidation facility. Any person who commences the operation of an electronic waste consolidation facility on or after January first, two thousand eleven shall register with the department at least thirty days prior to receiving any electronic waste. A registration is effective upon acceptance by the department. Any registration required by this paragraph shall be accompanied by a registration fee of two hundred fifty dollars.

(b) Beginning March first, two thousand twelve, each person operating an electronic waste consolidation facility shall submit to the department an annual report for the period of April first, two thousand eleven through December thirty-first, two thousand eleven and each calendar year thereafter, on a form prescribed by the department. The department may require annual reports to be filed electronically. Annual reports shall include, but not be limited to, the following information: (i) the name and address of each electronic waste collection site from which the consolidation facility received electronic waste during the reporting period, along with the quantity, by weight, of electronic waste received from each collection site; (ii) the name and address of each person to whom the electronic waste consolidation facility sent electronic waste during the reporting period, along with the quantity, by weight, of electronic waste that was sent to each such person; (iii) the weight of electronic waste collected on behalf of or pursuant to an agreement with each manufacturer during the reporting period; and (iv) a certification by the owner or operator of the electronic waste consolidation facility that such a facility has complied with the requirements of this title and all other applicable laws, rules, and regulations. All quantities of electronic waste reported by the consolidation facility must separately include electronic waste generated by New York state consumers and electronic waste received from or shipped outside the state.

(c) Each person operating an electronic waste consolidation facility shall:

(i) manage electronic waste in a manner that complies with all applicable laws, rules and regulations;

(ii) store electronic waste (A) in a fully enclosed building with a roof, floor and walls, or (B) in a secure container (e.g., package or vehicle), that is constructed and maintained to minimize breakage of electronic waste and to prevent releases of hazardous materials to the environment;

(iii) have a means to control entry, at all times, to the active portion of the facility;

(iv) inform all employees who handle or have responsibility for managing electronic waste about the proper handling and emergency procedures appropriate to the type or types of electronic waste handled at the facility;

(v) remove electronic waste from the site within one year of the waste's receipt at the site, and maintain records demonstrating compliance with this requirement; and

(vi) maintain the records required by paragraphs (a) and (b) of this subdivision and by subparagraph (v) of this paragraph on site and make them available for audit and inspection by the department for a period of three years.

(d) A person operating an electronic waste consolidation facility shall not engage in electronic waste recycling unless such person is also registered as an electronic waste recycling facility, and complies with the requirements of this section that are applicable to each type of facility.

(e) A person operating an electronic waste consolidation facility may accept electronic waste in the same manner as an electronic waste collection site provided that such person complies with the requirements of this section that are applicable to electronic waste collection sites.

3. Electronic waste recycling facilities. (a) No later than January first, two thousand eleven, each person operating an electronic waste recycling facility in the state shall register with the department on a form prescribed by the department. The department may require such form to be filed electronically. The registration shall include: (i) the name, address and telephone number of the owner and the operator of the facility; and (ii) the name, address, and telephone number of the electronic waste recycling facility. Any person who commences the operation of an electronic waste recycling facility on or after January first, two thousand eleven shall register with the department at least thirty days prior to receiving any electronic waste. A registration is effective upon acceptance by the department. Any registration required by this paragraph shall be accompanied by a registration fee of two hundred fifty dollars.

(b) Beginning March first, two thousand twelve, each person operating an electronic waste recycling facility shall submit to the department an annual report for the period of April first, two thousand eleven through December thirty-first, two thousand eleven and each calendar year thereafter, on a form prescribed by the department. The department may require annual reports to be filed electronically. Annual reports shall include, but not be limited to, the following information: (i) the quantity, by weight, of electronic waste received from consumers in the state; (ii) the name and address of each electronic waste collection site and electronic waste consolidation facility from which electronic waste was received during the reporting period, along with the quantity,

by weight, of electronic waste received from each person; (iii) the name and address of each person to whom the facility sent electronic waste or component materials during the reporting period, along with the quantity, by weight, of electronic waste or component materials thereof sent to each such person; (iv) the weight of electronic waste collected on behalf of or pursuant to an agreement with each manufacturer during the reporting period; and (v) a certification by the owner or operator of the facility that such facility has complied with the requirements of this title and all other applicable laws, rules, and regulations. All quantities of electronic waste reported by the recycling facility must separately include electronic waste generated by New York state consumers and electronic waste received from or shipped outside the state.

(c) Each person operating an electronic waste recycling facility shall:

(i) manage and recycle electronic waste in a manner that complies with all applicable laws, rules and regulations;

(ii) store electronic waste (A) in a fully enclosed building with a roof, floor and walls, or (B) in a secure container (e.g., package or vehicle), that is constructed and maintained to minimize breakage of electronic waste and to prevent releases of hazardous materials to the environment;

(iii) have a means to control entry, at all times, through gates or other entrances to the active portion of the facility;

(iv) inform all employees who handle or have responsibility for managing electronic waste about proper handling and emergency procedures appropriate to the type or types of electronic waste handled at the facility;

(v) remove electronic waste from the site within one year of the waste's receipt at the site, and maintain records demonstrating compliance with this requirement; and

(vi) maintain the records required by paragraphs (a) and (b) of this subdivision and by subparagraph (v) of this paragraph on site and make them available for audit and inspection by the department for a period of three years.

(d) A person operating an electronic waste recycling facility may also operate such facility as an electronic waste consolidation facility provided that such person complies with the requirements of this section that are applicable to each type of facility. Where a facility is operated for both purposes, only one registration fee must be paid.

(e) A person operating an electronic waste recycling facility may accept electronic waste in the same manner as an electronic waste collection site provided that such person complies with the requirements of this section that are applicable to electronic waste collection sites.

4. Except to the extent otherwise required by law, no manufacturer or person operating an electronic waste collection site, electronic waste consolidation facility or electronic waste recycling facility shall have any responsibility or liability for any data in any form stored on electronic waste surrendered for recycling or reuse, unless such person misuses or knowingly and intentionally, or with gross negligence, discloses the data. This provision shall not prohibit any such person from entering into agreements that provide for the destruction of data on covered electronic equipment.

§ 27-2615. Department responsibilities.

1. The department is authorized to promulgate rules and regulations necessary to implement and administer this title. At a minimum, the department shall promulgate rules and regulations on: standards for reuse; electronic waste acceptance credits; waivers of the recycling surcharge; and acceptable alternative methods for the determination of state sales data.

2. The department shall (a) maintain a list of manufacturers who are registered pursuant to section 27-2605 of this title, (b) maintain a list of each such manufacturer's brands, and (c) post such lists on the department's website.

3. The department may waive the recycling surcharge payable by a manufacturer under this title when the manufacturer demonstrates in an application to the department it was unable to accept the weight of electronic waste required by section 27-2603 of this title despite the manufacturer's best efforts. The application shall be made with the annual report required by section 27-2617 of this title. The application shall include such information as the department requires. A waiver provided pursuant to this subdivision shall not relieve a manufacturer from the obligation to comply with the provisions of this title not specifically addressed in such waiver.

§ 27-2617. Reporting requirements.

1. Beginning March first, two thousand twelve, for the period of April first, two thousand eleven through December thirty-first, two thousand eleven and each calendar year thereafter, a manufacturer that offers covered electronic equipment for sale in this state shall submit a report to the department on a form prescribed by the department that includes the following:

(a) sales data reported by weight for the manufacturer's covered electronic equipment sold in this state for the previous three calendar years, categorized by type to the extent known. If the manufacturer cannot provide accurate state sales data, it must explain why such data cannot be provided, and estimate state sales data by (i) dividing its national sales data by weight by the national population according to the most recent census and multiplying the result by the population of the state, or (ii) another method approved by the department;

(b) the quantity, by weight, of electronic waste collected for recycling or reuse in this state, categorized by the type of covered electronic equipment collected during the reporting period, the methods used to accept the electronic waste, and the approximate weight of electronic waste accepted by each method used to the extent known;

(c) all quantities of electronic waste reported by the manufacturer must separately include electronic waste generated by New York state consumers and electronic waste received from or shipped outside the state: (i) the quantity, by weight, of electronic waste received directly from consumers in the state through a mail back program; (ii) the name and address of each electronic waste collection site, electronic waste consolidation facility, and electronic waste recycling facility at which electronic waste from consumers was received on behalf of the manufacturer during the reporting period, along with the quantity, by weight, of electronic waste received; and (iii) the name and address of each person to whom the manufacturer sent electronic waste or component materials during the reporting period, along with the quantity, by

weight, of electronic waste or component materials thereof sent to each such person;

(d) the number of electronic waste acceptance credits purchased, sold, banked and traded during the reporting period, the number of electronic waste acceptance credits used to meet the requirements of section 27-2603 of this title, and from whom they were purchased and to whom they were sold or traded, and the number of electronic waste acceptance credits retained as of the date of the report;

(e) the amount of any recycling surcharge owed for the reporting period, with sufficient information to demonstrate the basis for the calculation of the surcharge;

(f) the names and locations of electronic waste recycling facilities utilized by the manufacturer and entities to which electronic waste is sent for reuse, whether in the state or outside the state, including details on the methods of recycling or reuse of electronic waste, any disassembly or physical recovery operation used, and the environmental management measures implemented by such recycling facility or entity;

(g) information detailing the acceptance methods made available to consumers in municipalities which have a population of greater than ten thousand and in each county of the state to meet the requirements of paragraph (a) of subdivision five of section 27-2605 of this title;

(h) a brief description of its public education program including the number of visits to the internet website and calls to the toll-free telephone number provided by the manufacturer as required by section 27-2605 of this title;

(i) any other information as required by the department; and

(j) a signature by an officer, director, or other individual affirming the accuracy of the report.

2. The department may require annual reports to be filed electronically.

3. The report shall be accompanied by an annual reporting fee of three thousand dollars, and any recycling surcharge due pursuant to section 27-2603 of this title.

4. The department shall submit a report on implementation of the title in this state to the governor and legislature by April first, two thousand twelve and every two years thereafter. The report must include, at a minimum, an evaluation of:

(a) the electronic waste stream in the state;

(b) recycling and reuse rates in the state for covered electronic equipment;

(c) a discussion of compliance and enforcement related to the requirements of this title;

(d) recommendations for any changes to this title; and

(e) a discussion of opportunities for business development in the state related to the acceptance, collection, handling and recycling or reuse of electronic equipment in this state.

§ 27-2619. Preemption.

Jurisdiction in all matters pertaining to electronic waste recycling, including but not limited to the obligations of manufacturers, retailers, electronic waste collection sites, electronic waste consolidation facilities and electronic waste recycling facilities with respect to electronic waste recycling, is, by this title, vested exclusively in the state. Any provision of any local law or ordinance, or any rule or regulation promulgated thereto, governing covered electronic equipment and

the collection, reuse, or recycling of electronic waste shall upon the effective date of this title be preempted.

§ 27-2621. Disposition of fees.

All fees and charges collected pursuant to this title shall be deposited into the environmental protection fund established pursuant to section ninety-two-s of the state finance law.

§ 71-2729. Enforcement of title 26 of article 27 of this chapter.

1. a. Any consumer, as defined in title twenty-six of article twenty-seven of this chapter, who violates any provision of, or fails to perform any duty imposed by, section 27-2611 of this chapter, shall be liable for a civil penalty not to exceed one hundred dollars for each violation.

b. Any person, except a consumer, manufacturer, or an owner or operator of an electronic waste collection site, electronic waste consolidation facility, or electronic waste recycling facility as these terms are defined in title twenty-six of article twenty-seven of this chapter, who violates any provision, or fails to perform any duty imposed by section 27-2611 of this chapter, shall be liable for a civil penalty not to exceed two hundred fifty dollars for each violation.

c. Any manufacturer, or any person operating an electronic waste collection site, an electronic waste consolidation facility, or an electronic waste recycling facility as those terms are defined in title twenty-six of article twenty-seven of this chapter, who:

i. fails to submit any report, registration, fee, or surcharge to the department as required by title twenty-six of article twenty-seven of this chapter shall be liable for a civil penalty not to exceed one thousand dollars for each day such report, registration, fee, or surcharge is not submitted; and

ii. violates any other provision of title twenty-six of article twenty-seven of this chapter or fails to perform any duty imposed by such title, except for subdivision four of section 27-2603 of this chapter, shall be liable for a civil penalty for each violation not to exceed one thousand dollars for the first violation, two thousand five hundred dollars for the second violation and five thousand dollars for the third and subsequent violations of this title within a twelve-month period.

d. Any retailer, as defined by section 27-2601 of this chapter, who violates any provision of title twenty-six of article twenty-seven of this chapter or fails to perform any duty imposed by such title, shall be liable for a civil penalty for each violation not to exceed two hundred fifty dollars for the first violation, five hundred dollars for the second violation and one thousand dollars for the third and subsequent violations of this title in a twelve-month period.

e. Civil penalties under this section shall be assessed by the commissioner after a hearing or opportunity to be heard pursuant to the provisions of section 71-1709 of this article, or by the court in any action or proceeding pursuant to this section, and, in addition thereto, such person may by similar process be enjoined from continuing such violation.

2. All penalties collected pursuant to this section shall be paid over to the commissioner for deposit to the environmental protection fund established pursuant to section ninety-two-s of the state finance law.

NYS E-WASTE RECYCLING & REUSE ACT

Implementation & Results for 2011 and 2012

Report to the Governor and Legislature – January 2016

Contents

I. Legislative Charge

The New York State Department of Environmental Conservation (Department) submits this report to the Governor and Legislature in accordance with Section 27-2617(4) of the New York State Electronic Equipment Recycling and Reuse Act (Act), Environmental Conservation Law Article 27, Title 26. That section requires a biennial report on the implementation of the Act that includes an evaluation of the electronic waste stream in the state; recycling and reuse rates in the state for covered electronic equipment; a discussion of compliance and enforcement related to the requirements of the Act; recommendations for any changes to Title 26; and a discussion of opportunities for business development in the state related to the acceptance, collection, handling and recycling or reuse of electronic equipment.

II. Executive Summary

The Act was signed into law by the Governor on May 28, 2010 and became the Nation's 22nd electronic waste (e-waste) product stewardship law. The passing of this key product stewardship legislation was a major step in moving New York State closer to achieving its goals to maximize waste reduction and recycling, as outlined in the current State Solid Waste Management Plan, "Beyond Waste".

The passing and implementation of the Act have engendered great enthusiasm and, as expected with any new legislation, some uncertainty. Many policy experts consider the Act to be one of the most comprehensive and progressive e-waste laws in the country.

This report is being submitted to the Governor and the Legislature pursuant to ECL §27-2617(4), and is intended to provide an update on the Act's implementation, an evaluation of its progress, an outline of the program's strengths and challenges, and recommendations for future improvements.

Product stewardship laws are intended to ensure that all those involved in the lifecycle of a product (e.g., manufacturers, retailers, recyclers, and consumers), share responsibility for reducing the health and environmental impacts that result from the production, use and end-of-life management of the product. Under product stewardship laws, manufacturers bear the primary financial responsibility for recycling programs, which have historically been managed and paid for by local governments at the expense of taxpayers. Product stewardship laws help reduce the financial burden on municipalities and often internalize end-of-life management costs in the cost of the product.

> To assure adequate service to the consumers of the state and improve e-waste collection, `11recycling and reuse, the Act includes three primary product stewardship elements: convenience requirements; performance standards; and environmental standards. These elements, along with a broad scope of covered products, help divert thousands of pounds of e-waste from landfills and waste combustion facilities; keep toxins such as lead, mercury and other hazardous materials from potentially contaminating the environment; and conserve natural resources by allowing valuable materials to be reclaimed and reused, rather than extracting virgin materials.

The Act, which took full effect on April 1, 2011, requires manufacturers who sell or offer for sale covered electronic equipment (CEE) (i.e., computers, computer peripherals, televisions, cathode ray tubes, small scale servers and small electronic equipment) in the state to register their brands of CEE with the Department, and acting individually or collectively through collective electronic waste acceptance programs (collectives), establish a convenient acceptance program for the collection, handling, and recycling or reuse of e-waste, free of charge to most consumers. Because of the Act, New York consumers now have more convenient opportunities to recycle their unwanted electronic equipment.

In addition to having established convenience requirements, the Act establishes annual Statewide Recycling and Reuse performance goals for e-waste, and requires manufacturers to collect and recycle their fair share of e-waste that is generated, based on their market share of CEE sold in New York State. Manufacturers that do not meet their annual Department-issued recycling acceptance standards are required to pay recycling surcharges for the prior year. This provision of the Act went into effect in program year 2013. Manufacturers that collect and recycle more than their acceptance standards were

allowed to begin accruing recycling credits in 2014, for use beginning in program year 2015. These credits can be banked, sold to other manufacturers, or used by the manufacturer to offset up to a 25 percent shortfall in the subsequent three years.

The Act also establishes a phased-in disposal ban for covered e-waste materials, which began on April 1, 2011 for manufacturers, retailers, operators of collection sites and consolidation and recycling facilities, and a complete disposal ban for all entities, including individuals and households, began on January 1, 2015. Therefore, as of January 1, 2015, individuals and households are no longer able to dispose of any e-waste covered by the law in a landfill or waste-to-energy facility, or place e-waste in any collection that is intended to result in disposal at such facilities.

The Department is tasked with oversight of the Act's implementation and its many requirements. The Department receives, processes and reviews all registrations, fee payments, annual report data and additional information from hundreds of the Act's regulated entities. The Department uses sales and market share data reported by manufacturers to calculate and allocate responsibility for the collection and recycling of e-waste among manufacturers of CEE to meet the Statewide Recycling and Reuse Goal. The Department is also required to provide enforcement, develop data management systems to track sales of CEE and e-waste being collected and recycled, and impose surcharges or award credits when appropriate.

A key element for effective program implementation involves a comprehensive education program that targets not only the public, but the manufacturers, the collection facilities and the communities affected by the Department's e-waste program. To that end, the Department created a website located at: **http://www.dec.ny.gov/chemical/65583.html**, where pertinent information and guidance are provided, including a list of all registered CEE manufacturers' brands and important information for consumers on how to recycle their e-waste easily through the various manufacturers' acceptance programs, with links to interactive lists and maps. Specific stakeholder guidance documents, as well as all registration, fee, and annual reporting forms are also available through this website.

Results reported for the first (partial) program year (9 months, from April 1, 2011 – December 31, 2011) were very encouraging. Manufacturers not only met the 2011 Statewide Recycling and Reuse Goal of e-waste collected for recycling or reuse of nearly 44,000,000 pounds, but exceeded the goal by slightly more than 850,000 pounds. Nearly 75 percent of the manufacturers met or exceeded their individual acceptance standards. By the end of the first program year, the Department received, reviewed and processed registrations and fees from 77 CEE manufacturers (39 individual manufacturers and 38 manufacturers participating in collective organizations), 6 collective organizations, 42 consolidation facilities, 47 recycling facilities and 726 collection sites.

Results reported for the second program year (January 1, 2012 – December 31, 2012) were slightly below the statewide goal, but still a significant improvement over years prior to the Act. Manufacturers were roughly 368,000 pounds short of meeting the 2012 Statewide Recycling and Reuse Goal of approximately 77,861,000 pounds. However, over 80 percent of the manufacturers reported either meeting or exceeding their individual acceptance standards, a slight increase over the prior program year. Beginning in 2014, manufacturers who exceeded their acceptance standards are allowed to accrue credits for over-collection for use beginning in 2015. For the second program year, 11 manufacturers did not meet their individual acceptance standards and were issued recycling surcharges totaling $786,530.30 for under-collection of 1,579,728 pounds. By the end of the second program year, the Department received, reviewed and processed registrations and fees from a total of 86 CEE manufacturers (42 individual manufacturers and 44 manufacturers participating in collective organizations), 7 collective organizations, 57 consolidation facilities, 62 recycling facilities and 1,105 collection sites.

There were notable accomplishments in the first two program years of this comprehensive product stewardship law. However, several challenges exist. As the program continues to mature, the Department is focused on working with all stakeholders to address these program challenges in order to achieve the most efficient, fair, and sustainable e-waste recycling program possible.

III. E-waste: A Growing Portion of Our Solid Waste Stream

In recent years, advances in consumer electronics and personal computers have spurred industry growth, changed information technology and improved people's lives in countless ways. But our growing dependence on electronic products both at home and in the workplace has given rise to a new potential environmental hazard: consumer e-waste. With lower prices and rapidly changing technology, computers, phones and TVs, as well as other electronic equipment, now have very short life spans. Accelerating trends in technology, in conjunction with the recent digital conversion, have resulted in a deluge of e-waste, giving it the notorious distinction of being the fastest-growing component of municipal solid waste. In addition, e-waste contains hazardous components that make the end-of-life management of these products complicated and, in some cases, expensive.

E-waste shows a higher growth rate than any other category of municipal solid waste, according to the United States Environmental Protection Agency (EPA). Nationwide, only 13.6 percent of the consumer electronic products entering the municipal solid waste stream were recovered for recycling in 2008. This compares to an overall recovery rate of 33.2 percent for all categories of municipal solid waste in 2008. A total of 430,000 tons of electronics were recovered in 2008. In 2009, the U.S. generated 3.19 million tons of e-waste, but only 600,000 tons or 17.7 percent was recycled, according to the EPA (up from 13.6 percent in 2008). Overall, between 2007 and 2008, total volumes of municipal solid waste decreased, while e-waste volumes continued to increase, putting more and more strain on local municipal budgets trying to handle the increasing volumes of e-waste generated.

The increasing rate of growth of e-waste and the environmental and fiscal problems associated with this growing component of our waste stream prompted 25 states, including New York, to pass e-waste legislation requiring manufacturers to provide programs to take back electronic equipment for reuse and recycling. Due to the states' e-waste legislation and expanded efforts of federal, state and local agencies, the recycling rate for e-waste is steadily increasing as more states are mandating product stewardship programs for selected electronic equipment. New York State's Act also bans disposal of e-waste in a solid waste disposal facility by anyone except an individual, starting January 1, 2012. The Act imposes a complete ban of e-waste disposal in any solid waste disposal facility, starting January 1, 2015.

Manufacturers of the following types of covered electronic equipment (CEE) must provide convenient electronic waste acceptance programs to NYS consumers:

- **Computers** (e.g. desktops, laptops, tablets and e-readers)
- **Televisions**
- **Small scale servers**
- **Computer peripherals** (e.g. monitors, keyboards, mice, fax machines, scanners and small printers)
- **Small electronic equipment** (e.g. VCRs, DVRs, portable digital music players, DVD players, digital converter boxes, cable or satellite receivers, video game consoles)

Many electronic products also contain valuable materials, such as precious metals (e.g., gold, silver, palladium, and copper), and engineered plastics, all of which require considerable energy to process and manufacture. Recycling the products can recover these valuable materials and help to offset demand for natural resources. Therefore, these product stewardship programs have the net beneficial effect of reduced greenhouse gas emissions, reduced pollution and decreased energy demand by extracting fewer raw materials from the Earth. In addition, recycling and reuse of these products saves valuable landfill space and reduces waste-to-energy emissions.

IV. Overview of the Act's Regulated Entities and their Responsibilities

Manufacturers of Covered Electronic Equipment

A manufacturer under the Act is an entity who assembles or substantially assembles CEE under its own brand name or under any other brand name for sale in New York; licenses a brand name to another person for use on CEE sold in the state; or imports CEE for sale into the state. However, entities that assemble or substantially assemble, and sell less than 1,000 units of CEE annually in the state are not considered manufacturers under the Act. Additionally, entities whose primary business is the sale of CEE which is comprised primarily of rebuilt, refurbished or used components, are also not considered manufacturers under the Act.

Manufacturers are responsible for implementing and maintaining an e-waste acceptance program, with oversight by the Department. The Act sets a statewide recycling or reuse goal and requires manufacturers, through their acceptance programs, to recycle or reuse their portion of that statewide recycling or reuse goal. A manufacturer's portion of the statewide goal is referred to as its acceptance standard, and is determined by the Department based on the manufacturer's market share of CEE sold into the state.

- **Statewide Recycling or Reuse Goal**

  Each year, manufacturers of CEE who sell into New York State are responsible for recycling or sending for reuse a portion of that program year's statewide recycling or reuse goal ("Statewide Goal"). This goal fluctuates annually based on the current state population, as well as a fixed per capita collection standard (set in statute for program years 2011 through 2013) or the amount of e-waste collected for recycling or reuse in prior years (for program year 2014 and annually thereafter).

  In 2011, the Statewide Goal was the product of the latest population estimate for the state, multiplied by three pounds, multiplied by three-quarters (for the abbreviated program period of April 1, 2011 through December 31, 2011), or **43,968,269 lbs.** For 2012, the Statewide Goal was **77,860,788 lbs.** based on 4 pounds per capita, and for 2013, was **97,851,305 lbs.** based on 5 pounds per capita.

  For 2014 and annually thereafter, the Statewide Goal is the product of the "base weight" multiplied by the "goal attainment percentage." The base weight is the greater of: (1) The average weight of all electronic waste collected for recycling or reuse during the previous three calendar years reported to the Department by a particular manufacturer; or (2) The three-year statewide average of all electronic waste collected for recycling or reuse during the previous three calendar years based on information reported to the Department by electronic waste collection sites, consolidation facilities and recycling facilities. The goal attainment percentage is 90-110 percent of the statewide recycling or reuse goal for the previous calendar year, depending on how the base weight compares to the Statewide Goal. Beginning in 2014 and each year thereafter, the Statewide Goal is calculated using the data from all registered entities' annual reports, which are due by March 1st each year. The submission of complete and timely annual reports to the Department is critical in order to calculate an accurate and equitable Statewide Goal. The formula for calculating the Statewide Goal for 2014 and beyond is essentially a sliding scale that will fluctuate based on the average weight of e-waste collected for recycling or reuse during the previous three calendar years as reported to the Department.

- **Acceptance Standards**

  Beginning with the 2011 program year, and annually thereafter, each manufacturer is required to accept for collection, handling and recycling or reuse, at a minimum, its acceptance standard of e-waste. However, manufacturers or their designee(s) may not stop collection of CEE once their acceptance standards have been met. E-waste acceptance programs must be run continuously throughout the program year.

A manufacturer's acceptance standard is determined by multiplying a program year's statewide recycling or reuse goal, as described above, by the manufacturer's market share of e-waste. A manufacturer's market share of e-waste is calculated by dividing the total weight of the manufacturer's CEE sold in the state (based on its average annual sales provided to the Department during the preceding three calendar years) by the total weight of all registered manufacturers' CEE sold in the state (based on the average annual sales during the preceding three calendar years).

Beginning in calendar year 2013, any manufacturer that fails to meet its acceptance standard for the previous calendar year is subject to a recycling surcharge. Beginning with calendar year 2014, a manufacturer that accepts more than its acceptance standard, may accrue and bank the excess weight as e-waste acceptance credits. These credits may be sold, traded, or banked beginning in calendar year 2015, for a period no longer than three calendar years following the year in which the credits were earned; but no more than 25% of a manufacturer's obligation for any calendar year may be met with recycling credits generated in a prior calendar year.

Manufacturer Acceptance Standard Example Calculation

Manufacturer's Market Share of CEE = Total weight of manufacturer's CEE sold in the state based on the average annual retail sales during the preceding 3 calendar years / Total weight of **all** manufacturer's CEE sold in the state based on the average annual retail sales during the preceding 3 calendar years = **100,000 lbs. / 1,000,000 lbs.** = **10%**

Manufacturer's Acceptance Standard = Statewide Recycling or Reuse Goal **X** Manufacturer's Market Share of CEE = **100,000,000 X 10%** = **10 million lbs.**

Additional important requirements for manufacturers under the Act include:

- **Registration with the Department**

Manufacturers are required to submit a registration form, a one-time $5,000 registration fee, and a fee form to the Department. A description of the manufacturer's e-waste acceptance program, prior sales data, and manufacturer brands must be included in the registration form, and must be updated within thirty days of any material change to the information provided.

- **Provision of a "Free and Convenient" Acceptance Program**

The manufacturer's e-waste acceptance program must be provided at no cost to most New York State consumers. For purposes of the Act, a consumer is an individual, business, corporation, limited partnership, not-for-profit corporation, the state, a public corporation, public school, school district, private or parochial school or board of cooperative educational services or governmental entity located in the state. While all of these consumers are entitled to convenient recycling, manufacturers are only allowed to charge consumers in the following instances: if a contract for services was in place prior to January 1, 2011; if the consumer is a for-profit entity with 50 or more full-time employees (FTEs) or a not-for-profit entity with 75 or more FTEs; or if a premium service is provided. Premium services are any services above and beyond the reasonably convenient acceptance methods defined in the Act.

Manufacturers must provide at least one reasonably convenient method of collection within each county and within each municipality of the state with a population of 10,000 or greater. A list of such counties and municipalities is available on the Department's website at: **http://www.dec.ny.gov/docs/materials_minerals_pdf/munipop10k.pdf**. The following collection methods are considered reasonably convenient under the Act: mail or ship back return programs; collection or acceptance events conducted by the manufacturer or the manufacturer's agent or designee, including events conducted through local governments or private parties; fixed acceptance locations such as dedicated acceptance sites operated by the manufacturer or its agent or designee; agreements with local governments, retail stores, sales outlets and not-for-profit organizations which have agreed to provide facilities for the collection of e-waste; community collection events; and any

combination of these or other acceptance methods that effectively provide for the acceptance of e-waste for recycling or reuse through means that are available and reasonably convenient to consumers in the state.

Through its acceptance program, the manufacturer must have the means to continually and conveniently collect, at no charge, not only its own brands of CEE, but also one piece of e-waste of any manufacturer's brand, if offered by a consumer, with the purchase of CEE of the same type by a consumer.

- **Provision of a Public Education Program**

  Manufacturers must provide a public education program to inform consumers about the manufacturer's e-waste acceptance program, and must provide sufficient information to enable a consumer to return CEE for recycling or reuse. At a minimum, the public education program must include a public education program website, a toll-free telephone number, and written information provided to consumers on how they may return CEE for recycling or reuse.

- **Retailer Notification**

  Each manufacturer must notify retailers that it is registered with the Department. If written information regarding the manufacturer's e-waste acceptance program is not included in the manufacturer's product manual for CEE, then the manufacturer must provide information on its e-waste acceptance program to retailers for distribution to consumers purchasing CEE.

- **Proper Labeling of CEE**

  A manufacturer may not offer for sale in the state or deliver to retailers for subsequent sale CEE unless it has a visible, permanent label clearly identifying the manufacturer of that equipment.

- **Annual Report Submission**

  Manufacturers are required to submit an annual report, a $3,000 annual reporting fee, and a fee form to the Department for the preceding program year. Details on the performance of the manufacturer's e-waste acceptance program, collection totals, prior years' sales data, updated manufacturer contact information, and other important facts and figures, are included in the annual report.

- **Records Maintenance**

  Manufacturers must maintain records demonstrating compliance with the Act, and make them available for audit and inspection by the Department for a period of three years.

- **Disposal Ban Compliance**

  The disposal ban of CEE for manufacturers began April 1, 2011.

Collective Electronic Waste Acceptance Programs

The Act enables manufacturers of CEE to meet their obligations through individual or collective electronic waste acceptance programs (collectives). A collective program must fulfill the same requirements as an individual manufacturer's e-waste acceptance program. While not specifically defined in the Act, a collective represents one or more manufacturers, for the purpose of satisfying their e-waste collection requirements. A collective program is often more efficient, and allows for cooperative effort among the manufacturers and their representative organizations to meet their obligations under the Act. Collectives must submit a registration form, and a one-time $10,000 registration fee and fee form to the Department, which is separate from their participating manufacturers' required submissions. Manufacturers who are a part of a collective still have the responsibility to meet all of their individual obligations, including the submission of an annual report, and a $3,000 annual reporting fee and fee form. However, manufacturers who register with the Department as participating in a collective from the beginning, are not required to submit an individual $5,000 registration fee or fee form.

Electronic Waste Collection Sites

E-waste collection sites (collection sites) are likely to be the first point of contact when consumers return their e-waste for recycling or reuse and, therefore, play an important role in the Act. A collection site is a fixed or temporary site (and may be either private or municipal) at which e-waste is collected from consumers and temporarily stored for more than five days in a calendar year before such waste is transported to an e-waste consolidation facility or e-waste recycling facility. Collection sites include, but are not limited to, dedicated sites and facilities for the acceptance of e-waste, retail stores and outlets, municipal or private e-waste collection sites and not-for-profit donation sites that have agreed to accept e-waste.

All collection sites, including municipal collection locations, are required to submit a one-time registration form to the Department at least thirty days prior to receiving any e-waste at the site. Collection sites must also submit an annual report by March 1st for the previous program year detailing collection totals of CEE accepted at the site. E-waste must be properly stored and removed from the site in a timely manner.

Electronic Waste Consolidation Facilities

Electronic waste consolidation facilities (consolidation facilities) organize, categorize and/or consolidate e-waste before it is transported to a recycling facility or other consolidation facility. Consolidation facilities include, but are not limited to, facilities of brokers acting as intermediaries between e-waste buyers and sellers, and regional centers at which e-waste is organized, categorized or consolidated after being transported to such centers from consumers, collection sites or other consolidation facilities.

Consolidation facilities must fulfill the same requirements as described above for collection sites. In addition to the registration form, consolidation facilities must also submit a one-time registration fee of $250 along with a fee form to the Department.

Electronic Waste Recycling Facilities

The Act defines e-waste recycling facilities (recycling facilities) simply as facilities at which e-waste is recycled. Recycling means to separate, dismantle or process the materials, components or commodities contained in e-waste for the purpose of preparing the materials, components or commodities for use or reuse in new products or components thereof, but not for energy recovery or energy generation by means of combustion, gasification, pyrolysis or other means. Recycling includes the manual and mechanical separation of e-waste to recover materials, components or commodities contained therein for the purpose of reuse or recycling, and changing the physical or chemical composition of e-waste.

The importance of information provided to the Department by recycling facilities is immeasurable. Recycling facilities are often the first point at which e-waste collected for recycling is weighed and quantified, so it is critical that their information is accurate and readily available to those collection sites, consolidation facilities, manufacturers and collectives with which the recycling facility contracts or on behalf of which it operates. Recycling facilities must fulfill the same requirements as described above for a consolidation facility.

Retailers

Retailers play an important gate-keeping function under the Act as they are only allowed to sell registered manufacturer brands – specifically, brands of those manufacturers that are currently registered and are in compliance with the requirements of the Act. Retailers are prohibited from selling unregistered brands of CEE, as well as CEE that has been improperly labeled by the manufacturer. The Department maintains an updated list of registered brands of CEE on its public website for the retailers' information. At the point of sale, retailers must provide purchasers of CEE with information about opportunities for the convenient return of e-waste if it has been provided to the retailer by the manufacturer for dissemination.

Waste Management Facilities & Waste Haulers/Transporters

Solid and Hazardous Waste Management Facilities and Waste Haulers and Transporters play an important role in ensuring the success of the Act's disposal ban. The Act's disposal ban prohibits e-waste from being accepted for disposal at a solid or hazardous waste management facility in three phases: April 1, 2011, from any electronic equipment manufacturer, retailer, or owner or operator of an e-waste collection site, consolidation facility, or recycling facility; January 1, 2012, from any person other than an individual, or household consumer; and January 1, 2015, from any person. Owners or operators of solid or hazardous waste management facilities are required to educate users of such facilities on the proper methods for recycling e-waste, providing both written information and posting signage at the facility. The Act also requires persons engaged in the collection of solid waste for delivery (i.e., private or municipal solid waste haulers/transporters), to educate their users in the form of written information, on the proper methods for recycling e-waste.

Department's Oversight Role

The Department is charged with implementing, administering and enforcing the provisions of the Act. As such, the Department is responsible for overseeing a comprehensive system for managing the rapidly growing amount of e-waste across the state. The Department is required to:

- Collect, process, analyze, track and summarize information required by the Act;
- Calculate and allocate responsibility for the collection of e-waste among manufacturers of CEE;
- Maintain and post on its website a list of registered manufacturers and collective electronic waste acceptance programs, links to their public education program webpages, and all forms necessary for the regulated community to comply with the Act;
- Promulgate rules and regulations necessary to implement, administer and enforce the Act;
- Promulgate rules and regulations on standards for reuse, e-waste acceptance credits, waivers of recycling surcharges, and acceptable alternative methods for determination of sales data;
- Register and maintain a list of manufacturers which are registered and their brands, in addition to publishing such list on the Department's website;
- Register all e-waste collection, consolidation and recycling facilities within New York State;
- Provide technical support and outreach, as well as disseminate information to all interested parties;
- Collect, analyze and evaluate information contained in registrations and annual reports, including manufacturers' sales data and e-waste collection data;
- Maintain a database of annual collections, waste credits and credit transactions;
- Process registration fees, annual reporting fees, and surcharge payments;
- Calculate recycling surcharges and track acceptance credits;
- Evaluate requests for waivers of recycling surcharges;
- Track compliance and enforcement; and,
- Submit a report to the Governor and Legislature biennially, which evaluates the e-waste stream in the state; evaluates the rate of recycling and reuse in the state of CEE; discusses compliance; recommends any changes; and discusses opportunities for business development in the state related to this program.

Department Website Quick Links:

- NYS E-waste Recycling Program Main Page: **http://www.dec.ny.gov/chemical/65583.html**
- Guidance for Consumers: **http://www.dec.ny.gov/chemical/66872.html**
- Registered Manufacturers & their Brands: **http://www.dec.ny.gov/chemical/82084.html**
- Text of the NYS Electronic Equipment Recycling & Reuse Act: **http://www.dec.ny.gov/docs/materials_minerals_pdf/ewastelaw2.pdf**

V. Program Performance and Results

Overall Collection Results

The NYS Electronic Recycling and Reuse Act has proven to deliver both positive environmental and economic results in 2011 and 2012. The total amount of CEE collected by manufacturers for recycling or reuse during the 2011 reporting period (April 1, 2011 – December 31, 2011) was 44,818,426 lbs., which equates to an approximate 2.3 lbs. per capita statewide collection rate. Manufacturers successfully collected 850,157 lbs. more from NYS consumers than was required by the 2011 Statewide Recycling and Reuse Goal of 43,968,269 lbs.

During calendar year 2012, the total amount of CEE collected by manufacturers for recycling or reuse increased to 77,492,596 lbs., which equates to an approximate 4 lbs. per capita statewide collection rate. However, manufacturers ultimately reported collecting 368,192 lbs. less from NYS consumers than was required by the 2012 Statewide Recycling and Reuse Goal of 77,860,788 lbs.

Significantly more e-waste was collected for recycling or reuse from NYS consumers in 2011 and in 2012 than in any previous year for which records are available. According to the limited historical data available to the Department, approximately 6,481,446 lbs. of e-waste was collected from household hazardous waste (HHW) collection events and permanent HHW sites in 2010. This amount does not account for other potential e-waste collected by any other voluntary methods.

2011

Statewide Recycling and Reuse Goal: **43,968,269 lbs.**
Manufacturing reported collecting: **44,818,426 lbs.**
That's an excess of: **850,157 lbs.**
2.3 lbs. per capita

2012

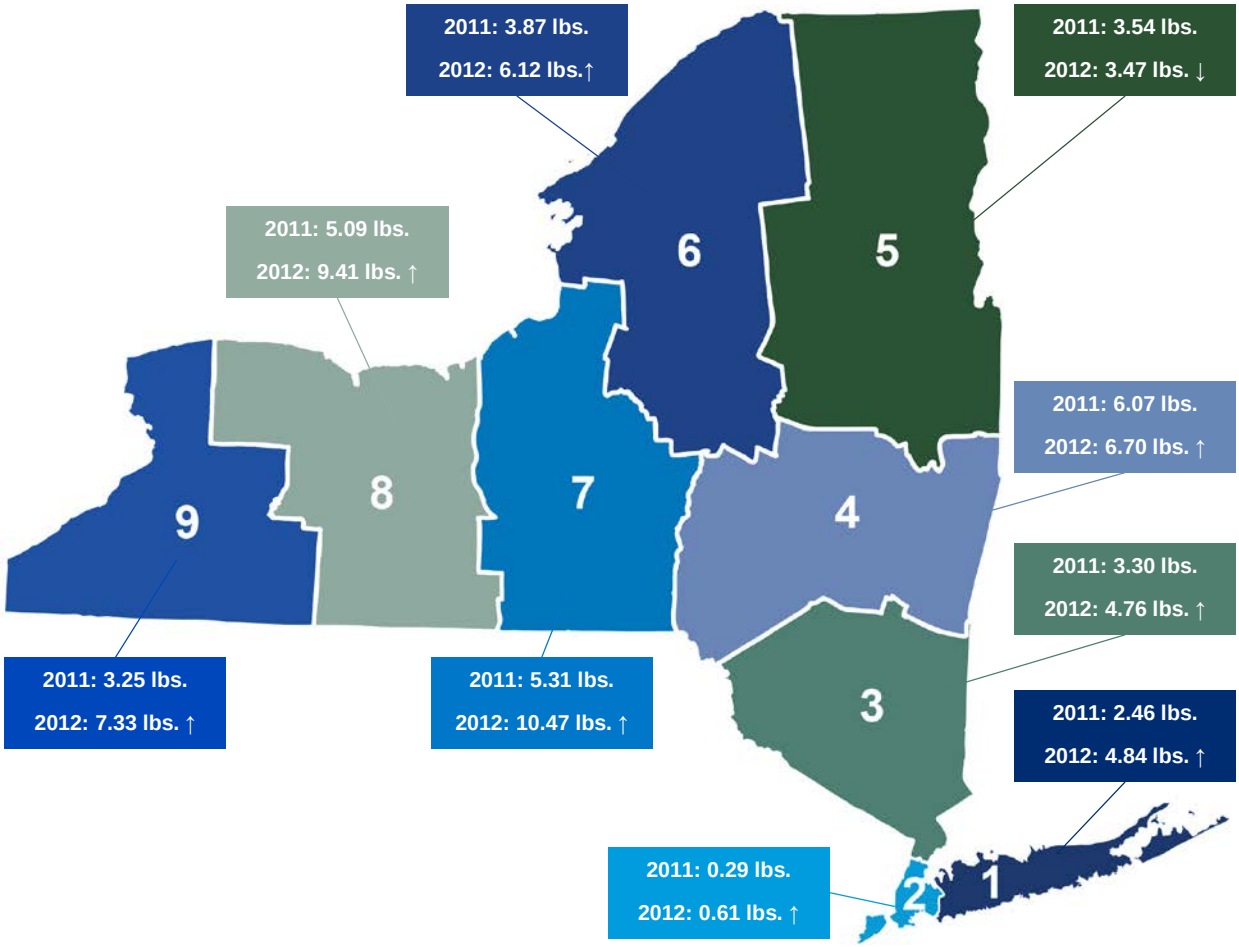
Statewide Recycling and Reuse Goal: **77,860,788 lbs.**
Manufacturing reported collecting: **77,492,596 lbs.**
That's a shortfall of: **368,192 lbs.**
4 lbs. per capita

Results by DEC Region

For the 2011 program year, only 40 percent of the e-waste collection sites that were registered submitted their required annual reports. Accordingly, the Department was only able to determine the origin of 29,482,416 lbs. of e-waste collected. Each county's percentage of the total weight that could be accounted for was then extrapolated to estimate the approximate per capita collection rates for the various DEC Regions for the 2011 program year based on the actual collection total of 44,818,426 lbs. (see diagram below). All regions of the state, aside from New York City (Region 2), met the 2.25 lbs. (3 lbs. multiplied by ¾ of a year) per capita statewide recycling or reuse goal for the 2011 program year. The New York City rate was far below the rate for the other Regions.

For the 2012 program year, approximately 75 percent of the e-waste collection sites reported. In addition, more detailed information was received from recycling facilities regarding the origin of e-waste collected via premium services such as on-site pickup. The Department was able to determine the origin of 61,134,927 lbs. of e-waste collected. Again, each county's percentage of the total weight that could be accounted for was then extrapolated to estimate the approximate per capita collection rates for the various DEC Regions for the 2012 program year based on the actual collection total of 77,492,596 lbs. (see diagram below). All regions of the state, aside from New York City and rural Region 5 met the 4 lbs. per capita statewide recycling or reuse goal for the 2012 program year. Every region, except Region 5, increased its per capita collection rate for 2012 over the prior program year. The New York City rate continued to be far below the rate for the other Regions.

Per Capita Collection by DEC Region



Region 1: Nassau and Suffolk Counties

Region 2: Kings, Bronx, New York, Queens and Richmond Counties

Region 3: Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester Counties

Region 4: Albany, Columbia, Delaware, Greene, Montgomery, Otsego, Rensselaer, Schenectady and Schoharie Counties

Region 5: Clinton, Essex, Franklin, Fulton, Hamilton, Saratoga, Warren and Washington Counties

Region 6: Herkimer, Jefferson, Lewis, Oneida and St. Lawrence Counties

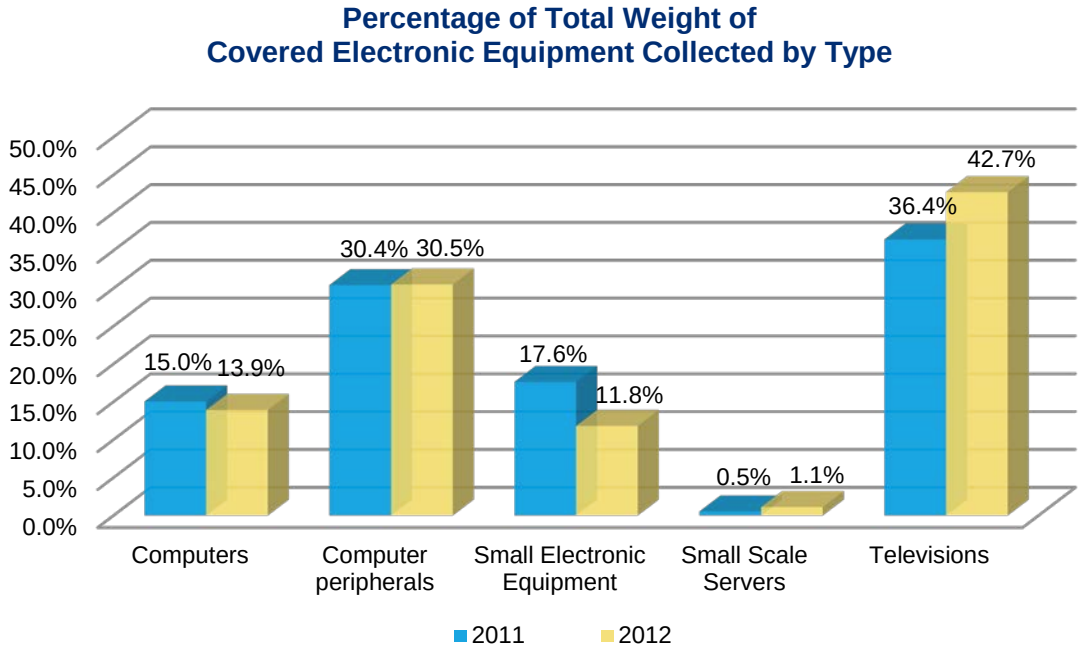
Region 7: Broome, Cayuga, Chenango, Cortland, Madison, Onondaga, Oswego, Tioga and Tompkins Counties

Region 8: Chemung, Genesee, Livingston, Monroe, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne and Yates Counties

Region 9: Allegany, Chautauqua, Cattaraugus, Erie, Niagara and Wyoming Counties

Results by Type of Covered Electronic Equipment

Television and computer peripheral categories of CEE, which include both bulky Cathode Ray Tube (CRT) televisions and CRT monitors, comprised over two-thirds of the weight collected from consumers for the 2011 and 2012 reporting periods. There was a significant drop in the weight percentage accepted from consumers in the small electronic equipment category from 2011 to 2012, suggesting that either consumers are recycling less of this type of equipment or that the equipment itself is becoming lighter. The weight percentage accepted from consumers in the television category from 2011 to 2012, however, increased significantly, likely due to increased consumer demand for recycling or disposal of the more obsolete CRT televisions. For a full results breakdown by CEE category, see the graph below.

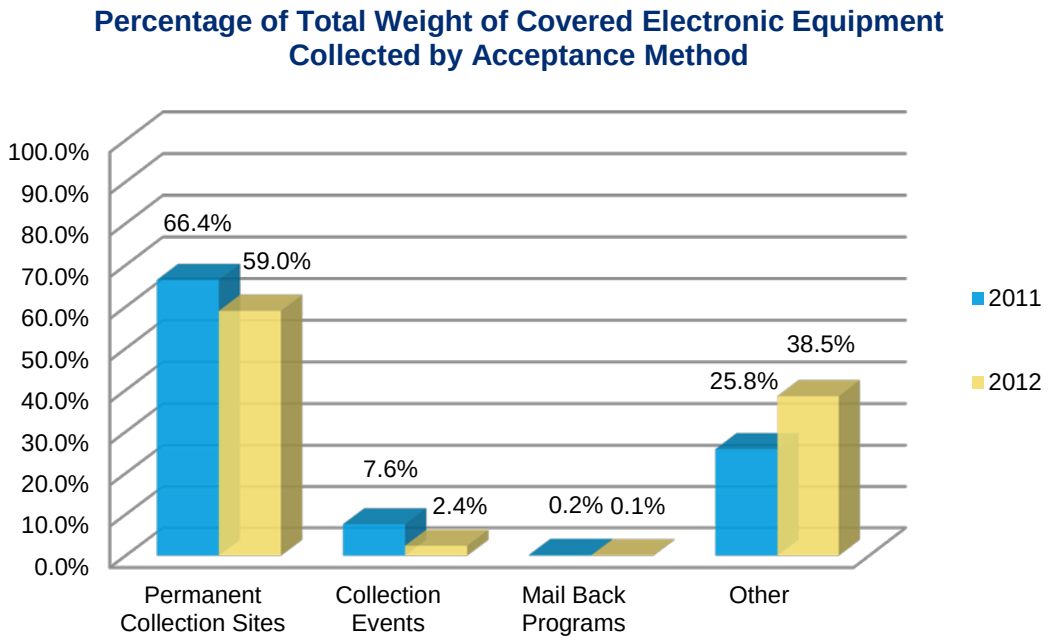


Results by Acceptance Method

The Act allows manufacturers of CEE to employ a variety of acceptance methods to meet the convenience requirements of the law. The following acceptance methods are considered reasonably convenient:

- **Mail or ship back return programs** that are free to the consumer and that do not exclude material based on weight limits (unless another reasonably convenient acceptance method has been provided);
- **Collection or acceptance events** conducted by the manufacturer or the manufacturer's agent or designee, including single and multiple-day events conducted by local governments, community groups or private parties;
- **Fixed acceptance locations** at dedicated acceptance sites operated by the manufacturer or its agent or designee, including local governments, retail stores, and not-for-profit organizations which have agreed to provide facilities for the collection of e-waste;
- **Other methods** which effectively provide for the acceptance of e-waste for recycling or reuse through means that are reasonably convenient to consumers in the state. Examples of “other methods” include premium services, such as reverse distribution/pick-ups of obsolete equipment at businesses, schools and government locations. In the program’s first and second year annual reports, several manufacturers reported purchasing significant quantities of e-waste from recycling facilities in an attempt to meet their acceptance standards. For these transactions, manufacturers failed to report the acceptance method used in the original collection. The weight of e-waste purchased from recycling facilities without further breakdown of origin, has been included in the “other” category for the 2011 and 2012 reporting periods.

Approximately two-thirds of the weight collected from consumers during the 2011 and 2012 reporting periods was collected at permanent collection sites. The results also show that the weight collected from permanent collection sites and collection events decreased from 2011 to 2012. Collection by mail back programs, which manufacturers used primarily to meet the Act's convenience requirements, represented less than a quarter of one percent of the total weight collected for both program years. It is important to note that a significant amount of e-waste in 2011 and 2012 fell into the "other" acceptance category, which accounts for weight that may have been simply collected directly from various business entities, outside the collection site infrastructure. For the full results breakdown by acceptance method, see the table below.



Registration & Annual Reporting Process

During the first two program years, the Department received numerous registrations and annual reports from the Act's regulated entities, as detailed in the chart below. By the end of 2011, the NYS E-waste Program had a total of 851 registered entities, due to registrant category adjustments and program drop-outs. By the end of 2012, there were 1,255 registered entities, after similar category adjustments and program drop-outs. Overall, compliance with the registered entities' annual reporting increased significantly from 2011 to 2012.

	Total Registrants		% Annual Reports Received	
Registrant Type	**2011**	**2012**	**2011**	**2012**
Collectives	6	7	100%	100%
Manufacturers	77	86	100%	94%
Individual	39	42		
Collective	38	44		
Collection Sites	726	1,105	40%	75%
Consolidation Facilities	42	57	70%	100%
Recycling Facilities	47	62	78%	94%

Many of the Act's regulated entities are required to pay a one-time registration fee depending upon the type of operations they perform. Collective electronic waste acceptance programs are required to pay $10,000 at the time of registration; manufacturers running individual e-waste acceptance programs are required to pay $5,000; and e-waste recycling and consolidation facilities are required to pay $250. All manufacturers are required to pay an annual reporting fee of $3,000 with their March 1st annual reports. Revenue from the first two program years, which was deposited into the Environmental Protection Fund, totaled **$800,000**, and broke down as follows:

	2011	2012
Registration Fees	**$297,000**	**$29,000**
Collectives	$60,000	$10,000
Manufacturers	$215,000	$10,000
Recyclers	$11,000	$4,000
Consolidators	$11,000	$5,000
Annual Report Fees	**$240,000**	**$234,000**
TOTAL	**$537,000**	**$263,000**

Collective Electronic Waste Acceptance Programs

Six collective programs operated in NYS during the first program year, and seven in the second. These collectives have proven to be an efficient and cost-effective option for many manufacturers, especially the smaller manufacturers, who may not have the resources available to implement and maintain their own statewide e-waste acceptance and public education programs. While about half of manufacturers who registered in 2011 joined collective programs, many manufacturers who originally opted to run their own individual acceptance programs have now switched to collectives in order to meet their increased acceptance standards. In fact, over 70 percent of manufacturers now report participating in collective programs. Collectives have some of the largest recycling infrastructure in the state, providing consumers with numerous physical collection locations in addition to the rarely used mail back programs.

Manufacturer Performance

While all annual reports for the 2011 program year were eventually received from manufacturers, many were submitted well into May, significantly beyond the March 1, 2012 reporting deadline. For program year 2012, manufacturers' annual reporting compliance decreased, as annual reports from five manufacturers were never received despite several reminders. In addition, many of the 2012 program year annual reports did not arrive until several months after the reporting submission deadline. This resulted in a delay in manufacturers' acceptance standard calculations and distribution of that information to manufacturers.

For program year 2011, 73.5 percent of manufacturers reported either having met or exceeded their manufacturer acceptance standards, while 26.5 percent reported having not met their acceptance standards. Of the manufacturers who reported for program year 2012, 80.2 percent reported either having met or exceeded their manufacturer acceptance standards, while 19.8 percent reported having not met their acceptance standards. The increased compliance of manufacturers with their acceptance standards for the second program year was likely due, at least in part, to the onset of recycling surcharges beginning in 2013 for shortfalls occurring in program year 2012. Recycling surcharge results are described in the following section.

In their initial registration forms and/or subsequent updates, all manufacturers listed a mail back program as one of their free and convenient acceptance methods to be provided to NYS consumers. However, for program year 2011, only about half of those who reported claimed to have collected any weight via this acceptance method, and for program year 2012, the number of those who reported accepting any weight via mail back dropped dramatically to less than 14 percent. In both program years, of those who reported receiving e-waste via a mail back program, only an exceptionally small fraction (less than 0.25 percent) of their total weight of CEE collected actually resulted from their mail back program. This is likely due to ineffective manufacturer public education programs and low consumer usage because of the inconvenience of mailing back large CEE. The majority of consumers use mail back for small CEE, and not bulky televisions and computers. It is usually preferable to a consumer to bring a large item to a drop-off location, which may or may not be conveniently located to them, than to have to prepare and package a large item and schedule a pick-up or bring the item to a mailing location. Mail back programs, in the first few program years, have been ineffective and are mostly used by manufacturers to meet the Act's convenience requirements. These programs may improve for smaller CEE with more outreach efforts on the part of manufacturers.

Manufacturer Recycling Surcharges

Beginning in 2013, and annually thereafter, a manufacturer that fails to meets its manufacturer's acceptance standard of e-waste for the previous calendar year is subject to a recycling surcharge of $0.30, $0.40 or $0.50 per pound, depending on how far a manufacturer is from meeting its acceptance standard.

Recycling Surcharge Calculation

A manufacturer's surcharge is calculated by multiplying the following rate by the number of additional lbs. the manufacturer should have collected/recycled towards its acceptance standard:

Rate, if manufacturer collected:

< 50% of acceptance standard = **$0.50 per lb.**

50% to <90% of acceptance standard = **$0.40 per lb.**

90% to <100% of acceptance standard = **$0.30 per lb.**

In rare cases, the Department may waive the recycling surcharge payable by a manufacturer when the manufacturer demonstrates in an application to the Department that it was unable to accept its acceptance standard of e-waste despite the manufacturer's best efforts. A waiver does not relieve a manufacturer of the obligation to comply with all other provisions of the Act. Waiver applications are to accompany the manufacturer's annual report and annual reporting fee due March 1st annually. For program year 2012 the Department received no waiver applications.

For program year 2012, recycling surcharges totaling $41,922.30 for under-collection of 90,512 lbs. were collected from 10 manufacturers. Going forward, the Department anticipates increased compliance by manufacturers in meeting and exceeding their acceptance standard performance goals.

Electronic Waste Collection Sites

At the end of 2011, there were approximately 726 e-waste collection sites operating across the state. Approximately 54 percent of collection sites that operated in New York State during the first program years were located at retail outlets or other privately run locations (e.g., Best Buy, Good Will and Salvation Army). Municipally-run collection sites made up approximately 46 percent, with about half of those being located at solid waste transfer stations.

Municipal Cost Savings Example

Westchester County

- Municipality benefits from savings of over $75,000 per month after the April 1, 2011 implementation of the Act
- Westchester County now has minimal operational expenses related to the management of residential e-waste

Both private and municipal collection site locations significantly increased in number after the first program year to a total of 1,105 by the end of 2012. As the statewide recycling and reuse goal and manufacturer's acceptance standards increased in the first two program years, so did the number of pounds of e-waste required for collection and recycling. Collection site locations are proving to be one of the most convenient and frequently-used methods for consumers to dispose of their e-waste, and therefore, play a critical role in New York's e-waste recycling infrastructure.

Municipalities have no responsibility to collect e-waste under the Act. In fact, a key purpose of the Act was to remove the burden and expense of managing costly e-waste acceptance programs from municipalities, and introduce a producer responsibility approach to managing this expanding waste stream. Still, many municipalities chose to offer e-waste collection opportunities in their community and, in many cases, partnered with recyclers, manufacturers and/or collectives in offering such programs.

In the fall of 2012, the Department surveyed state municipal contacts asking them about their experiences before and during the Act's first program year. According to those 280 municipal contacts surveyed, the Act's first program year proved to be successful. In fact, 70 percent of those surveyed indicated their municipality faced no obstacles as a result of the Act. Of those who experienced difficulties during the Act's first program year, most cited a lack of public awareness of the Act and/or that the municipalities lacked guidance regarding the Act's implementation. The Department, along with municipal solid waste management facilities and waste haulers, plays an important role in ensuring the success of the Act, and it is clear that additional education and outreach activities to consumers are necessary.

The Department was also able to conclude from this survey that the Act has resulted in fewer fees to residents for the acceptance of their e-waste for recycling/reuse and in some cases provided for a small revenue stream for municipalities. Several municipalities noted significant savings for the management of e-waste after the adoption of the Act. Westchester County, for example, was able to save over $75,000 per month after the Act went into effect. In addition, the municipal e-waste collection infrastructure in the state has expanded and there are now more collection opportunities available to residents than before the Act's implementation date. The Department plans to perform a follow-up survey of municipal contacts in the near future to assess how the Act has affected municipalities beyond the first two program years.

Electronic Waste Recycling Facilities

By the end of 2011, there were 47 NYS-based e-waste recycling facilities operating across the state. By the end of 2012, the number had increased to 62. These recycling facilities play a critical role in the implementation and overall performance of the Act. Recycling facilities act as a very important bridge between the collection of e-waste for recycling through collection sites, and the distribution of the weight recycled to manufacturer and collective acceptance programs, helping them to meet their convenience and performance goals. The recycling community's assistance to manufacturers was critical in the establishment of programs able to meet manufacturers' convenience requirements and performance standards imposed by the Act. Many manufacturers partnered with recycling facilities that were well established and had attained, or were in the process of attaining, third-party certification (e.g., R2 and e-Stewards). It is important to note that the Act does not require third-party certification of its registered e-waste recycling facilities.

Recycling facilities have been very active in implementing various aspects of the Act, including:

- Disseminating information to collection sites and, in the process, providing educational opportunities on the Act's requirements;
- Logistics planning around the state in anticipation of increased e-waste flow;
- Greatly expanding the state's e-waste collection infrastructure by contracting with municipalities and private collection sites, as well as through direct collection from business consumers;
- Working extensively with manufacturers and collectives to secure agreements for participation in their acceptance programs; and
- Changing the way they traditionally track and report collection data to reflect the Act's explicit reporting requirements (e.g., weight by type of CEE and by location of origin).

Recycling facilities continue to implement successful operations despite facing significant challenges, including, but not limited to:

- Competition to gain contracts with manufacturers who not only dictate low reimbursement rates but also delay payments;

- Low overall consumer awareness regarding the state's e-waste recycling program, the Act itself, and available options for recycling or reuse of their equipment;
- Managing complex materials, which are labor intensive to responsibly handle and process;
- High cost of materials transportation;
- Limited outlets for CRT recycling;
- Difficult collection logistics, especially in the state's urban centers;
- Fluctuating commodity prices; and
- Competition to gain contracts with municipalities, schools, large businesses and other collection site locations who demand increasingly high prices for their e-waste.

E-waste Job Creation Survey for Recyclers

In the fall of 2012, the Department surveyed the state's registered e-waste recyclers to obtain important feedback and gauge overall economic impact of the Act during the first program year. The E-waste Job Creation Survey for Recyclers (survey), included questions regarding jobs, economic impact and recycler satisfaction. Results were as follows:

- 72 percent of the recyclers that responded reported positive impacts on their business.
- The majority of recyclers had positive overall views regarding the Act, calling it positive for consumers and the environment.
- 42 percent of the recyclers surveyed felt that the program favors large recyclers and tends to keep smaller recyclers and start-ups from benefiting from the economic opportunity.
- 42 percent also indicated paperwork, data and tracking requirements imposed by the Act were difficult to handle.
- Two thirds of the recyclers indicated that the new opportunities presented by the passing of the Act were the main reason for their entry into the e-waste recycling business.
- Prior to the Act's implementation, 50 percent of the recyclers reported hiring up to three new employees in anticipation of the demand created by the implementation of the Act.
- A third of the respondents indicated a slight increase in their workforce, while about six percent forecasted significant increases in hiring by the end of year 2012.

Department Activities Performed

The Department played an active role in developing and advocating for e-waste product stewardship legislation in New York before the Act's passage in May of 2010. Since the Act's passage, the Department has taken the lead role in the implementation and administration of the state's E-waste Recycling/Reuse Program. The following are examples of program activities that were performed by the Department before and during the Act's first two program years. In many cases these activities are ongoing:

- Registration, annual reporting and fee form development and revision for all regulated entities;
- Short-term data management system development and implementation;
- Registration and annual report data entry and verification;
- Registration and reporting fee payment processing;
- Manufacturer acceptance standard calculation and distribution via certified mail;
- Manufacturer surcharge calculation;
- Long-term data management system development with contractor;

- Providing technical support and determinations to regulated entities via telephone and e-mail;
- Targeting and contacting unregistered manufacturers of CEE as well as other regulated entities;
- Notifying retailers about unregistered manufacturers' brands;
- Performance of enforcement and compliance activities;
- Creation and maintenance of guidance information on the public website, including, but not limited to, lists of registered entities;
- Development of outreach and education materials for publication;
- Development and delivery of presentations on the Act;
- Development of draft rules;
- Acquisition of membership with, and participation in, various stakeholder organizations such as the Electronics Recycling and Coordination Clearinghouse, the State Electronics Challenge, the New York Product Stewardship Council (NYPSC), and the Product Stewardship Institute (PSI);
- Survey creation, distribution and analysis;
- Verification and manipulation of collection data for trend determination and reporting; and
- Development of this report to the Governor and Legislature.

VI. Program Strengths

Broad Scope of Covered Electronic Equipment

New York passed an e-waste recycling law with a very broad scope of covered electronic equipment, as compared to states with earlier e-waste laws. Most other states have a limited variety of affected products, typically only computers, monitors, laptops and sometimes televisions and printers. In general, the Department believes, consumers are more likely to participate in collection programs that allow them to bring back all of the e-waste they have for recycling, especially the larger items, including televisions and printers. Department staff continually evaluate emerging electronic products in order to make technical determinations for inclusion as CEE under the Act and add these products when appropriate. For example, the Act's general definition of "computer" has allowed for the addition of tablets and e-readers to be included as CEE in New York's program.

Increased Recycling/Reuse and the Resulting Benefits

As a result of the Act, approximately 123 million pounds of e-waste that might not have otherwise been removed from the municipal solid waste stream was properly recycled or reused during New York's first two program years. This proper management of e-waste, including the recycling and reuse of unwanted equipment pursuant to the Act resulted in an energy savings equivalent to powering approximately 102,432 U.S. households a year, and a greenhouse gas reduction equivalent to removing approximately 26,786 passenger cars from the road per year (Source: The Federal Electronics Challenge's "Electronics Environmental Benefits Calculator (EEBC)"). The increases in the statewide recycling or reuse goal, combined with increased consumer awareness and the continued expansion of manufacturers' recycling infrastructures over the next few years, will likely continue to increase the amount of e-waste collected. Increased collection of e-waste for recycling or reuse will save additional valuable landfill space, further protect human health and the environment from potentially toxic materials, and result in fewer natural resources used, among numerous other benefits.

Convenient Collection Available to All Consumers

In several states with existing e-waste recycling legislation, e-waste collection opportunities are only available to household consumers. In New York State, however, the Act expands its free and convenient acceptance requirements to small businesses, corporations, limited partnerships, not-for-profit corporations, the state, public corporations, public schools, school districts, private or parochial schools, boards of cooperative educational services (BOCES), and governmental entities. These non-household consumers are significant contributors of e-waste, and it was essential to include them in the broad scope of entities covered by the Act. It's important to note that while free acceptance methods are available to non-household consumers in the state, many choose more convenient "premium service" options provided by manufacturer programs, such as at-business pick-up, equipment and data security services, or specialized packaging. Charging a fee for these "premium service" options is allowed under the Act.

Year-Round Collection

New York State consumers have access to free and convenient recycling year round. Even after manufacturers meet their acceptance standard goals, CEE collection may not be halted by manufacturers. Through its acceptance program, a manufacturer must collect not only its own brands of e-waste, but also one piece of e-waste of any manufacturer's brand if offered by a consumer, with the purchase of CEE of the same type by a consumer. Such collection must continue all year long, allowing consumers the flexibility to offer their e-waste for recycling or reuse at a time that is most convenient for them.

Adjusting Statewide Goals

Statewide recycling and reuse goals are prescribed in the Act for the first three program years; however, in program years 2014 and beyond, the Act uses a specified formula by which the statewide recycling and reuse goal will fluctuate. Year-to-year statewide collection goals will increase or decrease based on actual collection in the three preceding calendar years as reported to the Department. This will ultimately result in manufacturers' acceptance standards more closely following changing market conditions and collection activities.

Statewide Recycling & Reuse Goals:

- 2011: 43,968,269 lbs.
- 2012: 77,860,788 lbs.
- 2013: 5.0 lbs./capita
- 2014 & beyond: formula used*

* For 2014 and beyond, the statewide goal will fluctuate based on market conditions and takes into account the average weight of e-waste collected for recycling during the previous three years.

Manufacturer Flexibility in Establishing Unique Collection Infrastructure

Under New York's Act, manufacturers have been given the flexibility to decide how they will reach their acceptance standard goals. They can utilize a number of acceptance methods deemed "reasonably convenient" under the Act, such as mail back, collection at permanent sites, and collection events. This flexibility has been well-received by regulated manufacturers and has led to improved cooperation on the part of manufacturers.

Less Financial Burden on Local Government

Prior to the Act's implementation, many local governments across the state that provided e-waste collection programs for their residents were forced to pay excessively high prices. In many cases, the prohibitive cost of managing e-waste collection programs deterred local governments from offering such programs. During the first two program years, participating municipalities reported that not only had the Act removed the heavy financial burden of providing e-waste collection programs from local governments, but it had also helped defray program costs and, in some cases, provided a modest revenue stream. It should be noted that the Department is not involved in the actual contract negotiations between regulated entities and that these costs will continue to fluctuate based on market conditions beyond the Department's control.

Job Growth in Recycling Industry

The majority of recyclers that staff surveyed had positive overall views regarding the Act's first two program years, calling it beneficial for consumers and the environment. Initial qualitative and quantitative data suggests that the Act has positively affected growth in the e-waste recycling industry, as mentioned in the discussion regarding the E-waste Job Creation Survey for Recyclers. Business expansion and job creation occurred in the first two program years and can be expected to continue in future years.

VII. Program Challenges

Stakeholder Awareness

Many of the Act's regulated entities were slow in learning the details and requirements of the Act, and, therefore, did not submit the required registration or annual reporting forms, incorrectly registered, provided incorrect, incomplete or inconsistent data, and/or did not submit required information in a timely manner. This, in turn, made it difficult for the Department to pass along timely information to appropriate stakeholders.

Adequate public education and outreach is a critical component in the success of any new recycling program. Educating all consumers across the state with a clear, concise message and arming them with easy-to-use information regarding the free and convenient recycling/reuse opportunities available to them is key to increasing e-waste recycling in the state.

Data Management, Tracking and Verification

The absence of an effective database management system has limited the Department's ability to accomplish some of the objectives of the program. With the large amount of data and information generated from program registrations, annual reports and stakeholder correspondence, the use of desktop spreadsheets has been quickly outgrown. The time and effort required to manually enter and verify quantities of e-waste moving through a system involving over 1,200 regulated entities has been difficult and has strained the Department's ability to adequately track e-waste. The need for a comprehensive database management system has become even more crucial to the success of the program now that the Department is required to track e-waste acceptance credits (see below, "IX. Looking Forward").

Out-of-State Entities

The Department has difficulty tracking and accounting for e-waste collected and processed by out-of-state entities that are not required to register in New York. Presently, only the collectors, consolidators and recyclers located in New York are required to register in the program. There are sizable amounts of e-waste pick-ups from businesses and private entities that escape the Department's out-of-state tracking capabilities. If this e-waste is not being claimed by manufacturers or collectives participating and reporting in New York's e-waste recycling program, there is currently no other mechanism by which the Department can account for this weight. This missing weight can make a difference in calculating the annual Statewide Recycling and Reuse Goal, using the prescribed formula beginning in the 2014 program year.

Delayed Acceptance Standard Allocation for Manufacturers

Annual reports from all registered manufacturers of CEE were due March 1, 2012 for the first program year (April 1, 2011 – December 31, 2011). The Department could not accurately calculate and fairly assign 2012 acceptance standards for e-waste to manufacturers until annual reports from all registered manufacturers of CEE, with updated sales information, were received, processed and reviewed. The Department was still receiving manufacturer reports for the 2011 program year well into May of 2012. For the second program year (January 1, 2012 – December 31, 2012), the Department again received late manufacturer annual reports well past the March 1, 2013 deadline, despite multiple reminder attempts.

The untimely submission of complete annual reports by manufacturers and collectives in both program years led to a significant delay in the allocation of acceptance standards, which were not officially sent out until June. The Department anticipates more prompt submission of annual reports in future program years, but enforcement actions may be necessary to ensure compliance.

Program Implementation and Effectiveness in New York City

E-waste collection and recycling in New York City poses a unique challenge. Approximately 40 percent of the state's population lives in New York City. Due to the nature of housing and transportation within New York City, it is a daunting task to make e-waste collection and recycling conveniently available to over eight million residents through a small number of permanent collection centers and a few collection events held each year. In the first two program years, there was a significant under-collection of e-waste as reported by the various program stakeholders, despite the City's best efforts to disseminate information regarding e-waste collection opportunities and sponsoring one collection event in each of its five boroughs annually. Despite this not being the specific responsibility of New York City under the Act, the New York City Department of Sanitation (DSNY) recognized the need to develop an enhanced e-waste collection for City residents and began the development of a much more expansive and comprehensive program that will provide more convenient options for e-waste recycling/reuse within the City.

Recycling Cathode Ray Tubes (CRTs)

Consumers in New York State, like every other state in the country, have embraced new technologies that are shifting away from CRT display units. This has resulted in a glut of these older, heavy units available for collection, recycling and processing. CRTs contain significant quantities of lead and properly managing the resultant contaminated glass has become a challenging task, especially when adequate end markets to use this material continue to dwindle. Because of the abundance of CRT recyclers, who previously earned $200 per ton recycling CRT glass only a few years ago, they now typically pay $200 or more per ton to process the same glass. This can prove costly for recyclers who claim that they are not being adequately compensated by electronic equipment manufacturers, who are responsible under the law for the cost of collecting and recycling CRTs. For many recyclers, any revenue generated from the recovered material on the back-end and discretionary added premium services, such as a home pick up or assisted data removal that they may offer along with mandated free collection, are not enough to offset losses resulting from inadequate payments from the manufacturers and high CRT recycling costs. As a result, there is a net cost to recyclers. Besides these dynamic market forces, there are limited disposal options and increased transportation costs for CRTs, making recycling of CRTs financially burdensome to manufacturers and not viable for some recyclers.

On August 7, 2013, the Department issued an enforcement discretion policy to allow regulated parties, such as CRT collectors and processors, to store used CRTs and CRT glass removed from CRTs prior to legitimate recycling in compliance with federal regulations, while the Department completes the promulgation of those requirements into State regulations. This discretion policy provides a protective but streamlined approach to managing these materials and thereby significantly encourages the recycling of this glass. Specifically, regulated parties will be allowed to comply with the requirements of the "CRT Rule" promulgated by the United States Environmental Protection Agency (USEPA) at 40 Code of Federal Regulation (CFR) §261.39 (71 Federal Register (FR) 42928-42949, July 28, 2006).

More regulatory guidance and flexibility, both at the federal and state levels, will likely help to ensure strong end markets for processed CRT glass, help facilitate the creation of new opportunities for innovative recycling business and encourage job creation across the state.

Definition Clarifications

There is no definition for “collective electronic waste acceptance program” under the Act. Such a definition is needed, considering that collectives play such a large role in the implementation of New York’s e-waste program. More than 50 percent of manufacturers currently belong to a collective organization. While the “collective electronic waste acceptance program” was provided in the Act as an option for manufacturers to use, their responsibilities need to be more clearly defined.

The Department also believes a clear definition is needed for an “electronic waste collection event”. There is currently no language describing what constitutes such a collection event. The Department cannot always track and account for e-waste collected at in-state collection events and processed by out-of-state entities if the e-waste collected is not claimed as part of a registered manufacturer’s program. The Department will work to close this gap and require electronic waste collection event organizers to report e-waste collected at all these events.

VIII. Department Recommendations

Acceptance Standard Distribution Date

The Department will continue to evaluate and pursue options that will allow manufacturers’ acceptance standards to be provided to them well in advance of the program year for which the standard is distributed. Currently, acceptance standards are provided to manufacturers nearly halfway through the program year in which they apply. In order for manufacturers to receive an acceptance standard in advance of an upcoming program year, the calendar years of sales data to be used in the acceptance standard calculation would likely need to be altered. This would allow manufacturers to better plan for their electronic waste collection, recycling and reuse programs.

Data Management System Development and Online Reporting

The Department is working to secure a comprehensive system for the management of the large amount of data received from the Act’s regulated entities. To date, Department staff have used a short-term desktop spreadsheet solution for managing the e-waste program’s registration and annual reporting data. Paper submittal of registration, reporting and fee forms is still used. Online reporting would streamline the submittal and review of collection data for both regulated entities and the Department.

Manufacturer/Collective Program Improvement

The Department has found that many manufacturer and collective electronic waste acceptance programs are deficient and fail to comply with one or more provisions of the Act. The Department has made numerous attempts to bring each program into compliance by notifying manufacturers and collectives of shortfalls existing within their programs, as well as providing guidance on how to correct any such violations. Staff will continue to expand its outreach to manufacturers and collective organizations, encouraging them to enhance their electronic waste acceptance programs to meet all of the requirements of the Act. Emphasis will be placed on the provision of a continuous, convenient and effective acceptance program; the improvement of consumer education and outreach programs; and the importance of timely submittal of complete and accurate annual reports and associated fee payments. If the Department’s various outreach and education efforts to manufacturers and collectives continue to prove ineffective in addressing these issues, the Department plans to move toward taking stronger enforcement actions to ensure compliance with the Act.

Require Registration from All Manufacturers

Registration and annual reporting should be required of all manufacturers of CEE selling into the state irrespective of the current threshold. The department would still advocate that only those manufacturers crossing the sales threshold of 1,000 units/year continue to be required to pay registration and annual reporting fees and set up an e-waste acceptance program. This additional reporting would help keep

track of all compliant manufacturers and their branded electronic equipment being sold in New York State. Presently, only manufacturers who meet the 1,000 unit/year sales threshold are required to be registered and listed on the Department's website. It would be helpful for retailers of CEE who are allowed only to sell compliant brands to see all manufacturers' brands that may be sold into the state, rather than just those that are currently required to be registered. Without registration of those falling under the sales threshold, the Department has no way of knowing all brands that may be legitimately sold into the state and, therefore, cannot adequately inform retailers.

Regulation Development

The Department anticipates promulgating rules and regulations on standards for reuse, e-waste acceptance credits, waivers of recycling surcharges, and acceptable alternative methods for determination of sales data, among other areas in the Act that may require further clarification or guidance. The rulemaking process has begun and will be developed to reflect many of the challenges and lessons learned during the earlier implementation of the program.

Add Definitions

Definitions should be added for "collective electronic waste acceptance program" and "electronic waste collection events." These definitions would help to clarify participation in the program for those manufacturers considering using a collective to meet their acceptance standard and provide guidance for entities who arrange e-waste collection events in New York State. Reporting requirements should be clearly defined for both collective organizations and for collection event coordinators to ensure this valuable collection information is not lost.

Consolidation Facility Elimination

The Department recommends eliminating the entity referred to as a "consolidation facility". This term has become a source of confusion to the regulated community. After two program years it has proven unnecessary to the e-waste program and the Department recommends its elimination. Current e-waste consolidators who limit their activity to simple collection and sorting could be reclassified as collection sites while those consolidators who test and process collected e-waste for reuse could be considered recyclers.

Recycling of Cathode Ray Tubes (CRT's)

While large quantities of CRTs have already been collected, a large number of these CRT units (computer monitors and televisions) are still expected to be returned for recycling over the next 5 to 10 years. A combination of market factors, such as the lack of needed new capacity and decreased value for the processed glass, increased transportation and processing costs, and possibly mismanagement, has led to increases in the cost to recycle these wastes. These factors have made recycling CRTs increasingly burdensome to businesses and not financially viable for recyclers, and have ultimately provided fewer opportunities for consumers to recycle these units.

Options should be considered to help reduce the costs of transporting and processing of CRTs. Additional requirements for the manufacturers to pay certain minimum amounts towards this recycling effort may also help to alleviate the CRT management situation. The following recommendations could help mitigate these problems:

1. Storage flexibility should be considered, as well as removing inconsistencies with federal regulations concerning the management of CRTs.
2. Require manufacturers to reimburse the recycler, at minimum, the actual cost of transport and processing the CRT glass. This amount could be determined by the lowest of three bids obtained by the recycler. The manufacturer could have an option to suggest a vendor for bidding or contract directly with the processors for transport and processing of the CRT glass.
3. Provide grants and other incentives to CRT processors to locate in New York State.

IX. Looking Forward

Manufacturer E-waste Acceptance Credit Tracking

Beginning in the 2014 program year, if a manufacturer accepts more than its manufacturer's acceptance standard of e-waste, the excess weight may be used as e-waste acceptance credits. Starting in 2015 these e-waste acceptance credits may be sold, traded, or banked for a period of no longer than three calendar years following the year in which the credits were earned. No more than 25 percent of a manufacturer's obligation for any calendar year may be met with credits generated in a prior year. In addition, manufacturers may not buy, sell or trade credits in the year in which they are earned. The Department is working to develop and implement a system for tracking such credit transactions.

Disposal Ban for Everyone

Beginning January 1, 2015, the Act prohibits anyone, including individuals and households, from disposing of e-waste or placing it for disposal or for collection that is intended for disposal. As this disposal ban applies to the largest group disposing of e-waste, all program stakeholders will need to increase outreach and education efforts regarding the disposal ban to ensure consumer compliance with this prohibition. Both the Department and CEE manufacturers will need to continue and enhance educational efforts, especially for consumers, through their channels and on their websites. Additionally, waste transporters and solid and hazardous waste management facilities will need to conduct education and outreach activities to communicate this important last phase of the disposal ban to their customers.

Data Management System Development and Online Reporting

Staff are working toward the development of a long-term data management solution that will merge existing data with a comprehensive data management system, and that will provide for more streamlined and useful data output. Online reporting for regulated entities and an e-waste collection site geo-mapping feature as well as verification and cross-checking of reported data from the various stakeholders are just some of the features the Department is seeking to provide stakeholders through this new solution. Program staff have been granted approval to move forward and pursue a commercial software purchase, which appears to be the most cost-effective alternative to fulfill most of the program’s critical e-waste business requirements in the timeliest fashion. Efforts to finalize the contract to begin development of the data management system with a selected contractor are continuing.

Fluctuating Market Trends

Market forces are slowly at work doing what the law intended, providing municipalities a free or minimal cost option to recycle their e-waste. Prior to the Act, municipalities had to bear the entire cost of collecting and recycling e-waste if they chose to operate programs for their residents. With the passage of the Act in 2010, many manufacturers chose to negotiate agreements with municipalities, whereby the manufacturer provides free recycling to a municipality’s residents (through arrangements with recyclers) in return for the ownership of the weight collected, which would be applied to meet the manufacturer’s collection goal.

A shift occurred in the 2013 program year when competing recyclers began bidding up the price per pound of e-waste considerably, thereby providing a small, yet welcome, revenue stream for many municipalities. With municipalities expecting higher prices for their e-waste, and manufacturers offering minimum reimbursements to recyclers, incentives for recyclers to aggressively collect began to disappear. By the end of 2013, at least one recycler had terminated all its municipal contracts and another decided to charge for the collection and recycling of CRTs from collectors, thus limiting the collection opportunities available to consumers. Other recyclers appear to be slowly adjusting their practices by no longer paying municipalities for their less valuable e-waste. While the Department has no control over agreements between municipalities and recyclers, it will continue to closely monitor the delicate balance of these fluctuating market trends and their effects on consumer convenience and overall program performance.

Recycling Facility Visits and Inspections

As the program has expanded and the number of e-waste recycling facilities increased, the need for oversight of these facilities has grown. Recent reports of abandoned warehouses containing hazardous CRT materials in other states support the need for closer monitoring of facilities collecting e-waste, especially downstream processors and recyclers. Department staff have conducted site visits at a number of electronic waste recycling facilities based upon reports of collected electronic waste remaining on-site at year end. A total of 19 electronic waste recycling facilities were recently visited to determine compliance with New York State's e-waste law and to ascertain the presence of any CRT or CRT material stockpiles. With the exception of one relatively small facility that was issued a Notice of Violation for having CRT materials on site exceeding the one-year storage limit, all visited facilities were found to be in compliance with no evidence of CRT stockpiling taking place at this time. The Department intends to visit the remaining e-waste recycling facilities in the near future and conduct such visits on an ongoing basis to ensure compliance with the Act.

Recycling of Cathode Ray Tubes (CRTs)

A Commissioner's Policy (CP-57), "Use of Enforcement Discretion for Cathode Ray Tube (CRT) Glass" was issued in August 2013 that partially adopts EPA CRT rules to help relax CRT management requirements, and is available on the Department's website at: **http://www.dec.ny.gov/regulations/89804.html**. The Department has also helped to fast track the siting of a new CRT glass processing facility in western New York.

Program Implementation in New York City

The City of New York Department of Sanitation (DSNY) has begun to implement a comprehensive and innovative collection program called "e-cycleNYC", as of September 18, 2013. More information on this program is available on DSNY's website at: **http://www1.nyc.gov/site/dsny/resources/initiatives/e-cyclenyc.page**. The program involves a combination of e-waste pickups from high rise buildings and collection events involving high rise buildings located in close vicinity. According to recent DSNY reports, the City has signed up about 119 high rise structures which provide an opportunity for the residents for the collection, recycling and reuse of their electronic waste. Three types of collection services are being offered by DSNY's contractor, Electronic Recyclers International., Inc., that include locked bins, storage rooms that are street accessible and collection events that can be organized at the request of the building owners. DSNY has developed an extensive public education campaign with multi-lingual informational material provided to City residents and potential participants. This program is expected to help improve consumer convenience for a large number of apartment dwellers and significantly improve the collection of e-waste throughout the City. The Department will be closely monitoring this new program and assessing its performance to ensure compliance with the Act.

Continued Stakeholder Dialogue

The Department will continue to interact with all stakeholder groups to address critical concerns and identified challenges aimed at improving overall program performance. The New York Product Stewardship Council (NYPSC), with assistance from the Product Stewardship Institute, sponsored a day-long Summit on the Implementation of the Act on January 23, 2014 in Albany. The goal of the Summit was to begin a multi-stakeholder dialogue with municipal and state representatives, e-waste collectors/ consolidators/ recyclers, electronic equipment manufacturers, collective organizations and environmental groups to discuss ways to better implement the law and achieve its goals. Over 65 key individuals were invited by the NYPSC to participate in the Summit to express their position and perspectives on what they see as the challenges to the implementation of the program. The forum provided stakeholders an excellent opportunity to discuss those elements of the State's e-waste program that are working well, which areas need improvement and potential actions or steps that can be taken or considered to help fulfill the goals of this very comprehensive extended producer responsibility law. This information will also assist the Department in identifying critical issues that could be addressed in the upcoming rulemaking activities. The critical dialogue begun at this Summit is continuing and will help address the short and long-term challenges that have been identified. This will result in a stronger and more sustainable New York State e-waste management program for all participating entities.

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Review Version:

e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment©

Review Version 2.0

November 1st, 2013

The e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment©

Review Version 2.0

NOTE: This is NOT the complete version of the e-Stewards Standard

Purpose of this Review Version of the e-Stewards Standard:

The purpose of this Review Version is to provide interested parties access to the industry specific performance requirements in the complete e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment©. It is intended for information purposes only, as it does not contain the ISO 14001 language which is a critical part of the complete e-Stewards Standard. Therefore, this Review Version should not be used for any certification purposes. Any entity wishing to see the complete e-Stewards Standard should purchase a copy at www.e-stewards.org.

The second edition of the e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment© will be known by that name followed by the qualifier "Version 2.0". The Standard is available at www.e-stewards.org for a fee. **This Review Version is offered at no cost at the same web site.**

Amendments to the e-Stewards Standard, issued since publication of the most recent version of the Standard, are updated and only made available at no cost in the current and associated Sanctioned Interpretation document on the e-Stewards website, at www.e-stewards.org

The e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment: Version 2.0© will cancel and replace the first edition (e-Stewards Standard for Responsible Recycling and Reuse® 1.0, July 15, 2009), eighteen months after the publication date of Version 2.0.

Copyrights

e-Stewards® copyright

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FOREWORD

The e-Stewards® Standard and accredited third party certification program were initiated at the request of leaders in the recycling and refurbishment industries, in order to better distinguish their businesses in a marketplace where some practices result in profound negative impacts on the global environment and human health, and fail to meet customers' needs for responsible recycling.

The development of the Standard was led by the Basel Action Network (BAN), a non-profit organization working globally to prevent the illegal and unjust trafficking of hazardous waste, based on the United Nations' *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*.

The ongoing work of preparing and revising the standard is accomplished using a multi-stakeholder process with leaders in the industry via the e-Stewards Leadership Council and its Technical Committee, as well as other experts, such as specialists in health and safety, batteries, and data security. In addition, global norms, as determined within Basel Convention forums, are considered baselines. A public comment process allows the public to provide input into the draft standard. All comments received are then reviewed and considered in preparation of the final standard.

The e-Stewards Standard is maintained and revised at appropriate intervals through an ongoing mechanism of formal multi-stakeholder revisions, as industry and technology advance and as further research identifies risks and hazards prevalent in this industry. Between major revisions of the Standard, the e-Stewards program administrator publishes the e-Stewards Sanctioned Interpretations as needed, found at www.e-stewards.org, in order to clarify language or make formal changes in requirements. All Organizations seeking certification must meet requirements in both the e-Stewards Standard and the current Sanctioned Interpretations (if any).

This second edition, the e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment: Version 2.0©, November 1, 2013, cancels and replaces the first edition (The e-Stewards Standard for Responsible Recycling and Reuse®: Version 1.0, July 15, 2009), eighteen months after the publication date of Version 2.0. However, all certification audits, including surveillance and re-certification audits, conducted after 6 months following the publication of Version 2.0 (i.e. after May 1, 2014) must be conducted against Version 2.0 of the Standard.

Governance of Stewards certification program

The e-Stewards® Standard is owned and copyrighted by the Basel Action Network (BAN), a non-profit public interest group, for use in an accredited third party audited certification program. BAN is led by its board of directors with considerable guidance on this program from the e-Stewards Leadership Council and their Technical Committee. BAN and/or its licensed program administrator provide oversight of the accreditation and certification functions (conformity assurance), the Standard, and proper usage of the e-Stewards mark.

Structure of e-Stewards conformity assurance program

The e-Stewards certification program is based on global standards for accreditation (ISO 17011) and certification bodies (ISO 17021), and invokes norms and guidance published by the International Accreditation Forum (IAF).

Figure 1: Structure of e-Stewards Certification Conformity Assurance

INTRODUCTION

Welcome to e-Stewards Certification

Welcome. In becoming an e-Stewards recycler, you join an elite group of businesses that are recognized as the world's best recyclers and asset managers of used Electronic Equipment. By becoming an e-Stewards recycler you also become part of a much larger e-Stewards community that is made up of many more stakeholders, including concerned consumers, environmental groups, enterprise companies, non-profits, universities, local governments, policy makers, and others that have learned that it does indeed matter *how* used Electronic Equipment is managed and traded - domestically and internationally. These stakeholders have joined together to help create, and now foster and spread, the e-Stewards certification and ethic into every neighborhood and country.

Beginning as a vital tool in the United States and Canada to promote much needed conformity with the Basel Convention - established international waste trade law - the e-Stewards Standard is now available for use all around the world. Certified e-Stewards recyclers range from non-profits to small family businesses to multi-billion dollar transnational companies. While e-Stewards recyclers and the greater e-Stewards community are a diverse group, they all share the common bond of a desire to be leaders. Such leadership embraces the notion of the "triple bottom line" that defines success not just in financial terms, but also by the kind of social and environmental legacy one leaves future generations.

Purpose and value of the e-Stewards Standard

The e-Stewards® Standard is established and copyrighted by the Basel Action Network (BAN) for use in an accredited third party audited certification program. It was created in partnership with leaders in the recycling industry to provide rigorous, yet practical operational criteria for globally responsible recycling and refurbishing of Electronic Equipment.

The Standard is unique in that it requires consistent conformity by an entire corporate or organizational entity (e.g. with multiple facilities or assets), not just individual facilities within such an entity. In addition, the Standard provides a verifiable and operational framework with specific performance requirements to:

- Protect Customer Data and privacy,
- Protect occupational health and safety, and communities surrounding facilities,
- Prevent pollution, reduce environmental impacts, and facilitate efficient use of resources,
- Ensure fair labor practices, specifically excluding forced and child labor, and prison operations for managing hazardous e-waste,
- Require proper disposal of hazardous e-waste, specifically limiting it from solid waste disposal,
- Operate in conformity with international laws, treaties, and agreements throughout the Recycling Chain - in essence, preventing toxic waste exports from developed to developing countries, and
- Ensure that the above criteria are extended downstream of the e-Stewards recycler.

Value of the program for e-Stewards Organizations

e-Stewards certification has been available since 2010, and its history has demonstrated that Organizations implementing the e-Stewards management system see a positive impact on their businesses due to their increased ability to:

- Differentiate their services for customers seeking assurance that their electronics are being managed in an environmentally and globally responsible manner,
- Reduce worker exposures, injuries, and lost time,
- Identify and manage environmental, health, safety, and operational risks,
- Create opportunities for business improvement, improved compliance, and risk reduction, and
- Lay the groundwork for successful customer audits and regulatory inspections.

Due to the significant health and safety risks prevalent in the electronics recycling industry, in any country, the Standard has integrated essentially all of the concepts and elements of BS OHSAS 18001, the standard for occupational health and safety management systems. Therefore, even though the e-Stewards Standard does not require certification to BS OHSAS 18001, it should not be difficult to achieve this additional certification, should an Organization choose to obtain it.

Overview of environmental, health, and safety management systems

Environmental, health, and safety management systems have been designed to provide a business framework for ensuring that an Organization manages risk and maximizes business value.

In practice, the e-Stewards program provides businesses with a best practices framework to effectively manage the different types of risks it faces, whether they are environmental, health and safety, legal, operational, or customer related. Once established, this system provides a living tool for continually improving business performance.

The following Figure 1 provides a graphic illustration of the process for implementing an e-Stewards certified environmental, health, and safety management system (EHSMS).

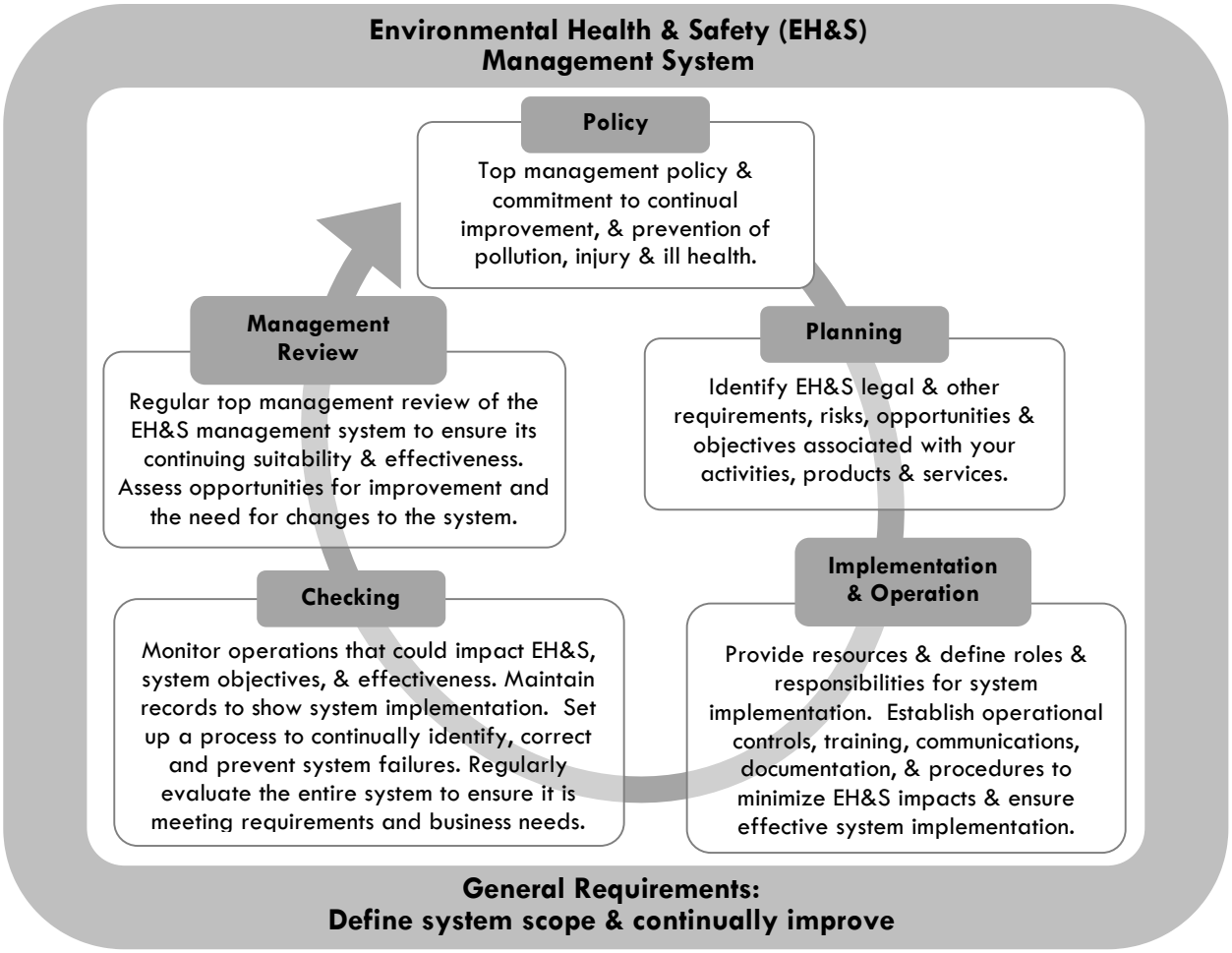


Figure 2 — Simplified overview of environmental, health, and safety management system

Appendix A numbering

For ease of use, the subsection numbers in section 4 of the body of the Standard are reflected in the corresponding subsections in Appendix A. For example, 4.4.6.5 and A.4.4.6.5 both pertain to downstream accountability, and 4.5.1.2 and A.4.5.1.2 both deal with airborne hazards.

Acronyms used in the Standard

Key defined terms (see Glossary, section 3) frequently used as acronyms in this Standard:

Acronym	Defined Term
IDP	Immediate Downstream Processor
HEE	Hazardous Electronic Equipment
PCM	Problematic Components & Materials
PHPT	Potentially Hazardous Processing Technologies
HEW	Hazardous Electronic Waste

ENVIRONMENTAL MANAGEMENT SYSTEMS - REQUIREMENTS WITH GUIDANCE FOR USE

1. Scope

The complete e-Stewards Standard (but not this Review Version) *specifies requirements for an environmental management system* which include ISO 14001 requirements and health & safety *management system requirements*, as well as more specific e-Stewards' requirements, often beyond legal requirements.

The e-Stewards certification and the e-Stewards Standard are intended to provide electronics recyclers, refurbishers, asset managers, processors, refiners and others with a formal framework with which to:

a) *Implement, maintain and improve an environmental management system* that includes occupational health and safety, responsible reuse and recycling, data security, and accountability for toxic materials throughout the Recycling Chain;

b) *Assure itself and others of its conformity with the environmental* and health and safety *policy* required in the complete Standard, *as well as any additional stated environmental policy*;

c) Operate, with respect to export of Electronic Waste, as if their country has ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, and the Basel Ban Amendment; and

d) *Demonstrate such conformity* with the complete *Standard by seeking certification/ registration of its environmental*, health and safety *management system by an external certifying body* accredited to certify to the complete e-Stewards Standard.

Collectors, Brokers, and transportation companies are currently not eligible for certification under the e-Stewards program.

The complete Standard represents minimum requirements to attain e-Stewards certification. It is therefore a baseline and should not preclude individual companies from taking further steps that are more rigorous and more protective of the environment, occupational safety and health, community health, social welfare, and data security.

The complete e-Stewards Standard specifies minimum performance requirements for eligible Organizations in the electronics Recycling, asset recovery, Processing, and refining industries, inserted into the framework of the ISO 14001 environmental management system standard. This enables an Organization to develop policies and objectives which also take into account information about significant health and safety, data security, and social accountability aspects of its operation.

The term "environmental management system", as used throughout the Standard, includes within its scope the environmental, occupational health and safety, data security, social accountability, and other performance requirements identified in the Standard. The scope of the management system also extends to Ancillary Sites owned and/or Controlled by the e-Stewards corporate entity (see Appendix B for more information on Ancillary Sites.)

1.1 Application

1.1.1 Integration with ISO 14001: 2004

The complete e-Stewards Standard (but not this Review Version) fully incorporates the requirements of the international environmental management systems standard, ISO 14001: 2004 © (ISO). It also includes industry-specific performance requirements which are fully integrated into ISO 14001and are written for use internationally. This Review Version paraphrases but does not duplicate ISO 14001 language.

For the sake of clarity in this Review Version, regular font indicates the e-Stewards industry-specific performance requirements throughout this Version, while *italic* font paraphrases requirements from ISO 14001: 2004. The font style does not infer greater or lesser importance of the text. Conformance to the e-Stewards Standard requires that both ISO 14001 and the e-Stewards performance criteria (as defined by the complete e-Stewards Standard) be met in order to receive e-Stewards certification. Those seeking certification should not rely solely upon this Review Version to understand all requirements.

1.1.2 New edition of Standard and Sanctioned Interpretations

The second edition of the e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment: Version 2.0© (e-Stewards Standard) cancels and replaces the first edition, the e-Stewards Standard for Responsible Recycling and Reuse®: July 15, 2009 (Version 1.0), eighteen months after the issue date of Version 2.0.

In addition, between major revisions of the Standard, the e-Stewards program administrator publishes the e-Stewards Sanctioned Interpretations as needed, found at www.e-stewards.org/files/SI/e_Stewards_Sanctioned_Interpretation_V2.pdf, in order to clarify intentions and/or make formal changes in requirements. All Organizations seeking certification must meet (be audited to) requirements in both the current complete e-Stewards Standard and the current and corresponding version of the e-Stewards Sanctioned Interpretations.

1.1.3 Geographic scope of the e-Stewards certification program globally

e-Stewards certification is available to Recycling entities and their facilities in any country where e-Stewards accreditation and certification bodies are allowed to work. If, however, the candidate entity/facility(s) is located in a country that is not an OECD, EU, or EFTA member country, then their potential e-Stewards certification body(s) must first notify the e-Stewards program administrator of the application to the certification body (CB), and the CB must receive written approval from the program administrator prior to proceeding with a contract for facility certification in any of these countries (i.e. outside of OECD, EU, and EFTA member countries).

1.1.4 Eligibility for certification

e-Stewards certification is currently available to entities with facilities that perform significant Recycling of Electronic Equipment, including but not limited to refurbishers, asset managers, dismantlers, shredders, and Materials Recovery operations. Such entities may be owned by for-profit, not-for-profit, non-profit, or public entities. e-Stewards certification is currently not available to Intermediaries, such as Brokers, logistics companies, or entities that only collect Electronic Equipment and/or perform software data sanitization without conducting other Recycling operations (see definition of Recycling). End Processors may contact the e-Stewards program administrator to explore eligibility.

1.1.5 Facilities required to become certified

Corporate certification: The e-Stewards certification program requires certification of all Recycling facilities located within one country and owned (fully owned or owning a controlling interest) by a corporate, organizational, or government entity. While individual Recycling facilities may receive a site certification, all multi-sited e-Stewards entities shall eventually possess e-Stewards certification of all its eligible Recycling site, as well as all its electronics Recycling subsidiaries, regardless of brand. (See Appendix B for more information.)

Ancillary Sites: In addition, all Ancillary Sites associated with a Recycling facility shall be included within the Organization's documented management system. (See Appendix B for more information.)

Separate electronics Recycling companies with same ownership: In addition, if the top management or owner(s) of an e-Stewards entity also owns or owns a controlling interest in a separate electronics Recycling entity, all of these Recycling entities and facilities are also required to become e-Stewards certified. (See Appendix B for further details.)

1.1.6 Defined terms

e-Stewards-specific terms and requirements defined in the glossary are capitalized throughout this document. ISO-defined terms are not capitalized.

1.1.7 Use of the terms "shall" and "should"

The term "shall" is used in this document to indicate those provisions which are mandatory. The term "should" is used in this document to indicate a recognized means of meeting a mandatory requirement of the Standard. An Organization may meet a "should" requirement in an equivalent way, provided that equivalence can be demonstrated to the satisfaction of the Organization's e-Stewards certification body.

1.1.8 Requirements in footnotes and appendices

This document contains both footnotes and a number of appendices which contain requirements for those Organizations seeking or maintaining certification. Appendix D does not contain requirements, and is provided for guidance.

1.1.9 Hierarchy of legal compliance and voluntary conformity with Standard

Where requirements in the Standard conflict with legal requirements, or the Organization is required by law to manage electronic equipment in specific ways, the law will prevail. However, where the voluntary Standard is not in conflict with laws, the e-Stewards requirements shall be implemented; for example, the e-Stewards definition of Hazardous Electronic Waste and export restrictions go beyond laws in some countries, and thus shall prevail for all e-Stewards Organizations, except where in direct conflict with such laws.

1.1.10 Restricted use of this Standard

An Organization may only claim to meet the Standard and/or be an e-Stewards recycler if the Organization is currently certified by an accredited e-Stewards certification body and is currently licensed to use the e-Stewards name and logo by the Basel Action Network or its program administrator.

The Standard may only be used as part of e-Stewards accredited certification, a third-party audited, accredited certification program, as licensed by the Basel Action Network. Its use in any other way, other than for informational purposes, is not authorized.

2 NORMATIVE REFERENCES

ISO 14001: 2004 (fully incorporated into the complete e-Stewards Standard- but not in this Review Version of the Standard)

SA8000 (not provided)

3 GLOSSARY OF TERMS

Please refer to ISO 14001:2004 (E) Section 3 for a listing of unique terms that are used within ISO 14001.

Terms and definitions pertaining to the e-Stewards Standard performance criteria

3.21 Ancillary Sites

Locations or operations owned, leased, or Controlled by the Organization, other than Recycling facilities, which serve as sites for collection, receiving, sorting, consolidating, warehousing, storing, cross-docking, administration, retailing, wholesaling, and/or web-based selling of Electronic Equipment, and any other activities not covered by the term Recycling but involving management of Electronic Equipment.

3.22 Annual

Any 12 consecutive month period, with the starting date for the period defined by the e-Stewards Organization, with subsequent one year periods matching the originally defined 12 month period.

3.23 Broker

An Intermediary in the Recycling Chain which buys, sells, transfers, or donates Electronic Waste, without significantly[1] Recycling it. Brokers may or may not take physical possession of equipment.

3.24 Certified Industrial Hygienist or Equivalent

A health and safety professional who:

a. Is currently certified by an industrial or occupational hygiene certification agency that is a recognized certification scheme by International Occupational Hygiene Association (IOHA)[2] or other internationally or nationally accredited organization that certifies occupational or industrial hygiene professionals, or
b. Has spent at least 10 years as a full time (at least 75% of their job duties) trained industrial hygiene professional, or
c. Has a minimum of 5 years of experience, specific to the electronics recycling industry, as a full time (at least 75% of their job duties) trained industrial hygiene professional.

3.25 Commodity

[1] For example, cutting cables from devices does not disqualify someone from this definition

[2] Refer to www.ioha.net for the latest listing of IOHA organizations

Materials (as opposed to wastes) derived from primary resources (mined or extracted from virgin raw materials) or from secondary materials (recyclables or wastes) which need no further Processing, cleaning, separation, or Recycling[3] and are not destined for Final Disposal[4], but will instead be:

a. Sold directly into a market as new consumer products, or
b. Used as a direct feedstock in primary manufacturing processes, and
c. Used in applications which will not release harmful emissions or leachate, or produce hazardous by-products or residues that fail the threshold levels listed in the definition of Hazardous Electronic Equipment, as determined by testing.

3.26 Competent Authority

For nations that have ratified the Basel Convention, the Basel definition of Competent Authority applies.[5] For the USA, the definition found in OECD Agreement C (2001) 107/FINAL applies. For countries not party to either of these two instruments, this term refers to the designated government agency responsible for approving transboundary movement (imports, transits, and exports) of hazardous wastes, recyclables, and reusable materials and equipment.

3.27 Control

Activities and/or services in which the e-Stewards Organization bills, collects, stores (including off-site or leased storage), transports, Recycles, makes decisions about, represents services as e-Stewards services, and/or otherwise makes arrangements for Electronic Equipment, even if the Organization never takes possession of the equipment or materials.

3.28 Customer Data

Any digital or analog data or information located in, on, or about any Electronic Equipment derived from any media, including but not limited to digital memory, magnetic memory, floppy drives, hard or flash drives, audio or video recordings, paper, microfiche, photographs, and labels, which:

a. Could identify individuals (such as former or current users, owners, employees) or allow discovery of such users or their activities, including information such as Internet Protocol (IP) addresses, email and mail addresses, phone numbers, ID numbers, passwords, correspondence, documents, photographs,
b. Could identify or allow discovery of information about a corporation or organization and its activities, except for an asset number or code, the corporate name, its logo, and publicly known information about the corporation or organization,
c. Consists of licensed software, if the electronic device will not be returned to the licensee, or
d. Consists of financial information of any kind other than sales price of equipment.

3.29 Downstream Processor

Any facility which Recycles/Processes or otherwise manages any Electronic Equipment (including materials derived from it) that pass through the e-Stewards Organization's facility or Control. Downstream Processors include initial processors which an e-Stewards Organization arranges to receive/Process customer equipment, if the Organization benefits in any way or represents such

[3] (i.e. any Basel Convention Annex IV B destinations)

[4] (Basel Convention Annex IV A destinations)

[5] www.basel.int

services as e-Stewards services. Downstream Processors do not include Intermediaries or Final Disposal Facilities.

3.30 Due Diligence (also known as Duty of Care)

The duty to gather necessary information on actual or potential risks involved in business relationships and donations, both direct and indirect, and validating that representations made by another party are complete, accurate, and fully truthful by means of measurement/assessment, examining documentary evidence, direct observations, researching historical and current performance, and contacting relevant parties to verify the veracity of information. Ongoing Due Diligence requires continual verification of the abilities of other parties to fulfill the agreements, conditions, and requirements of the e-Stewards Organization.

3.31 Electronic Equipment

Electrical and electronic equipment and/or components, in any form, e.g. whole, disassembled, shredded, or granulated, including:

a. Those that are dependent on electric currents or electromagnetic fields in order to work properly and have never contained ozone depleting substances, combustible fuels, or gasses, including equipment for the generation, storage, transfer, and measurement of such currents and fields, and

b. Associated consumables, e.g. ink and toner and their cartridges, compact and other discs, and accessories, such as batteries, chargers, and adapters.

3.32 e-Waste or Electronic Waste

Used or new Electronic Equipment (including components and derived materials) which are:

a. Destined, or are intended to be destined, all or in part (e.g. components removed during Repair/Refurbishment) for Materials Recovery, Recycling, energy recovery, or Final Disposal,

b. Destined, or are intended to be destined, for Repair/Refurbishment or reuse but either are untested for Full Functionality or, if tested, found not to be Fully Functional,

c. Tested and Fully Functional, but for which a legal and legitimate reuse market has not been affirmed, and/or

d. Considered waste by the country of import, transit, or export.

3.33 End Processor

The final Downstream Processor at the end of the Recycling Chain that transforms a mixed, waste, or scrap material into products or into Commodities that will be used again to produce new products with no further refinement or separation of materials or wastes. End Processors may produce residual by-products, such as slag and filter cake, or treated wastes for further Recycling or Final Disposal. End Processors include smelters, and mercury retort, plastics recovery, and glass-to-glass furnace operations.

3.34 End Refurbisher

A certified e-Stewards Organization or their Immediate Downstream Processor(s) that completes the e-Stewards requirements for reuse, as defined in this Standard.

3.35 Environmental aspects / Environmental and Stewardship Aspects

Any facets of an Organization's services, activities, or products that may interact with the environment, health and safety, social accountability, and/or data security.

3.36 Environmental impacts / Environmental and Stewardship Impacts

Changes to the environment, occupational health and safety, social accountability, and/or data security, caused (fully or partially) by an Organization's Environmental and Stewardship Aspects, whether these changes are harmful or helpful.

3.37 Environmental Management System/ environmental management system

Parts of an Organization's management system used to develop, document, implement, and maintain its environmental, health and safety, and data security policy and practices, and manage its Environmental and Stewardship Aspects and Impacts. Included within its scope are the environmental, occupational health and safety, data security, social accountability, and all other performance requirements identified in the complete e-Stewards Standard.

3.38 e-Stewards Organization – see definition for Organization below

3.39 Essential Function(s)

Product features which a user of an electronic product (equipment or component) can reasonably expect to be present based on the original or upgraded design and marketed description of the Electronic Equipment, and features without which safe or effective use would be unlikely. If equipment or components have been Repurposed, Essential Functions must include all features needed to perform for the actual consumer of the Repurposed device, in accordance with the definition of Repurposing.

3.40 Final Disposal

Operations which do not lead to the possibility of Materials Recovery, Recycling, reclamation, Direct Reuse, or alternative uses (i.e. Basel Annex IV Part A). It includes deposit in landfills and/or incinerators (including incinerators with energy recovery), and safe, monitored, retrievable storage.

3.41 Final Disposition

The last facility or operation in the e-Stewards Recycling Chain at which an e-Waste either:

a. Ceases to be a waste by being Processed into a Commodity,

b. Is prepared for Direct Reuse by completing reuse requirements in this Standard, and/or

c. Has arrived at Final Disposal and is finally disposed.

These end points in the Recycling Chain can include Final Disposal facilities (e.g. landfills and incinerators), End Processors (e.g. smelters making Commodity metals), End Refurbishers, and in the case of cleaned CRT cullet, a glass furnace operation, if all requirements have been met.

3.42 Fully Functional/Full Functionality

Electronic Equipment and/or components that have been effectively tested and demonstrated to:

a. Meet or exceed the original functionality specifications for the product/component's Essential Functions, or if upgraded or Repurposed, the intended new specifications for these products,

b. Be safe for use and handling, without electrical, physical, or fire hazards, and not have structural problems (such as cracked casings, screens, or wire sheathing) which could lead to damage or lack of functionality, and

c. Not contain any non-functional Hazardous Electronic Equipment, such as non-working circuit boards, mercury-containing devices, batteries, or CRTs.

3.43 Halogenated Materials

Contain compounds with atoms of the halogen group of elements including fluorine, chlorine, bromine and iodine. In Electronic Equipment, these materials include all plastics, circuit boards, and other items which contain brominated flame retardants (BFRs), polyvinyl chloride (PVC), and components containing polychlorinated biphenyls (PCBs).

3.44 Hazardous Electronic Equipment (HEE)

Electronic Equipment, components, and materials (processed, unprocessed, and residuals) for which the constituents or hazardous characteristics are unknown, or that consist of, contain, or are derived from:

a. Asbestos, except unintentional inputs,

b. Batteries:
   - Of any kind containing intentional inputs of lead, mercury, and/or cadmium,
   - Unsorted batteries or batteries of which the contents are unknown,
   - Batteries containing flammable organic solvents, e.g. lithium ion batteries & battery packs,
   - Batteries containing any other hazardous materials listed in the Basel Convention Annex I and possessing an Annex III hazardous characteristic,

c. Cathode ray tubes (CRTs); CRT glass (including mixed glass); CRT cullet; CRT fines, Phosphors, coatings, and frit from CRT glass; and any materials contaminated with these,

> NOTE: The following are exempt from the definition of HEE:
> 1. CRT glass that is non-leaded and is thoroughly cleaned of Phosphors, coatings, frit, and fines[6], as determined by a toxics characteristic leaching procedure (TCLP) or equivalent method, and
> 2. The metal band around the CRT front panel, and/or the shadow mask, unless they are contaminated with Phosphors or materials listed in the chart in d) below.

d. Circuit boards[7], lamps, switches, or any other parts, materials[8], assemblies, housings, cables, and wires which contain any of the substances listed below in levels exceeding the indicated thresholds. In the absence of knowledge or information regarding the toxicity of Electronic Equipment, in any form, it shall be presumed to be Hazardous Electronic Equipment, unless it can be demonstrated via the US EPA's TCLP Method 1311[9] that the material does not exceed threshold limits in the chart below:

[6] e.g. some, but not all, cleaned front panel CRT glass.

[7] For the purposes of practicality, it can be presumed that all circuit boards will fail these levels and should be presumed to be Hazardous Electronic Equipment due to common constituents such as lead and beryllium, unless they are tested and demonstrated to fall below limits in this TCLP table.

[8] NOTE: This may include shredded plastics contaminated with lead and other toxics, to the extent they fail the cited TCLP.

[9] http://www.epa.gov/epawaste/hazard/testmethods/sw846/pdfs/1311.pdf This is a sample extraction method for chemical analysis employed as an analytical method to simulate leaching through a landfill, defined in US law in 40 CFR Part 261, Appendix II, EPA Method 1311. This is a defined procedure that can be followed by any qualified laboratory, and will serve as a standard procedure until there is a universally accepted TCLP incorporated into this Standard. The TCLP levels are drawn from US Federal Register (40CFR 266 Appendix VII).

TCLP Limits for 3.44 d)			
The following limits are for concentrations of one or more elements (present elementally or found in a compound form):			
▶ Arsenic (unintentional inputs)	▶ 5.0 mg/L	▶ Chromium	▶ 5.0 mg/L
▶ Barium	▶ 100 mg/L	▶ Lead	▶ 5.0 mg/L
▶ Beryllium	▶ 0.007 mg/L	▶ Mercury (unintentional inputs)	▶ 0.2 mg/L
▶ Cadmium	▶ 1.0 mg/L	▶ Selenium (unintentional inputs)	▶ 1.0 mg/L
NOTE: The above levels are to apply to separated components, such as separated circuit boards, separated lamps, switches, plastics, structural metal, or to separated Processing residuals (e.g. shredded circuit boards, or CRT fines), and not to the whole device/equipment they are found in. For example, when testing for beryllium, one should test the circuitry/component where copper beryllium alloy is expected to be found and not the entire computer.			
NOTE: Hazardous Electronic Equipment does not refer to non-hazardous materials such as copper, aluminum, or steel alloys (waste streams listed in the Basel Convention Annex IX), unless that material is contaminated with materials listed in a) – i), or otherwise exceeds the threshold test levels in this chart.			

e. Mercury: Circuit boards, lamps, switches, LCD displays, and other parts, components or assemblies containing intentional inputs of mercury,

f. Polychlorinated biphenyls (PCBs) with levels that exceed actual concentrations >50 mg/kg,

g. Radioactive waste: All components/materials containing or contaminated by radio-nuclides, the concentrations or properties of which result from human activity,

h. Selenium & arsenic: Components and/or devices containing intentional inputs of selenium and/or arsenic and their compounds, including printer or copy drums, and LEDs with gallium arsenide, and

i. Any other materials deemed hazardous waste by the Organization's national government or other countries involved in transboundary trade.

3.45 Hazardous Electronic Waste[10] or Hazardous e-Waste (HEW)

Includes new or used:

a. Hazardous Electronic Equipment (HEE) that is destined, or is intended to be destined for:
   - Recycling, energy recovery, or Final Disposal, all or in part, including shredded material, components, residues, and parts removed during Repair/Refurbishment, and/or
   - Repair/Refurbishment or reuse, but not Direct Reuse, and

b. Electronic Equipment (including components) that is:
   - Tested and Fully Functional but for which a Direct Reuse market has not been affirmed according to requirements in 4.4.6.2 (Reuse), and/or
   - Deemed hazardous waste or banned for importation by the country of import or transit, regardless of type of destination or condition of equipment.

3.46 Immediate Downstream Processor

[10] The term 'Hazardous Electronic Waste' as used in this Standard is not meant to pertain to, nor is synonymous with any current legal national, provincial/state, or local definitions of 'hazardous waste'. In addition, this definition interprets the Basel Convention definitions of hazardous waste as they apply to electronic waste in particular, resulting in a precautionary and pragmatic definition for use in this Standard.

A next-tier[11] facility to which the e-Stewards Organization transfers (with or without Intermediaries involved) Hazardous Electronic Equipment, Hazardous e-Waste, or Problematic Components and Materials in any form. An Immediate Downstream Processor can include End Refurbishers, Downstream Processors, End Processors, and Final Disposal facilities, but does not include Intermediaries such as Brokers.

3.47 Industrial Hygiene

The anticipation, recognition, evaluation, communication, and control of environmental stressors in, or arising from, the workplace that may result in injury, illness, impairment, or affect the well being of workers and/or members of the community.

3.48 Intermediary

Any entity within the Recycling Chain which Brokers, holds, buys, sells, transfers, stores, manages, or facilitates transactions of any e-Waste (including material derived from it) that passes through the Organization's facility or Control, but does not Recycle. Intermediaries include, but are not limited to, Brokers, independent representatives, agents, logistics and cross-docking firms, and freight forwarders. The term Intermediary does not include Downstream Processors.

3.49 Materials Recovery

Operations that are part of a Process to recapture elements, compounds, or materials and transform them into Commodities.

3.50 Occupational Environmental Health and Safety Professional

A professional or a combination of professionals[12] with qualifications and competencies in environmental and occupational health and safety aspects of an Organization's operations, who have all of the following qualifications and competencies in the areas in which they provide services for the Organization:

a. Have successfully completed environmental and occupational health and safety professional development training courses, and update credentials as required, and

b. Can demonstrate knowledge of the electronics recycling industry's hazards, Industrial Hygiene solutions, and environmental risks, in particular those of the operations and facility(s) they serve, through competent risk assessments, records, and auditor interviews, and

c. Either:

- Possess a current certification in environmental and occupational health & safety from a nationally or internationally recognized environmental and occupational health & safety certifying agency; or
- Have spent at least 7 years as a full time (at least 75% of their job duties) trained environmental and occupational safety and health professional with experience pertinent to the work they will perform for the Organization; or
- Have a minimum of the equivalent of 2 years of full time experience and training specific to the electronics recycling industry as an environmental and occupational health and safety professional.

[11] i.e. with no other entities Processing or Recycling the material between the e-Stewards Organization and the subsequent vendor.

[12] For example, physicians experienced in occupational and environmental medicine and medical toxicology, certified industrial hygienists, certified safety specialists, and ergonomists.

3.51 Organization / e-Stewards Organization (see also definition 3.16 Organization)

An eligible entity which is either a candidate for certification to the e-Stewards Standard, or is currently registered as a certified e-Stewards recycler. An Organization includes all assets, property, and operations of the entity, including Ancillary Sites.

NOTE: See 1.1.4 and 1.1.5 above for requirements for eligibility and certifying multiple Recycling facilities with the same ownership in one country.

3.52 Phosphors

Metal compounds which produce light when excited (i.e., are struck by a free electron). Phosphors coat the inside of face plates/front panels of cathode ray tubes (CRTs) (typically a powdery white coating), and are also used in some lamps, such as fluorescent lamps utilizing mercury-based phosphors. Phosphors in the current waste stream are likely to contain compounds of cadmium, mercury, and/or other metals of varying or unknown toxicity or value.

3.53 Potentially Hazardous Processing Technologies (PHPTs)

Technologies, activities, or operations which Process Hazardous Electronic Equipment and/or Problematic Components or Materials, including:

a. Shredding, cutting, grinding, crushing, breaking, baling, pulverizing, fragmenting, cracking, and/or chipping, or any other activities which create dust, particulates, or vapors,

NOTE: The following are not considered a Potentially Hazardous Processing Technology:

- A hard drive punch/drill
- Shredding of separated magnetic storage hard drives, if the circuit boards are manually removed prior to shredding the hard drives. (This exemption does not extend to solid state drives, hybrid drives, or any newer technology which may have imbedded circuit boards.)
- Careful, slow and controlled release of the vacuum in a cathode ray tube (CRT) that is otherwise intact

b. Opening, dismantling, or repairing mercury-containing devices, such as LCD displays or mercury switches, including manual removal of mercury-containing lamps,

c. Thermal or chemical Processes of any kind, including but not limited to smelting, refining, melting, dissolving, reacting, and burning.[13]

3.54 Problematic Components or Materials (PCMs)

e-Wastes which may not be defined as Basel Convention hazardous wastes or e-Stewards Hazardous Electronic Wastes, but which may be hazardous or require special controls or attention in this Standard due to desired recyclability or potential environmental or occupational health and safety risks that may arise from Recycling such components or materials. These include:

a. Sorted alkaline and other non-hazardous batteries, which contain no lead, mercury, cadmium, lithium, flammable organic solvents, or unknown contents,

b. Glycolant coolants,

c. Inks and toners, and their uncleaned cartridges and containers,

[13] This does not include the incidental use of cleaning chemicals including solvents, or hand-held solder guns, if proper precautions are used to prevent exposure to toxic or irritant fumes.

d. Plastics with Halogenated Materials, such as polyvinyl chloride (PVC) and those containing brominated flame retardants, and

e. Other components and materials identified by the Organization as problematic.

3.55 Recycling/Processing

As an alternative to Final Disposal, the physical alteration, manipulation, or management of Electronic Equipment (hardware and software) for the purposes of reuse and/or Materials Recovery. It includes, but is not limited to, manually dismantling, mechanically reducing size, repairing, remanufacturing, Repurposing, refining, End Processing, and harvesting parts from Electronic Equipment. It also includes software manipulation such as data sanitization and software installation, upgrading, and testing. Final Disposal and energy recovery are not Recycling.

3.56 Recycling Chain

All entities, activities, and operations beginning with the initial e-Stewards Organization and including any of its downstream vendors that manage, receive, transfer, storage, Broker, Process, Repair/Refurbish, Recycle and/or finally dispose of Electronic Equipment that passes through an e-Stewards Organization's facility or Control, through but not beyond Final Disposition. The Recycling Chain includes, but is not limited to, all Ancillary Sites, Downstream Processors, End Refurbishers, Intermediaries, End Processors, Brokers, and Final Disposal facilities that manage any Electronic Equipment from the Organization or under its Control.

NOTE: The end of the Recycling Chain for cleaned CRT glass, but not its residuals, destined for use as a feedstock in the manufacture of new products is at the facility manufacturing new products using the CRT glass.

3.57 Repair/Refurbish(ment), or Repairing/Refurbishing

The process and activities required to transform used or unused Electronic Equipment (including components) into Fully Functional Electronic Equipment for Direct Reuse rather than for Materials Recovery or Final Disposal. Such activities may include cleaning, data sanitization, software and hardware changes or upgrading, fixing hardware faults, replacing or removing faulty or unwanted components, remanufacturing, removal of identifying labels/stickers, and/or Repurposing. Repair/Refurbishment activities usually result in some e-Waste (e.g. non-functional parts or devices) that will be destined for Recycling or Final Disposal.

3.58 Repurposing

A form of reuse that relies on the primary data processing function of Electronic Equipment, (except photo voltaic modules), but utilizes that function for a purpose or context other than originally intended, e.g. combining CPUs or motherboards for use as a network server.

3.59 Shipping Records

Verifiable records of incoming and outgoing shipments or transfers of Electronic Equipment (including components and materials derived from equipment), including shipping logs, invoices, bills of lading/waybills, other commercially-accepted documentation of transfers, and the corresponding acknowledgements of receipt from receiving facilities. Such records should contain weights of materials and/or piece/unit counts, date, consignee and consignor, and verifiable contact information for entity that transfers shipment.

4 Environmental management system requirements

4.1 General requirements

An e-Stewards *Organization shall create and maintain a documented environmental management system (EMS) in conformance* with the complete e-Stewards Standard*, and identify and document the scope of their EMS.*

An e-Stewards *Organization's Environmental Management System shall:*

a) *Include occupational health and safety, data security, and social accountability management system(s), and other requirements specified in* the complete e-Stewards Standard, and

b) Apply to:

1. The Electronic Equipment, property and assets under the Organization's ownership and/or Control, and
2. Workers, including temporary, part time, and contract workers, volunteers, and interns.

4.2 Environmental policy

An e-Stewards *Organization's highest level of management shall document, implement, and maintain its environmental and health and safety policy, ensuring that it is scaled appropriately to the impacts of its activities, addresses the need for continual improvement and pollution prevention, offers the structure for developing and monitoring progress toward environmental, occupational health and safety, and data security goals and targets, and commits to compliance with all legal and other requirements that are applicable.*

An e-Stewards Organization shall ensure the EMS policy includes a commitment to:

1. Prevention of exports of Hazardous Electronic Waste (HEWs) throughout the Recycling Chain which violate international laws, treaties, and agreements,
2. Prohibition of forced or child labor throughout the Recycling Chain,
3. Prohibition of prison operations throughout the Recycling Chain that involve incarcerated individuals handing HEWs or Customer Data, and:
   - Are subsidized by government (directly or indirectly),
   - Involve the likelihood of risks of release or misuse of Customer Data, or
   - Do not provide workers with the same rights as private sector workers to protections from exposure to toxics, and
4. Social accountability values within its Organization consistent with the principles of SA 8000 (certification to SA 8000 is encouraged but not required).

The EMS policy shall be communicated to all persons working for the e-Stewards *Organization and shall be made available to the general public,* and shall encourage all Downstream Processors to operate consistent with the principles of SA 8000.

4.3 Planning

4.3.1 *Environmental* and Stewardship *Aspects*

The e-Stewards *Organization shall develop and maintain a process and procedure*

a) *to identify* Stewardship *and environmental Aspects of its operations,* including those that arise from the requirements of this Standard, *within the scope of the EMS under its control and influence, and for any new developments or altered operations, and*

b) *to determine those* Stewardship *and environmental Aspects that have significant impact or potential for significant impact on the environment,* the health and safety of those impacted by the operations[14], and the data privacy of customers,

c) Conduct a risk assessment

At least every three years, conduct and document a risk assessment of the Organization's Environmental and Stewardship Aspects associated with all forms of Electronic Equipment and its management. The health and safety portion of the assessment shall be conducted by an Occupational Environmental Health and Safety Professional(s). The assessment may require a multidisciplinary team to address all potential hazards. Additional risk assessments shall be conducted on specific operations or areas prior to and following any significant changes.

The risk assessments shall take into account the Organization's Environmental and Stewardship Impacts and the results of monitoring activities (4.5.1), and shall give consideration to:

1. Customer Data privacy, downstream risks associated with Hazardous e-Waste and hazardous waste management, releases to the environment such as storm water runoff and air emissions, and transportation,
2. Physical hazards, including noise (impact, continuous, and intermittent), ergonomic hazards, vibration, lighting, and temperature extremes,
3. Chemical hazards in the form of vapors, dust, fumes, or radioactivity, whether from the hazardous substances present in Electronic Equipment or processes used to manage it, both in operational areas and in areas where hazards may migrate (e.g. offices, changing rooms, dining and break rooms). Examples of chemical hazards include, but are not limited to lead, mercury, cadmium, Phosphors, beryllium, and brominated flame retardants,
4. Biological hazards, e.g., blood that is present in used glucometers, or microorganisms in medical Electronic Waste,
5. The following practices, in order to decrease worker exposure and take home contamination (potentially exposing others outside the workplace):
   - Housekeeping practices in the workplace (disallowing practices such as dry sweeping dust, and using compressed air to clean surfaces),
   - Work practices of individual workers, and
   - Personal hygiene practices, e.g. washing or showering adequately for removal of contamination prior to eating, taking a break, and/or leaving the work area,

[14] This includes workers, temporary workers, supervisors, consultants, auditors, volunteers, any others performing work for the Organization, as well as the surrounding community.

6. Trends or continued risks as documented in records of past injuries, accidents, and workplace monitoring records in order to determine if earlier risks have be adequately addressed and reduced, and

7. Other hazards including hazardous substances that may be present in the Electronic Equipment, non-conforming (unusual incoming) materials, and in other products or processes used in operations (such as solvents, cleansers, and solder guns), and

d) Identify and prioritize significant Environmental and Stewardship Aspects

The Organization shall identify, determine significance of, and prioritize its Environmental and Stewardship Aspects, taking into account their associated severity and frequency, the results of the risk assessment(s), stakeholder concerns, legal and other requirements (4.3.2), and environmental, health and safety monitoring results (4.5.1). *The Organization shall record this information and keep it current.*

Significant Environmental and Stewardship *Aspects* and other risks and obligations that arise from the requirements of the complete e-Stewards Standard *shall be taken into account in the development and management of the* e-Stewards *Organization's EMS.*

4.3.2 *Legal and other requirements*

The e-Stewards *Organization shall develop and maintain a process*

a) *to determine and acquire legal requirements that apply to their operations and other applicable requirements followed by the Organization concerning its Environmental* and Stewardship *Aspects,* contractual agreements, and each policy commitment (4.2),

b) *to show how these apply to its* Stewardship and *Environmental Aspects,*

c) to identify, obtain, and maintain all required national, state/provincial and local permits covering specific operations, limitations, and controls, and

d) to implement all local, state/provincial, and national requirements for environment, social accountability, occupational health and safety, and data security.

The e-Stewards *Organization shall demonstrate how such requirements are considered in developing and maintaining its EMS.*

4.3.2.1 Legal Export, Transit, and Import Requirements

An Organization shall ensure legal transboundary movement (export, transit, and import) of used Electronic Equipment destined for reuse and of each Hazardous e-Waste (and of some Problematic Compounds or Materials as noted in 4.4.6.7), coming into their facility(s), under their Control, and throughout their Recycling Chain, by identifying and ensuring consistency with all relevant legal and other requirements, including:

a) The requirements of:

1. The Organization for Economic Cooperation and Development (OECD),

2. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,

3. The Basel Convention Decision III/1, also known as the Basel Ban Amendment, regardless of whether or not it is in legal force nationally or internationally,

4. Other applicable international laws regarding trade (export, transit, or import) in hazardous wastes, including regional treaties and accords (e.g. the Waigani Treaty, Bamako Convention, Izmir Protocol, Central American Accord, EU Waste Shipment Regulation), and
5. National legislation of any countries concerned (export, transit, and import), including laws pertaining to tested and Fully Functional used equipment, and restrictions on older equipment, and

b) Ensuring that each shipment of Hazardous e-Waste is exported or imported only as follows:

1. Implementation of Basel Ban Amendment [a) 3 above]: When exported from OECD/EU countries and Liechtenstein, shipments shall only go to and through countries in that same group, and the trade is for Recycling and not Final Disposal,

2. Implementation of trade ban between Basel Parties and non-Parties[15]: All countries concerned (export, transit, and import) must be Parties to the Basel Convention, unless at least one of them is a Basel Party and all countries concerned have concluded a valid special bilateral or multi-lateral agreement as allowed under Article 11 of the Basel Convention, and

3. Implementation of the Basel Convention, regional agreements, and national laws: If trade (export, transit, and import) is not prohibited under 1and 2 above[16], it shall be conducted only in full conformity with all applicable legal and other requirements including national and regional agreement requirements, as well as with the requirements of the Basel Convention. These requirements include contacting government Competent Authorities[17] and obtaining national government-to-government written approval from the exporting, transiting, and importing countries prior to the export of each shipment[18]. The Basel Convention also requires recognition of national definitions of hazardous waste for any country concerned (export, transit, and import) as submitted to the Basel Convention Secretariat.

4.3.3 *Objectives, targets and programme(s)*

Environmental management system objectives shall be identified and documented, including those pertaining to health & safety and data security*, and responsibilities and methods for achieving targets and goals shall be defined, including timing for such achievement.*

Objectives shall measurable whenever practical, and shall be consistent with the e-Stewards' policies.

When setting up and reviewing its objectives and targets, an Organization shall consider its legal and other requirements, and its significant Stewardship *and Environmental Aspects*, including those associated with the requirements of this Standard. *Technological options, operational and business requirements, and the views of stakeholders shall be considered.*

The e-Stewards *Organization shall operate a program for achieving its goals and targets including identifying who is responsible for setting and achieving the goals and targets at various levels of the Organization, and how and when they will be achieved.*

[15] Basel Convention, Article 4, Paragraph 5; www.basel.int (NOTE: USA is not a Basel Party as of date of publication of this Standard.)

[16] e.g., for trade between two non-OECD and non-Basel Parties

[17] For a list of Competent Authorities of Basel Parties, and their contact information, see: http://www.basel.int/Countries/CountryContacts/tabid/1342/Default.aspx

[18] The Basel Convention, OECD and other agreements may allow a country to provide "general consent' for periods of time, based on a number of conditions.

4.3.4 Planning for responsible management & disposition of Electronic Equipment

The Organization shall document and implement a plan for the responsible management and disposition of Electronic Equipment received by the e-Stewards Organization or under their Control in a manner that protects human health and the environment, and is in conformity with this Standard. The plan shall identify:

- Electronic Equipment that is accepted, items that are not accepted, and how to manage unusual materials if received,
- The hazardous substances that may be in Electronic Equipment, including HEWs,
- Priorities for managing Electronic Equipment based on the Figure 3. Waste Management Hierarchy, and as appropriate to business model and customer requirements,
- Potentially Hazardous Processing Technologies employed,
- Operational controls for management of HEWs, PCMs, and their residuals in accordance with this Standard, and
- Acceptable downstream Processing options, countries, and Final Disposition for HEWs, PCMs, and residuals.

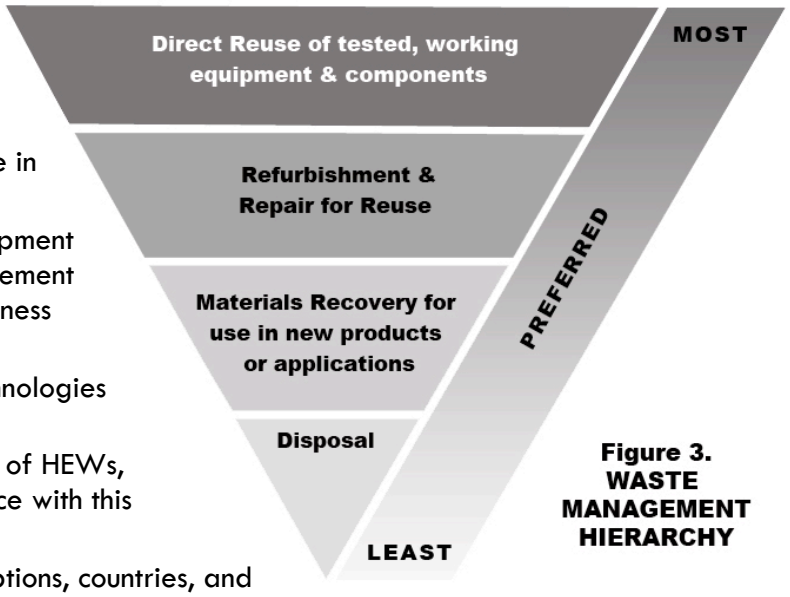


Figure 3. WASTE MANAGEMENT HIERARCHY

4.4 Implementation and operation

4.4.1 Resources, roles, responsibility and authority

An e-Stewards Organization's top management shall provide resources (human, technical, and financial) for the effective and efficient operation of the environmental management system and achievement of its goals.

For human resources, roles shall be clearly defined, including responsibilities and authorities assigned to each. An environmental management system representative shall be designated by the highest level of management, and their role shall include:

a) *Ensuring the environmental management system functions effectively and efficiently in conformance with* the complete e-Stewards Standard, *and*

b) *Access and reporting to the highest level of management on the performance of the EMS against its objectives.*

4.4.2 Competence, training and awareness

An e-Stewards Organization shall ensure that all personnel who are responsible for achieving the requirements of the complete e-Stewards Standard *are qualified on the basis of job training, work experience, and/or education.*

Awareness and job training shall be provided and documented for employees whose jobs relate to the Organization's environmental, occupational health and safety, and data security *aspects and impacts and EMS. This training shall address the critical nature of conformance with policy and procedures, identification of those aspects and impacts which may be associated with their jobs, their specific roles in*

achieving conformity, and the potential results of not achieving conformity, including potential risks and controls arising from the introduction of new Processes and/or new materials.

4.4.3 *Communication*

An e-Stewards *Organization shall effectively communicate internally regarding its defined Environmental* and Stewardship *Aspects and Impacts and the requirements of its environmental management system,* including ensuring that all training and other communications to workers are made in a language and format understandable by the workers (e.g. tailored to literacy levels).

External communications about its significant environmental aspects and conformity to the complete e-Stewards Standard *shall be considered, and a method for this transparency shall be implemented, as appropriate,* including reporting emergency events and exceptional releases of toxics or other hazards to appropriate authorities.

4.4.3.1 Participation and Communication

The Organization shall establish and maintain a participation and communication program:

a) For workers

The Organization shall communicate with workers regarding the Environmental Management System, including but not limited to:

1. Conduct and document regularly scheduled safety and health meetings,
2. Ensure workers and contractors are consulted and informed regarding issues and changes that may affect their occupational health and safety,
3. Communicate environmental, health and safety information, as allowable by law, including:
   - Industrial Hygiene monitoring results for each affected work position, without identifying any affected workers, as well as communicating a clear explanation of what the results mean, and
   - Timely and confidential communication of Industrial Hygiene and medical monitoring results with each affected worker with clear interpretation of these results, including whether or not workers have been exposed to levels at which the Organization is required by law or this Standard to mitigate,
4. Establish and maintain an ongoing occupational and environmental health and safety team in order to ensure regular communication between and participation of representatives of all levels of workers and management regarding environmental, health, safety, and social accountability issues, which:
   - Facilitates two-way communication between workers and management, without fear of reprisal (e.g. via a system to accept anonymous tips or concerns),
   - Regularly reviews environment, health and safety suggestions, complaints, concerns, reports of safety violations, and exposure data,
   - Allows workers and supervisors to participate in hazard identification, risk assessments, and incident investigations,
   - Reviews effectiveness of controls, and makes recommendations to management review (4.6) meetings for improvements to system processes and operational controls,
   - Provides workers with the authority to discuss recommendations and implement actions for environmental protection, health and safety, and social accountability, and

- Regularly reviews non-conformities and the effectiveness of closure (completion) of corrective and preventive actions (4.5.3),

b) For Customers

If requested by customers, including upstream e-Stewards Organizations, the Organization shall provide, or allow review of, verifiable records of:

1. Hazardous e-Waste going for Recycling or Final Disposal, including Hazardous e-Waste generated by Repair/Refurbishment operations. Records shall include current contact information for Downstream Processor(s) through Final Disposition, and
2. Equipment and components going for reuse, up to the point of completing requirements for reuse in conformity with 4.4.6.2. Records shall include dated sales orders or invoice numbers, but do not need to include names of buyers.

Should the customer require extensive detailed documentation, provision of such information may be contractually negotiated and controlled.

4.4.4 *Documentation*

In addition to the requirements for documentation made elsewhere in the complete e-Stewards Standard, *an e-Stewards Organization's EMS shall document:*

a) *The scope and core elements of the EMS,*

b) *A description of the interaction between the core elements of its management system, and reference the related procedures,*

c) *Records which provide evidence of conformance with* the complete e-Stewards Standard, *and*

d) *Procedures and records that may be necessary to ensure effective planning, implementation, and control of its significant environmental aspects and impacts.*

4.4.5 *Control of documents*

Where documentation is a requirement of the complete e-Stewards Standard *and/or the EMS, documentation (including externally generated documents) shall be controlled, including an effective process to*

a) *Approve documented procedures and revisions,*

b) *Ensure that current revision levels are identified and relevant versions are available wherever required to assure conformity,*

c) *Ensure document identification, legibility, and known distribution, and*

d) *Prevent the unintentional use of superseded documents.*

4.4.6 *Operational control*

An e-Stewards *Organization shall identify, plan, and perform operations essential to the effective implementation of the environmental management system by*

a) *Utilizing and documenting procedures, including operating criteria, where the lack of procedures could lead to nonconformance with the* e-Stewards *EMS policy and objectives, and*

b) Communicating any relevant process requirements to customers and/or suppliers related to significant Environmental and Stewardship *Aspects.*

4.4.6.1 Eliminate and mitigate significant Environmental and Stewardship Aspects

An Organization shall establish, implement, and maintain a documented program and procedures to address its Environmental and Stewardship Aspects, including an occupational health & safety and Industrial Hygiene program to:

- Protect workers from injury and illness,
- Reduce or eliminate workplace hazards and exposure to hazardous materials, and
- Protect workers' rights for health and safety.

This program shall include a precautionary approach, shall address priority hazards and respond quickly to emerging information about new concerns, and shall give preference to the following hierarchy of controls, in this order: elimination, substitution, engineering, administrative, and finally personal protective equipment. The ongoing occupational health and safety and Industrial Hygiene program shall include, but not be limited to, the following:

a) Airborne hazard controls

Based on the results of the risk assessment (4.3.1) and testing for each airborne hazard[19] (4.5.1.2), establish and maintain controls to mitigate exposures in the operational areas and to prevent migration of hazards outside the operational areas. This shall include controls according to the hierarchy of controls outlined above to maintain air quality and prevent releases, under the direction of competent personnel and effectively reduce or eliminate exposures, as required below.

The e-Stewards operational occupational exposure limit (OOEL) for each identified hazard shall be either the applicable regulatory limit in the jurisdiction of the Organization or the current Threshold Limit Value established by the American Conference of Governmental Industrial Hygienists (ACGIH). In order to foster best practices, Organizations are encouraged to adopt the lowest, most protective limits. If there are not regulatory limits for any particular hazard in the country concerned, then only the ACGIH TLV shall apply.

In addition, the following controls shall be implemented:

1. If results are equal to or exceed 100% of the OOEL (described above) in the Organization's jurisdiction, urgently implement appropriate measures in accordance with the hierarchy of controls above. The Organization shall take timely action to protect workers when elimination, substitution, and/or engineering controls are not immediately feasible or effective in reducing exposures to acceptable levels,

2. If results exceed any regulatory action levels (i.e. levels at which mitigation is legally required prior to reaching legal exposure limits), then implement control measures in accordance with the hierarchy above to reduce and maintain worker exposures below the action levels, as soon as possible, and

3. If there are no regulatory action levels (i.e. no requirements to mitigate prior to exceeding the legal exposure limits), and test results are equal to or above 50% of the OOEL, the Organization shall establish objectives (4.3.3) to address these airborne hazards as soon as possible,

[19] It is important to note that the lack of an occupational exposure limit for a substance does not imply that the substance is safe or not hazardous.

b) Housekeeping

Establish and implement an ongoing housekeeping program for all areas to prevent or mitigate physical hazards (such as slips, trips and falls), and avoid or minimize secondary routes of exposure (such as ingestion or dermal absorption) to chemical and biological hazards. Non-operational areas shall be kept free of harmful substances that may migrate from operational areas and cause increased exposures and take home contaminants,

c) Ergonomic controls

An ergonomics program shall be established, documented, implemented, and re-evaluated at least every 3 years and when significant changes are made in work processes to address the risks identified in the ergonomic evaluation (4.3.1 c). If past injury reports and activities identify a strong likelihood that workers have suffered or will suffer musculoskeletal disorders, the Organization shall take further steps to prevent these,

d) Noise controls

A documented hearing conservation program shall be established, as needed, after comparing noise test results (4.5.1.2) to the most stringent regulatory exposure limits within the Organization's jurisdiction or if none, to those in an OECD country. The program shall:

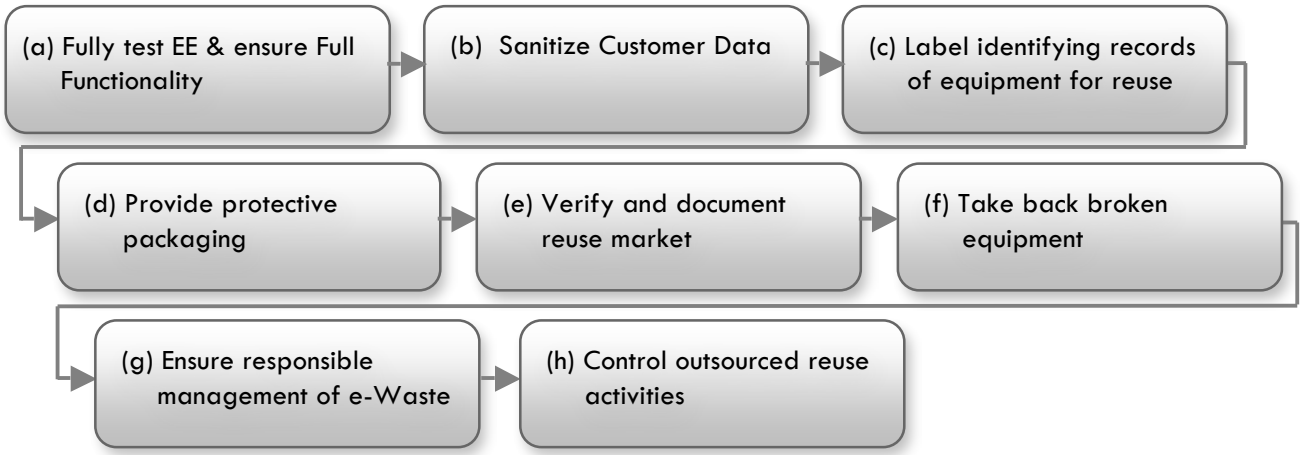
1. Evaluate and implement feasible engineering and administrative controls to reduce worker noise exposures in the event that noise levels are above either 85 decibels (time weighted average) or the applicable regulations or standard, whichever is more protective,
2. Ensure that hearing protective devices are worn by all affected workers while and until effective engineering and administrative controls are implemented, and retesting confirms effectiveness, and
3. Complete audiometric testing (gauging long term impacts) for all affected workers in the event that engineering/administrative controls take a year or longer to implement, and

e) Controls for significant Environmental and Stewardship Aspects

Establish, implement, and document formal procedures for significant Environmental and Stewardship Aspects, in order to mitigate and minimize environmental releases, worker and community exposures, take home contamination, data privacy risks, and have the necessary equipment and capacity on-site to implement these procedures.

4.4.6.2 Reuse and Refurbishment of Electronic Equipment

The Organization shall ensure that Electronic Equipment that is donated, transferred, and/or sold for reuse, throughout Final Disposition, according to the following requirements (details below):



a) Fully test Electronic Equipment and ensure Full Functionality

The Organization shall determine that Electronic Equipment, including components, which contain or consist of HEEs and/or PCMs are Fully Functional, with exceptions defined in Table 1 below, by testing each item to determine its condition, Repairing/Refurbishing as needed, and ensuring they are Fully Functional prior to going for Direct Reuse.

In addition, the Organization shall:

1. Determine and document the state of health of each rechargeable battery[20] destined for reuse from mobile computing devices, including laptops, notebooks, e-readers, and touch-pads, as follows:
   - Recharge battery and ensure it will accept a charge, and
   - Test each battery that will accept a charge (whether it is part of a device or separate), and allow such batteries to go into reuse if:
     - The full charge capacity on the 'smart chip'[21] displays a value of 80% or greater than the original rated capacity[22] of the battery, or
     - Each recharged battery maintains a run time[23] of at least one hour during 'load testing'[24] at 60% of the battery's original load rating[25] or a mathematically equivalent load test protocol,

[20] This does not include rechargeable batteries in small wireless peripherals, such as wireless track pads, mice and keyboards.

[21] While there is no single definition for 'smart chip', integrated circuit chips standardized in 1993 contain smart battery systems designed to indicate 'state of charge', and provide both permanent and temporary data. Battery manufacturers program the permanent data into the battery, which includes battery identification, type, manufacturer's name, serial number and date of manufacture. The temporary data is regularly added to during battery use and consists of cycle count, user pattern, and maintenance requirements. It is not permissible for an Organization to reset the value on the smart chip.

[22] Battery capacity is a measure (typically in Amp per hour) of the charge that can be stored by the battery in its present condition. There are various testing protocols for determining the capacity of a battery and its state of health. Battery manufacturers typically state the rated capacity of new batteries on the battery labels, in terms of milli Amps per hour (mAmps).

[23] The time for the battery to fully drain is recorded, with at least 1 hour run time available from the battery (when not plugged into electrical grid).

[24] 'Load testing' refers to the actual usage or electrical demand placed on an electronic device (such as a laptop) during the battery test. All of the following can affect the 'load' (energy demand) on a device, while in use: screen brightness, type of programs, type of activity, temperature, and wireless features.

[25] i.e. 60% in milli Amps (mAmps) of the original milli Amp Hours (mAh) rating of the battery. For example, for a battery rated at 4,000 mAh, the required load would be 2,400 mAmps (60% of its original [new] rated output) with one hour run time before the electronic device shuts down.

2. Determine the state of health of each mobile phone battery destined for reuse[26], ensuring that it is capable of holding a charge of at least 80%[27] of its original rated capacity[28]. This should be accomplished by the following:
   - Recharge each battery (at least 30% recharged) and then perform a 'quick test' (e.g. with a quick sort analyzer) if a reliable quick test[29] is available for battery type, or
   - Fully charge and discharge the battery to measure its current capacity,
3. Determine that photo voltaic modules destined for reuse are capable of producing power output that is at least 50% of original power output, and
4. Test CRT devices that are destined for remanufacturing[30] as follows:
   - Test each cathode ray tube for viability[31] and ensure only reusable tubes are transferred for remanufacturing, and
   - Do not allow other components that consist of or contain HEE (such as circuit boards) to be transferred to remanufacturing operations if those materials will be Recycled or disposed of, or if they are destined for reuse and have not met the requirements in this section 4.4.6.2.

Table 1: Electronic Equipment that does not have to be tested for Full Functionality (4.4.6.2 a), if it meets these requirements

Type of Electronic Equipment exempt from Full Functionality requirements (4.4.6.2 a)	Requirements for this type of Electronic Equipment, prior to going for reuse
1. New equipment or components still in unopened original packaging	The Organization shall determine that the devices are not known or suspected to be defective nor the subject of a product recall, and demonstrate the Organization has clear title and authority to sell such products.
2. New components (parts) in their original packaging which has been opened in order to remove some but not all of the new components	The Organization shall determine that the devices are not known or suspected to be defective nor the subject of a product recall, and demonstrate the Organization has clear title and the authority to sell such products. In addition, this exemption is only for components/packaging for which it can be demonstrated that the components are brand new, even if packaging has been opened.

[26] Unless mobile phone is Repurposed to a use that does not rely on the battery.

[27] This parameter was defined by participants in the United Nation's Mobile Phone Partnership Initiative (MPPI), including industry participants; http://www.basel.int/industry/mppi.html

[28] See footnote 23

[29] If using a pass/fail analyzer, it must be set at a minimum threshold of 80% for all batteries indicated to "pass" the quick test.

[30] e.g. removing a cathode ray tube (CRT) from a used device and building a new device/product incorporating the old tube.

[31] E.g., using a CRT picture tester/restorer.

Type of Electronic Equipment exempt from Full Functionality requirements (4.4.6.2 a)	Requirements for this type of Electronic Equipment, prior to going for reuse
3. Used Electronic Equipment which is very unusual[32] and the total Annual sales/value of which equals 5% or less of the Organization's total Annual sales and/or value of donations.	The Organization, but not their End Refurbisher(s), may sell and/or donate up to this limited quantity of unusual items without ensuring Full Functionality, if they complete all of the following: ▶ Establish & implement documented procedures for meeting the requirements of this exemption, including restrictions on quantities, clear criteria for identification of limited types of Electronic Equipment, as defined, and accepting returns, ▶ Ensure all such Electronic Equipment is only exported, directly or indirectly, in conformity with section 4.3.2.1 (Legal Exports), ▶ Prior to transfer of exempted Electronic Equipment, perform and document a thorough physical inspection of each unit and ensure the equipment/component is not damaged and appears to be in good working order or is repairable, ▶ Clearly state on all advertising and invoices related to the sale or donation of each exempted item that it is: ▶ Not fully tested for functionality, and provide full disclosure of inspection results and condition, ▶ For Repair/Refurbishment, and not Recycling or disposal, ▶ Warranted for at least 90% money-back, ▶ Keep the following records: ▶ Unit and total value of Electronic Equipment donated and/or sold, and exempted in this subsection 3 of Table 1, and ▶ Number or weight of units and/or parts returned.

b) Sanitize all Customer Data in conformity with 4.4.6.3 (Data Security),

c) Label or list identifying records for each item of Electronic Equipment

The Organization shall provide and maintain identifying information for each item of Electronic Equipment (including components) destined for reuse, except for integrated circuits and random access memory (RAM). The identifying information shall be conveyed via either a label attached to each item and/or a list of items in each lot or shipment, and shall be easily accessible to officials (e.g. customs officers) and customers without the need for unpacking. Identifying information shall include:

1. Type of device or component,
2. A unique identification number[33] of whole devices (and/or components if they are sold or donated separately and if they have identification numbers),
3. Year of production (if available) and model number (if available),
4. Manufacturer or brand name,

[32] i.e. Electronic Equipment which in not generally handled by the Organization and is very difficult to fully test due to the need for rare and highly specialized skills, specialized software or testing equipment, and/or rare and unavailable parts. Such unusual equipment may include obsolete (vintage), medical, manufacturing and testing equipment, but not equipment commonly available, or frequently managed by the Organization.

[33] The identification number can be a serial number affixed to a device or component by the manufacturer, or a similar unique number assigned to the specific device or component, distinguishing it from devices of similar make or model.

5. Type of testing performed on each device or separate component and, if applicable, data sanitization (see 4.4.6.3),
6. Result of tests performed, an accurate representation of the condition of the device or component (including cosmetic condition), a description of missing components (if applicable), confirmation that all equipment and/or components are Fully Functional (except for exempted equipment), and a clear representation that it is a used device or component (unless it is new and still in original packaging),
7. Information on rechargeable batteries for mobile computing devices, as follows [see Appendix A 4.4.6.7 b) for additional documentation required for exports]:
   - When a battery is shipped with the computing device it powers and is Fully Functional [4.4.6.2 a) 1], information for each battery indicating test results, i.e. that it has at least 80% of original capacity, and the battery shall be associated with the device,
   - If batteries destined for reuse are not shipped with the computing devices each battery will power (e.g. separated, bulk batteries), identifying information for each shipment shall include all the information in the bullet point above, as well as weight, count, and model number for each type of battery chemistry in a shipment,
8. Information on rechargeable batteries for mobile telecommunications devices indicating that each battery is Fully Functional [4.4.6.2 a) 2], i.e. has at least 80% of original capacity [see Appendix A 4.4.6.7 b) for additional documentation required for exports],
9. Name, address (including country), and current contact information of the Organization (and their End Refurbisher, if applicable) responsible for evidence and confirmation of Full Functionality, and
10. Product return policy,

d) Provide protective packaging

The Organization shall package Electronic Equipment destined for reuse in a manner that will safeguard its reusability, public and worker health, the environment, and protect it from damage during loading, transit, and unloading,

e) Verify Direct Reuse market

The Organization shall confirm that every sale or donation of Electronic Equipment and components is destined for Direct Reuse, and not for Recycling (including repair) or Final Disposal, by documenting and maintaining:

1. A copy of the contract, invoice, or receipt relating to the sale and/or transfer of ownership or equipment, which states:
   - The name and address of the buyer/receiver, including country[34],
   - That the equipment or components are Fully Functional (or in the case of exemptions found in 4.4.6.2 a) Table 1, required records), and
   - That the equipment or components are being sold, donated, and/or received for Direct Reuse,

[34] Alternatively, tested and Fully Functional equipment and components (4.4.6.2.a) may be sold for reuse without proof of reuse market if the Organization documents and implements a procedure to show that the selling price is at least three times more than the prevailing scrap for each sale. In this case, the Organization shall obtain and maintain a) objective evidence of the prevailing scrap rate at the time of sale for each type of tested and Fully Functional equipment and/or components sold, and b) the weight of the equipment and/or components, their selling price, and a calculated price per unit of weight.

2. Bills of lading/waybills and/or other relevant Shipping Records, if shipping is involved, with both the buyer/receiver and seller/donor listed,

f) Take back Hazardous Electronic Equipment

The Organization shall always accept back, free of charge, equipment and/or components which originated from the Organization's facility or Control if they were misrepresented to the customer, and/or if they are comprised of or contain Hazardous Electronic Equipment but were subsequently determined to be non-functional, including those broken during shipment or significantly different than described,

g) Ensure responsible management of resulting e-Waste

All scrap, e-Waste, and material generated from Repair/Refurbishment activities that meet the definition of HEWs and/or PCMs shall be managed according to the applicable requirements for such materials in this Standard, and

h) Control outsourced reuse activities

If outsourcing any reuse tasks (4.4.6.2), retain full responsibility for all outsourced tasks and establish, implement, and maintain a system of controls to ensure that the Organization:

1. Only transfers Electronic Equipment to End Refurbishers that are Immediate Downstream Processors and that complete[35] all applicable requirements in this section (4.4.6.2), except as allowed in the note below,

2. Assumes that Electronic Equipment which is being exported for Repair/Refurbishment is Hazardous e-Waste and the Organization only transfers it to End Refurbishers in conformity with export requirements (4.3.2.1 and 4.4.6.7), unless there is objective evidence accompanying each shipment that it contains no HEEs, and

3. Ensures that all scrap and e-Waste generated by the Repair/Refurbishment Process is managed in conformity with 4.4.6.4 (Responsible Management of Electronic Equipment), 4.4.6.5 (Downstream Accountability), 4.4.6.6 (Final Disposition), and 4.4.6.7 (Export).

NOTE: If outsourcing ink and toner cartridges for remanufacturing, the Organization may allow their End Refurbisher to further outsource cartridge remanufacturing if the Organization verifies that the End Refurbisher (i.e. the Organization's Immediate Downstream Processor):

- Outsources cartridge remanufacturing tasks to their next tier remanufacturer who shall not further outsource tasks and shall complete them in conformity with the Organization's requirements in 4.4.6.2,
- Performs a thorough visual inspection of all cartridges prior to transferring them to a next tier remanufacturer, and only sends cartridges which appear viable for remanufacturing and are packaged in a manner that prevents leakage and spills of inks and/or toners during handling, storage, and transport, and
- Executes a written agreement with their next tier remanufacturer to only sell or donate tested, working ink and toner cartridges and dispose of the resulting wastes according to 4.4.6.6 (Final Disposition) and 4.4.6.7 (Export).

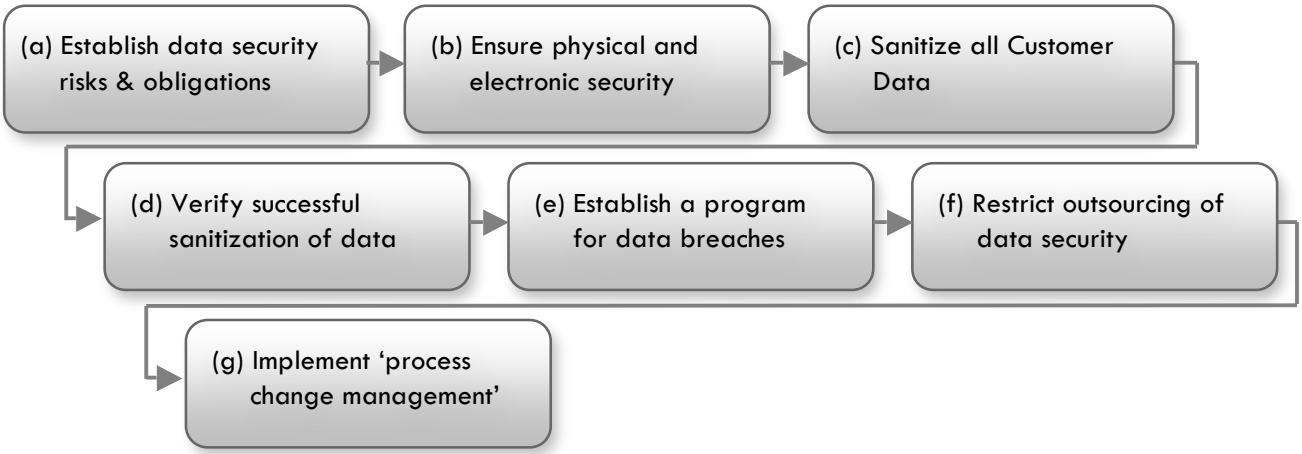
4.4.6.3 Data security

The Organization shall prevent unauthorized access to or release of any Customer Data, regardless of whether data storage devices are going for reuse, Materials Recovery, or Final Disposal. The Organization shall offer data security services in-house and/or under their Control, and shall retain

[35] i.e. do not further outsource any reuse tasks

responsibility for protecting and preventing unauthorized access to or release of Customer Data, regardless of whether or not the Organization outsources any of the associated activities.

The following is an overview of additional data security requirements, described in more detail in the following sections:



The Organization shall develop, document, implement and maintain a system of procedures and controls that includes the following:

a) Establish and communicate data security risks and obligations

Inform customers of data security risks, and communicate in writing with customers the Organization's explicit role, service obligations and agreements, and customer indemnifications, if any, regarding the data security services that are and/or are not provided. In addition, for customers that are utilizing the Organization's data security services, this includes communication of:

1. Types of assets and other material for which the Organization is sanitizing data,
2. Method(s) by which data sanitization shall be accomplished, e.g. software-based media overwriting processes, degaussing, and/or physical destruction of media,
3. Any additional information the customer has required the Organization to sanitize (i.e., in addition to Customer Data, e.g. asset tags and customer logos),
4. Data security standard(s) that is achieved in securing and sanitizing Customer Data,

b) Ensure physical and electronic security

Develop, implement, and maintain written procedures for physically securing data storage devices, and data processing systems used in the delivery of data security services[36]. The Organization shall establish, implement, and maintain controls to physically and electronically protect all Customer Data until it is sanitized (or returned to the customer), whether data storage devices[37] are going for reuse, Materials Recovery, or Final Disposal, for each device throughout the chain of custody. This system of controls shall:

1. Identify the data-bearing characteristics of the assets types for which they provide services, on an ongoing basis,

[36] While this Standard does not require certification to the ISO 27002-2005 Code of Practice for Information Security Management standard, Organizations are encouraged to pursue such certification.

[37] This includes solid state drives and hybrid drives

2. Establish and document a clearly defined chain of custody for Customer Data, including the following:
   - Stipulate when and where the transfer of custody to the Organization begins and ends for Customer Data, i.e. until it is sanitized (including destruction),
   - Provide secure logistics for data security, including the transport of customer/user assets to the Organization's facility(s), between the Organization's own facilities, and/or to the End Refurbisher(s), and maintain effective physical and electronic controls throughout the transport and transfer processes, and
   - Ensure that any locations where customer assets may be temporarily stored during the Organization's transport and transfer processes operate under a comparable set of security requirements as defined in 4.4.6.3. b) 3 below,
3. Provide effective controls to physically and electronically secure facilities and equipment, in order to:
   - Ensure that only authorized personnel are allowed access to areas where Customer Data is stored and where data security services are performed,
   - Isolate areas where data security services are performed from locations where unauthorized people can enter the property, such as loading and unloading areas,
   - Prevent data from being electronically accessible, even if physically controlled, and
   - Restrict or control entry and exit of authorized guests in secure areas, as appropriate,
4. Implement controls to mitigate data security risks associated with workers, including but not limited to background verification checks on all workers and temporary service providers who are involved in the delivery of data security services, and
5. Establish effective inventory control by documenting and tracking the custody of all data storage devices and sanitization activities on them, including:
   - Clearly identify all equipment and components that require data security services either by using a manufacturer-designated serial number or assigning a unique number for each device, or by designating secure accumulation areas for non-serialized data storage devices,
   - Document their physical location and data security status throughout the chain of custody,
   - Implement handling procedures to ensure inventory integrity until data sanitization is complete, to prevent access to accumulated media, and track accumulation containers' physical locations until Customer Data is sanitized (e.g. media destruction), and
   - Provide inventory tracking information to customers regarding their data storage devices and sanitization status, and allow customers to audit inventory tracking processes, upon their request,

c) Sanitize all Customer Data (such as purging, clearing, or destroying data storage devices)

Unless otherwise requested by the customer in writing, effectively sanitize all Customer Data prior to leaving the Organization's Control[38], so that data storage devices are permanently unusable, unreadable, and/or indecipherable, including solid state and hybrid drives, in accordance with 4.3.2

[38] Organizations and/or their End Refurbishers may sanitize data storage devices in a mobile environment, such as in a vehicle designed to provide data security and destruction, if the vehicle, its equipment, and processes meet e-Stewards requirements for data security and protect human health and the environment.

Legal and Other Requirements, including written customer requirements. This shall be achieved by conforming either to a published national standard for data security in the country or region in which services are being delivered or with the current version of NIST Special Publication 800-88 Guidelines for Media Sanitization, whichever is more stringent. The Organization shall ensure that all data storage devices sold or donated for reuse have been sanitized of Customer Data and that:

1. Licensed software has been permanently removed unless the device is being returned to software licensee, or is legally transferred,
2. Devices are physically destroyed if data sanitization requirements of this section 4.4.6.3 cannot be met. Thresholds for physical destruction shall be established for the quantity of addressable locations whose failure prevents data elimination through overwriting, and
3. Paper and other media containing Customer Data, such as letterhead paper, logos, or tags/stickers, are removed from equipment and components, including from internal paper pathways of imaging equipment,

d) Verify successful sanitization of Customer Data, whether clearing, purging or destroying data storage devices

The Organization shall:

1. For all data storage devices going for reuse, verify that prescribed overwrite instructions have been successfully executed for 100% of a device's physical memory locations. Where the prescribed overwrite instructions cannot be executed successfully for all physical memory locations (i.e., failed sectors), logging shall include identification of these locations, and shall account for 100% of the media's physical memory locations or shall result in the logged destruction of the 'failed sector' drives/storage devices,
2. For all data storage devices going for destruction (including Materials Recovery and/or Final Disposal), verify physical destruction processes are completed via a 'validation of process' execution,
3. Provide verification records of successful sanitization for each serialized device and/or for each container of non-serialized data storage devices, or if allowed by the customer, successful sanitization of batches of their data storage devices,
4. Perform regular internal review of risk mitigation processes, to identify and mitigate points-of-failure, and improve process capability and durability[39], and
5. Verify and log information to customers for their data storage devices upon their request, except as contractually stipulated, and allow customers to audit data destruction verification and logging processes,

e) Establish a program for data security breaches

An Organization shall establish and implement procedures to prevent, detect and respond effectively and quickly to information security breach[40] incidents. Should there be a data security breach, the Organization shall:

1. Inform relevant authorities in a timely manner,
2. Report the breach to the impacted customer(s) in a timely manner, and

[39] "Durability" refers to the ability to perform a designed function for an extended length of time.

[40] "Breach" refers to the intentional or unintentional release of Customer Data and/or private information to an unapproved party or environment.

3. Collect evidence from the time that a security breach is initially detected, retain and present it in conformity with the rules of evidence in the relevant jurisdiction(s), if the security breach incident involves legal action (civil or criminal),

f) Restrict outsourcing of data security

If outsourcing any data security tasks, an Organization shall retain responsibility for Customer Data and shall implement, operate, and maintain a documented system of controls that:

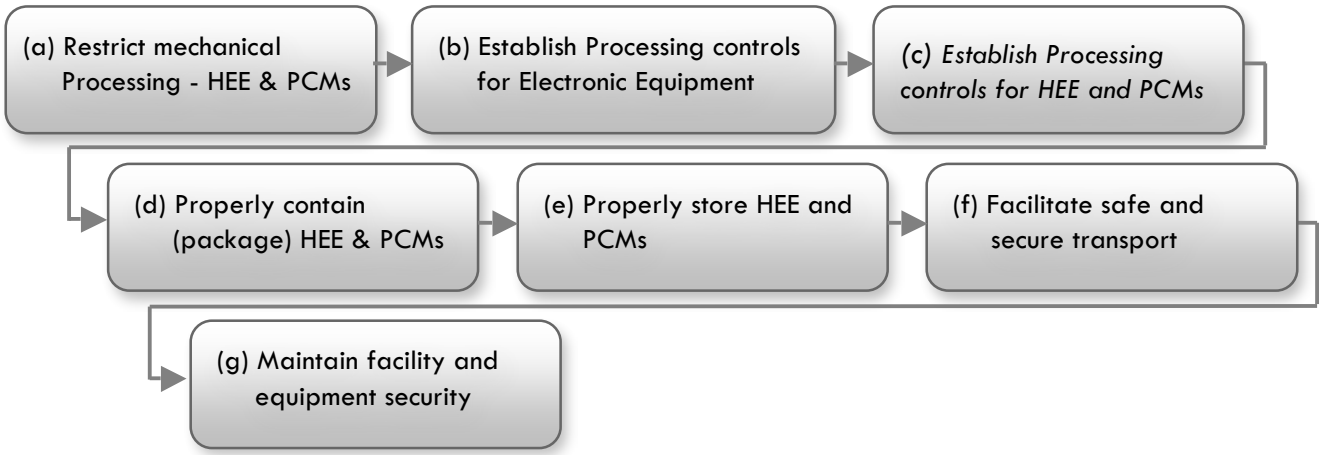
1. Allows outsourcing only to Immediate Downstream Processors that are End Refurbishers,
2. Ensures that the End Refurbisher completes and conforms to the applicable requirements in sections 4.4.6.2 (Reuse) and 4.4.6.3, and does not further outsource any of these tasks, and

g) Implement documented 'process change management' procedures

An Organization shall establish and implement a documented management-of-change procedure to document, train workers, and communicate changes in the performance of data security services, and notify customers of such changes in a timely manner.

4.4.6.4 Responsible management of Electronic Equipment

An Organization shall manage all Electronic Equipment on-site and/or under their Control in conformity with their management plan (4.3.4), with best available techniques and practices which are protective of human health and the environment, whether or not such activities have been identified as significant Environmental and Stewardship Aspects, and according to the following requirements (details below):



The Organization shall:

a) Restrict or disallow mechanical Processing of these Hazardous Electronic Equipment (HEE) and Problematic Components and Materials (PCMs)

Ensure that the items listed in Table 2 are safely removed from Electronic Equipment, separated, and not mechanically Processed (e.g. shredded), unless the mechanical Processing is accomplished by an operation which uses best available technologies specifically designed to Process the specific material in a closed system with engineering controls that prevent releases to the environment and work area, with workers fully protected from exposure. In addition, the Organization should only disassemble components to a level at which they can safely manage the associated hazards.

Table 2: Items to be removed so they are not mechanically Processed, unless specifications in paragraph 4.4.6.4 a) are met
▶ Mercury-containing components including mercury lamps, LCD screens, switches, batteries & subcomponents
▶ Cathode ray tubes (CRTs) including Phosphors, and other leaded display glass, such as leaded plasma display glass
▶ Glycolant coolants (e.g. in old rear-projection CRT display devices)
▶ Lithium button, lithium ion, and lead acid batteries, and batteries that have a potential for explosion
▶ Toners, inks, and toner & ink cartridges (liquid, pasty & powder), and their uncleaned cartridges
▶ Magnetrons in microwave ovens and other equipment, if they contain beryllium oxide ceramic insulators
▶ Polychlorinated biphenyl (PCB)-containing components
▶ Printer and copier drums and other components containing selenium and/or arsenic
▶ Radioactive devices or materials, such as some smoke detectors and nuclear medicine devices
▶ Any additional materials deemed hazardous, explosive, corrosive, or otherwise problematic for mechanical Processing, by the Organization or applicable regulations

b) Establish Processing controls for Electronic Equipment

Only Process Electronic Equipment which the Organization has the technical capability and operational capacity to Process, and establish and maintain:

1. Controls for mechanical size reduction (such as shredding), if applicable, which include installation and maintenance of emergency shut-off switches, and/or for materials separation (manual or mechanical) which protect workers & the environment from hazards,
2. Effective air quality control systems and procedures, if necessary based on air monitoring results, to capture and contain dust, gases, and vapors to prevent hazards and releases, including during removal of used pollution control filters, and
3. Processing of all Electronic Equipment only in enclosed, weatherproof sheltering in a manner that protects materials from adverse atmospheric conditions and leaching,

c) Establish Processing controls for HEE and PCMs

Establish operational controls and procedures for Processing HEWs & PCMs as follows:

1. Process HEE only on impermeable flooring,
2. Capture and contain Phosphors in a manner that prevents dispersal and exposures,
3. Never intentionally open sealed devices containing polychlorinated biphenyls (PCBs),
4. Minimize dispersal of toners and inks and breakage of their cartridges or containers, until they reach the point of qualified remanufacture or Final Disposal,
5. Separate batteries which have the potential for unintentional discharges, in ways that will not allow such discharge during storage, transportation, and handling,
6. Never incinerate (including waste-to-energy) materials which contain mercury, Halogenated Materials, and/or beryllium (unless required by law), and
7. Identify, isolate, and properly contain potentially radioactive equipment or materials, e.g. in nuclear medicine electronic devices and/or smoke detectors,

d) Properly contain (package) HEE and PCMs

Safely consolidate and contain HEE and PCMs in a manner which prevents leaching, leakage, spills, dispersal, and releases of vapors, fumes, particulates, dust, liquids, and/or other forms of dangerous materials, including:

1. Safely separate and consolidate removed HEE and PCMs [4.4.6.4.a)], and place in containers that:
   - Protect human health and the environment during storing and shipping of each material,
   - Meet the packaging and shipping requirements of respective Downstream Processors,
2. Accurately and visibly label containers according to their contents and packaging type, and
3. Prevent container damage, collapse, and contamination,

e) Properly store HEE and PCMs

Ensure that HEE and PCMs are stored, onsite and offsite, in a manner which prevents fires and contamination of air, soil, groundwater, and storm water runoff, including storage in:

1. Weatherproof sheltering with impermeable flooring,
2. Designated and labeled storage areas (or containers),
   - In a manner which minimizes spills, breakage, and injuries,
   - According to regulatory storage limits, including maximum time limits and quantities allowed in storage,

f) Facilitate safe and secure transport and shipping

Establish procedures to ensure safe and legal transportation/shipping of Electronic Equipment, including HEEs and HEWs, under the Organization's Control in a manner that allows optimal conditions for reuse & Recycling, and minimizes risks to human health and the environment, including:

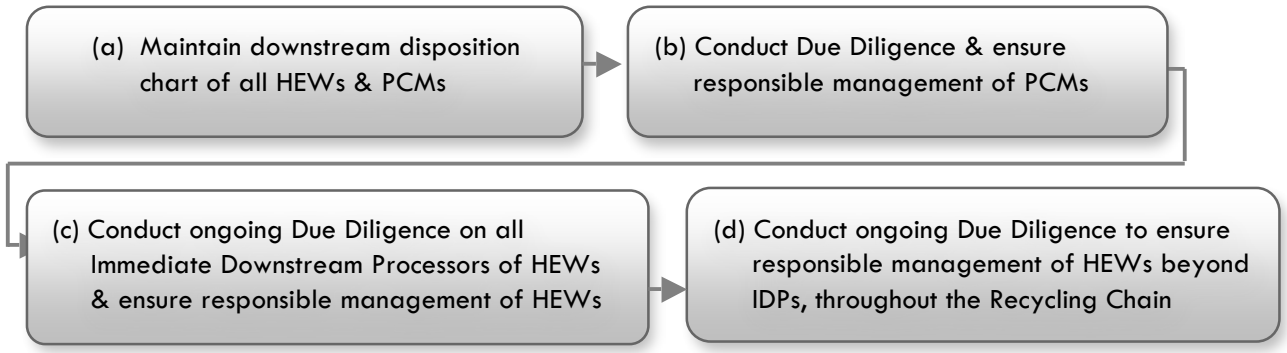
1. Accurate classification and labeling/placarding, record keeping, and appropriate packaging and security for transport, and
2. Use of transporters that have all legal authorizations, and adequate insurance or financial guaranty to cover costs in the event of an accident or injuries, and

g) Maintain facility and equipment security

Establish and maintain a system of controls that secures Electronic Equipment, inside and outside the facility, including storage, and clearly defines the beginning and end of the Organization's chain of custody of the materials, commensurate with the Organization's agreements and protection of affected stakeholders and the surrounding community.

4.4.6.5 Accountability for downstream recycling

An Organization shall establish, implement, document, and maintain an effective system of controls to track all HEWs and PCMs to Final Disposition, perform ongoing Due Diligence, and ensure these materials are managed in a manner that protects human health and the environment throughout each material's Recycling Chain, in facilities approved by the e-Stewards Organization in conformity with this Standard as summarized in the flow chart below:



Specifically, the Organization shall:

a) Establish an up-to-date downstream disposition chart of HEWs and PCMs

Create and maintain an up-to-date document which indicates the material flow and chain of all facilities and Brokers managing PCMs and HEWs which come through the Organization's facility and/or Control, including HEW residuals and Electronic Equipment going to End Refurbishers, throughout each material's Recycling Chain in accordance with Appendix A.4.4.6.5 a),

b) Conduct Due Diligence & ensure responsible management of PCMs throughout Recycling Chain

Prior to shipment, and Annually thereafter, verify and document that PCMs are only transferred to downstream destinations in accordance with 4.4.6.6 (Final Disposition) and 4.3.2.1 (Legal Exports),

c) Conduct ongoing Due Diligence on all Immediate Downstream Processors (IDPs) and ensure responsible management of HEWs by IDPs

Ensure HEWs are managed only in approved IDP facilities, with or without Intermediaries involved in transfers to these facilities, in accordance with requirements in Appendix A.4.4.6.5 c) and the following:

1. Evaluate, perform on-site audits of, and approve each IDP: Prior to initial shipment and at least Annually thereafter, evaluate and approve each IDP used for Recycling (including Repair/Refurbishment) and/or Final Disposal of the Organization's HEWs in conformity with requirements in this section 4.4.6.5 c), and perform on-site audits of each IDP using qualified auditors, unless IDP has a current and valid e-Stewards certification, in which case no on-site audit is required. If the IDP is an End Processor, the Organization or their qualified auditor shall perform on-site audits at least every 3 years,

2. Ensure IDP controls their downstream: Ensure the e-Stewards Organization's system of controls extends to the entire Recycling Chain for each HEW, including create and enforce written agreements[41] with each IDP to control and restrict destinations of HEWs to only approved facilities downstream of IDPs, throughout the Recycling Chain, unless the IDP for a particular HEW or PCM is a certified e-Stewards recycler,

3. Maintain ongoing records: Maintain objective evidence, including Shipping Records, of all the Organization's outgoing shipments and sales of HEWs and the corresponding acknowledgements of receiving and Processing these same shipments from each IDP[42], including certified e-Stewards recyclers, and

[41] If the IDP is an End Processor, such as a smelter or mercury retort operation, the Organization may alternatively obtain and maintain objective evidence of the End Processor's current and valid accredited certifications to ISO 14001 and OHSAS 18001, and shall advise the End Processor of the Organization's requirements in 4.4.6.6 (Final Disposition) and document End Processor's acknowledgement of these requirements.

[42] End Processors may provide records Annually.

4. Ensure IDPs have an environmental, health, and safety management system: Confirm that each Immediate Downstream Processor (except Final Disposal facilities) managing the Organization's HEWs fully implements, Annually reviews, and updates as needed a documented management system for: identifying and complying with legal requirements; identifying and effectively responding to environmental, health, and safety impacts and risks; and continually evaluating and improving that system and their operations accordingly.

NOTE: In the rare cases when Electronic Equipment from an Organization's customer[43] is sent directly to a non-certified e-Stewards Recycling facility, the Organization shall perform initial and ongoing Due Diligence on such facilities, in accordance with all requirements in this section (4.4.6.5), as well as including all such Electronic Equipment in the Organization's material balance accounting (4.5.1.3 a) - c).

d) Conduct ongoing Due Diligence to ensure responsible management of HEWs beyond IDPs, throughout the Recycling Chain, including when other certified e-Stewards are involved

At least Annually, and whenever changes in vendors and Brokers are made, evaluate and approve Downstream Processors and Final Disposal facilities beyond the IDPs, throughout the Recycling Chain, for each of the Organization's HEWs and their HEW residuals, and conduct ongoing Due Diligence, in accordance with requirements in Appendix A.4.4.6.5 d), including:

1. Verify business relationships downstream: Confirm with objective evidence[44] ongoing business relationships between each Downstream Processor and their downstream facilities throughout the Recycling Chain, including verification that written agreements or alternative control systems are in place and enforced between each facility throughout the Recycling Chain to restrict HEWs and their HEW residuals in conformity with the Organization's e-Stewards obligations found in this section 4.4.6.5, in 4.4.6.6 (Final Disposition), and in 4.4.6.7 (Export),

2. Confirm ongoing materials flow and records: Create, maintain, and implement a written procedure for reviewing and documenting an Annual random sampling of HEW shipments between each vendor in the Recycling Chain of HEWs, and

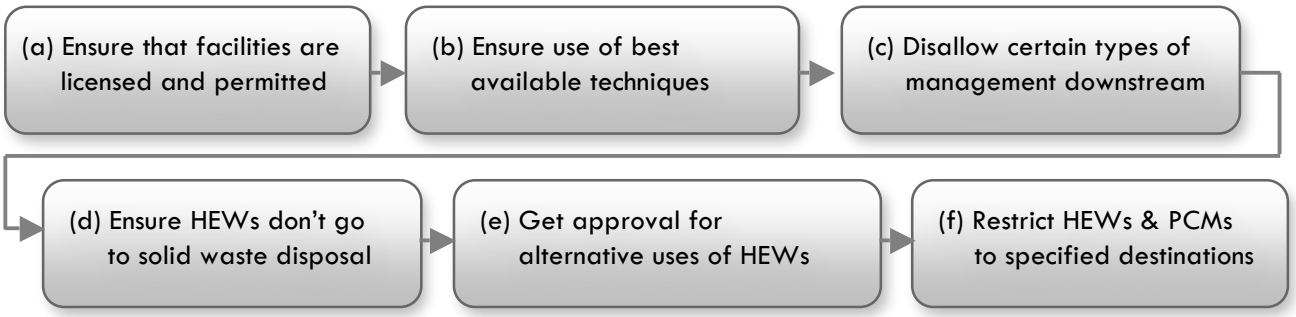
3. Ensure Downstream Processors have an environmental, health, and safety management (EHSMS) system: Confirm that each Downstream Processor managing the Organization's HEWs fully implements, Annually reviews, and updates as needed a documented management system for: identifying and complying with legal requirements; identifying and effectively responding to environmental, health, and safety impacts and risks; and continually evaluating and improving that system and their operations accordingly.

4.4.6.6 Restrictions on Materials Recovery and Final Disposition operations

An Organization shall ensure that Hazardous e-Waste (HEWs) and Problematic Components and Materials (PCMs) destined for Materials Recovery and/or Final Disposition are treated, Processed, and managed only in types of facilities or applications, throughout the Recycling Chain, as allowed by law and as listed below, including Table 3, with or without Intermediaries involved. Requirements are summarized in the flowchart, with details below:

[43] This assumes that the e-Stewards Organization is either representing services as e-Stewards services and/or benefitting in some way.

[44] e.g. via buy/sell agreements, scope of work agreements, or memorandums of understanding (MOUs)



Specifically, the Organization shall:

a) Ensure that such facilities are licensed and permitted, as required by applicable jurisdictions, to receive and Process or utilize the specific materials received,

b) Ensure that such facilities use best available techniques and processes/applications designed to safely recover and reuse maximum materials (except as limited in 3 below) and responsibly dispose of non-recyclable fractions, including:

   1. Prevent contamination of air, land, and water, including emissions and releases of hazardous chemicals, elements, and compounds, in any form,

   2. Manage residuals, by-products, and breakdown products of HEWs as hazardous waste, unless the facility regularly demonstrates that a specific type of residual:
      - Falls below the thresholds found in the definition of Hazardous e-Waste, e.g. by using a toxicity characteristic leaching procedure, and
      - Is not considered a hazardous waste by applicable regulation, and

   3. Permanently retire[45] asbestos, polychlorinated biphenyls, and radioactive materials in hazardous waste facilities licensed and permitted to manage the specific material for long term storage or destruction,

c) Ensure that, unless otherwise required by law, no downstream operations receive the Organization's HEWs or PCMs, directly or indirectly, if they:
   - Melt or burn Electronic Equipment in open fires,
   - Incinerate (including waste-to-energy) materials which contain mercury, Halogenated Materials, and/or beryllium,
   - Smelt Electronic Equipment without effective controls to capture emissions, including mercury, beryllium, and halogenated compounds such as dioxins, furans, and brominated flame retardant compounds, consistent with local and national regulations, or
   - Allow HEWs or PCMs to be used in hydraulic fracturing or injection wells,

d) Ensure that no HEWs are disposed of in solid waste disposal operations, other than exceptions found in Rows 6 & 8 in Table 3 (treated leaded display glass & treated Processing residuals),

NOTE: Hazardous waste landfills may be used for a particular HEW, as a last resort, if a) – d) and all of the following conditions are met:
- There are no feasible Materials Recovery facilities in country or available via legal export to an OECD/EU country for environmentally sound management, as determined and documented by the Organization,
- There are hazardous waste laws in the country which allow hazardous waste land filling of the particular

[45] i.e. do not allow back into the marketplace for further use in products or processes

material, and

- The hazardous waste landfill has current permits to accept and dispose of the specific material in question, and is lined and leachate-controlled or encapsulated, and monitored long-term.

e) Ensure that Processes utilizing HEWs in new/alternative applications (uses) (i.e. other than Materials Recovery or Final Disposal) have been approved in writing by the e-Stewards program administrator[46], and

f) Restrict HEWs and PCMs to approved facilities according to the requirements in Table 3 below, unless otherwise required by law:

Table 3 Restrictions on Materials Recovery & Final Disposition Operations for HEWs and PCMs (in addition to restrictions above)

Type of HEW or PCM:	These HEWs or PCMs shall:
1. Arsenic-containing equipment or components if defined as HEE	▶ Not be openly burned or Processed in operations which release arsenic or its compounds to the biosphere; and ▶ Be sent to hazardous waste disposal or Processed by integrated smelters or other types of facilities capable of effectively recovering arsenic and arsenic compounds.
2. Batteries – Sorted alkaline & non-hazardous batteries[47]	▶ Be recycled in battery recycling facilities or steel mills that recover the metal value, even if disposal is allowed by law, or ▶ If no recycling markets or options are available, including legal exports, these batteries may be disposed of in legally permitted solid waste landfills.
3. Batteries – if defined as HEE	▶ Be recycled in a battery recycling facility which recovers the metal value from the batteries and properly handles hazardous materials, including potentially corrosive & explosive constituents, or ▶ If no recycling markets or options are available, including legal exports, batteries may be disposed of in legally permitted hazardous waste disposal facilities.
4. Beryllium-containing components defined as HEE	▶ Never be Processed in incinerators of any kind, ▶ Be sent to integrated smelters which agree to accept beryllium-containing components and are equipped to responsibly Process and capture beryllium, or ▶ Be sent to hazardous waste landfills licensed & permitted to manage beryllium

[46] Decisions will be made on the basis of research, expert advice, and scientific evidence of risks involved. If new technologies are proprietary, the program administrator will sign a non-disclosure agreement in order to review pertinent information. If new technologies are not proprietary, the e-Stewards Technical Committee may provide recommendations to program administrator regarding the acceptability of such technologies. A dispute resolution process will be available.

[47] May not contain lead, mercury, cadmium, lithium, flammable organic solvents, or unknown contents

Type of HEW or PCM:	These HEWs or PCMs shall:

5. Cathode ray tubes (CRTs) (with or without vacuum) & CRT glass that is uncleaned	▶ Never be placed in solid waste disposal operations, and
	▶ Be directed to:
	  ▶ A CRT glass processor, in conformity with 4.4.6.7 (Export), for preparation for use in the manufacture of new products,
	  ▶ A lead smelter, integrated copper smelter, or other technology capable of recovering lead and cadmium,
	  ▶ As a last resort, a lined, leachate-controlled hazardous waste landfill, unless forbidden by law.

6. Cleaned display glass containing lead, including:
▶ CRT glass, and
▶ Some flat panel display glass, e.g. leaded plasma glass
	▶ Be thoroughly cleaned of Phosphors, coatings, frit, fines, and particulates,
	▶ Be Processed in any of the following types of facilities:
	  ▶ Facilities which completely utilize the leaded glass in manufacturing new products that will not leach metals during their useful life,
	  ▶ Lead smelter, integrated copper smelter, or other thermal technology capable of recovering lead, or
	  ▶ Hazardous waste landfill, and
	▶ Never be placed in solid waste disposal operations, except, as last resort, in a lined, leachate-controlled & monitored solid waste disposal facility if the cleaned glass has first been stabilized with a pre-treatment method in accordance with applicable laws and, as a result, passes the TCLP and thresholds found in definition of HEW (unless prohibited by law or facility).

7. CRT glass that is non-leaded & thoroughly cleaned[48] of Phosphors, coatings, frits, and fines	▶ Be allowed for use in alternative applications, if they will not leach metals during their useful life, and ▶ As a last resort, may be disposed of in solid or hazardous waste disposal facilities, if allowed by law.

8. CRT Processing residues and CRT residues, including :
▶ CRT Phosphors,
▶ Coatings,
▶ Frits,
▶ Fines, and
▶ Waste streams contaminated with them
	▶ Never be Processed in incinerators of any kind,
	▶ Always be considered HEWs for the purpose of export,
	▶ Be Processed in one or more of the following facilities that have been notified and have consented in writing in advance to accept such materials:
	  ▶ Facility that reclaims rare earth & critical metals (e.g. in Phosphors),
	  ▶ Primary or secondary smelter that recovers lead & cadmium,
	  ▶ Lined, leachate-controlled, and monitored solid waste landfill, only if residues have first been stabilized with pre-treatment in accordance with applicable laws and pass TCLP & thresholds found in definition of HEW,
	  ▶ Lined, leachate-controlled and monitored hazardous waste landfill, and
	▶ If Phosphors cannot be recycled, and if allowed by law, store them in safe, monitored, retrievable hazardous waste storage for future Recycling, e.g. of critical metals.

[48] As determined by a TCLP or equivalent method via a regular sampling

Type of HEW or PCM:	These HEWs or PCMs shall:
9. Glycol-based coolants	▶ Be recycled (preferably) in a facility which decontaminates and restores coolant properties, or ▶ Be finally disposed of with treatment as a specially controlled liquid waste.
10. Inks and toners, including liquid, pasty, and powder forms	▶ Managed in facilities that prevent explosions and respiratory hazards according to the following hierarchy, in order of preference: 1. Reuse cartridges by refurbishing or remanufacturing them, 2. Recycle emptied and cleaned cartridges in plastics recovery facilities, and recover carbon black for use in manufacturing, if possible, 3. Remove inks & toners, dispose of color inks & toners in hazardous waste landfills, and black inks & toners in solid or hazardous waste landfills, 4. Dispose of entire units including inks and toners in hazardous waste landfills or incinerators, and/or 5. Dispose of ink and toner cartridges and containers in a solid waste landfill only if the landfill has been notified and consented in writing in advance to accept ink and toner cartridges and containers as profiled & documented.
11. Mercury and mercury-containing devices	▶ Never be Processed in incinerators of any kind, ▶ Not be 'recovered' in metals smelters, including smelters that recover mercury in the form of calomel and/or utilize mercury capture systems not designed for full mercury recovery from waste materials or secondary sources, and ▶ Preferably be permanently retired (before or after mercury retort operations) in a monitored, secure, and retrievable long term mercury storage facility and not recovered for reuse, or ▶ Be Processed at mercury retort facilities until or unless such long term mercury storage is available, in a facility that achieves a minimum of 99.99% mercury capture and recovery.
12. Plastics & resins with Halogenated Materials, including: ▶ Plastics that are baled, shredded, or whole, with or without metal contamination, ▶ Cleaned ink and toner cartridges with such plastics	▶ Not be melted or burned in open fires, ▶ Preferably be recycled in plastics recovery facilities which separate and recover reusable plastics as long as, prior to shipment, the Organization obtains current valid operating and environmental licenses & permits to Process the specific plastics/resins. The unrecyclable plastics, waste materials, and residues shall be Processed via one of the plastic disposal Processes set forth immediately below, ▶ Be Processed in a smelter which continuously monitors, captures, and restricts emissions, including dioxins, from flue gas stacks, ▶ As a last resort, be disposed of in a leachate-controlled solid or hazardous waste landfill.

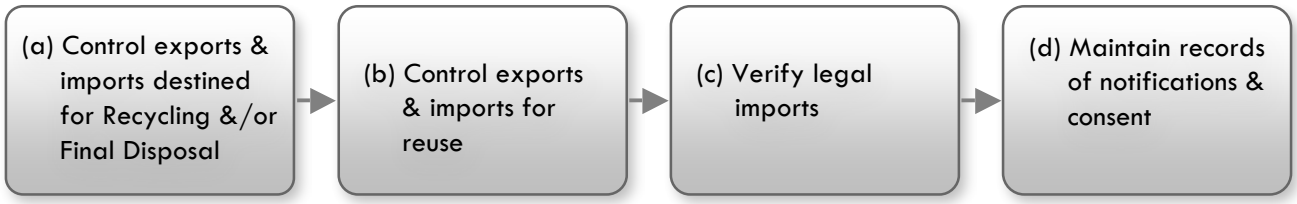
Type of HEW or PCM:	These HEWs or PCMs shall:
13. Polychlorinated biphenyl-containing components with PCB concentrations above 50 ppm or quantity unknown	▶ Never be opened up, recycled, or shredded, except by PCB processors that meet qualifications defined in remaining requirements in this section, and ▶ Only be dismantled & Processed by a processor that is trained and compliant with both: ▶ Basel Convention & Stockholm Convention guidelines and obligations, and ▶ Additional applicable national laws.
14. Printed circuit boards, or components or materials (e.g. shredded fractions) which contain lead solders, Halogenated Materials, or fail threshold levels in definition of HEE	▶ Be pre-processed (e.g. shred the boards and refine/alloy metals in preparation for End Processors), if needed, in facilities which monitor and prevent releases of hazards, such as toxic dusts and stack emissions; and ▶ Be Processed by End Processors that are either: ▶ Pyrometallurgical facilities, such as integrated copper smelters, that monitor and restrict fumes and emissions, including continuous dioxin monitoring from flue gas stacks, and/or ▶ Hydrometallurgical facilities that control and manage fumes, and all hazardous residues to prevent releases to the environment and/or exposures.
15. Radioactive wastes	▶ Be transferred to a facility that meets international standards[49] for storage or disposal of radioactive wastes.
16. Residuals from Processing, pollution controls, and housekeeping, such as bag-house dusts, filter residues, slags, and sweeps	▶ Shall be managed as hazardous waste unless the Organization can regularly demonstrate that a specific type of residual: ▶ Falls below the thresholds found in definition of HEE, and ▶ Is not considered a hazardous waste by regulation, and/or ▶ If allowed by law: ▶ Residuals which contain identifiable fractions of metals or other materials, e.g. sweeps from shredding or manual dismantling areas, may be reprocessed within the Organization's Processing systems, and/or ▶ Residuals which contain high enough levels of precious metals or other materials to make them recyclable in either pyro- or hydrometallurgical facilities may be Processed according to requirements for printed circuit boards above.
17. Selenium-containing components[50]	▶ Shall be transferred to a facility licensed and permitted to Recycle or dispose of selenium.

4.4.6.7 Export and import controls

The Organization shall establish, implement, document, and regularly update an effective system of controls in order to restrict exports and imports of Hazardous e-Waste (HEWs) and Problematic Components and Materials (PCMs) that enter their facility(s) or come under their Control and throughout the Recycling Chain, in accordance with 4.3.2.1 (Legal) and the following requirements:

[49] Notably the instruments of the International Atomic Energy Agency (IAEA), including the Convention on Nuclear Safety, the Codes of Conduct, and the International Safety Standards.

[50] e.g. xerographic photocopier drums, older printer drums or analog copiers, some solar panels & other photovoltaic cells



Specifically, the Organization shall:

a) Control exports and imports of PCMs and HEWs destined for Recycling and/or Final Disposal

The Organization shall not allow PCMs and/or HEWs to be exported or imported, directly or indirectly, except as stipulated in 4.3.2.1. However, the following materials may be traded if considered legal by all the countries concerned (export, transit, & import) and meet requirements below :

1. Plastics with Halogenated Materials may be exported to any country, but prior to export, the Organization shall obtain and maintain copies of current import permits from all facilities in other countries which receive the Organization's plastics with Halogenated Materials, as well as objective evidence of conformity to requirements in 4.4.6.6 h) Row 12,
2. Prepared CRT cullet, exported for use as a feedstock to manufacture new products that are deemed non-waste by the Competent Authority of the importing country shall not be considered an HEW, and will therefore not be subject to the import and export restrictions found in 4.3.2.1. This exception shall be allowed only if all of the following occur prior to exportation:
   - The cullet is thoroughly cleaned of Phosphors, coatings, and other dispersible particulates, using best available technologies,
   - It is determined, via objective evidence, that the cullet will be used as a direct feedstock in manufacturing new products without further Processing or preparation, other than quality control screening,
   - Any conditions placed on such legal trade by the Competent Authorities in the written determinations of any country concerned (export, transit, and import) are implemented,

b) Control exports and imports of Electronic Equipment for reuse

When exporting or importing, directly or indirectly, any Electronic Equipment (including components) for reuse from or to their facility and/or Control, the Organization shall:

1. Assume all Electronic Equipment which is being exported or imported for Repair/Refurbishment is Hazardous Electronic Equipment (HEE), unless there is objective evidence accompanying each shipment that it contains no HEEs and PCMs,
2. Ensure that each shipment of Electronic Equipment exported or imported for reuse only takes place in conformity with 4.3.2.1 (Legal Exports)[51] and 4.4.6.2 (Reuse)[52], and
3. In addition to labeling requirements in 4.4.6.2 c), ensure that each shipment exported for reuse is accompanied by a completed and signed declaration/document found in Appendix A.4.4.6.7 b), attached in a manner that is easily accessible to officials and customers, without the need for unpacking, and

[51] e.g., the Organization shall not export equipment or components for repair from OECD/EU countries or Liechtenstein to non-OECD/EU countries.

[52] Conformity with these sections does not require that cosmetic alterations or software loading be completed prior to export/import

c) Verify legal imports of e-Waste

For incoming e-Waste that is not generated in-country, assure that Electronic Equipment Processed by the Organization has not been imported, directly or indirectly, into the Organization's country in violation of the Basel Convention and/or the Basel Ban Amendment, regardless of whether or not either instrument is in legal force nationally or internationally, and

d) Maintain records of Competent Authority notifications and consents for all legal shipments of HEWs.

4.4.7 *Emergency preparedness and response*

An e-Stewards *Organization shall provide for emergency preparedness within its environmental management system and specify how it will respond to possible emergencies,* injuries, *and accidents,* and data security breaches. *The Organization shall specifically* take measures to prevent fires and explosions in and around facilities, by recognizing, evaluating, and controlling risks for both. *Periodic drills to test emergency preparedness shall be conducted, where safe and practical.*

Organizational response to actual emergencies shall prevent or remediate adverse environmental, occupational health and safety, and data security *impacts.*

An e-Stewards *Organization shall regularly reassess its procedures for emergency preparedness and response, and improve them as needed.*

4.4.8 Insurance

An Organization shall obtain and maintain liability insurance[53] adequate to cover the potential risks and liabilities, per occurrence and in the aggregate, as follows:

a) Levels of insurance shall be commensurate with the nature and size of the Organization's operations[54],

b) The insurance shall cover liability for data privacy breaches, contractual liability, property damage, environmental pollution, and occupational health and safety impacts (e.g. hazardous exposures and releases, bodily injury, and accidents) and other emergencies, and

c) The Organization shall retain the appropriate insurance to underwrite indemnification to customers, if indemnification is offered and allowed by law.

The Organization shall obtain professional advice and bids of at least two insurance actuaries regarding appropriate insurance for their site(s). The record of this professional advice shall be maintained as part of the e-Stewards records system and the insurance coverage ultimately chosen should fall within the range of the bids.

4.4.9 Site closure plan and financial surety

The Organization shall create and maintain a site closure plan which stipulates how the Organization's closed site(s) will be tested and remediated (if necessary), and how all remaining Electronic Equipment will be properly managed in accordance with this Standard and regulations[55] in the event of sale, closure, abandonment, bankruptcy or any form of dissolution of the

[53] Or its equivalent, in countries which do not allow insurance.

[54] Take into consideration whether or not operations break CRTs, manually dismantle, bale, shred, incur transportation liability, and/or incur non-owned disposal facility liability.

[55] e.g. based upon the regulatory authority's operating permit or site closure parameters for the facility

company/Organization. The Organization shall also provide a financial instrument(s) put into custody of a third party[56] to cover costs for the execution and completion of site clean-up and closure, even in the case of abandonment, according to this plan, including Electronic Equipment and residuals in storage. The plan shall include a closure schedule, as well as:

a) A description of the facility and inventory, including:

3. Site description,

4. Current plot (site) plan, and

5. Estimates of the maximum amount, by weight or count, of whole electronic devices, Processed and sorted components and materials, and hazardous materials inventory that will have been held on site at any one time (based upon the active life of the facility), including an estimate of wastes that will be generated from closure activities,

b) Closure activities

1. Removal, transportation, Materials Recovery, and Final Disposition of all Electronic Equipment, waste, and HEWs & PCMs, including those in off-site storage areas,

2. Industrial Hygiene monitoring during closure activities, if PHPTs were used at any time,

3. Cleaning of the facility(s), and outside and off-site storage areas,

4. Remediation & decontamination procedures & activities, if PHPTs are used at any time, and

5. Closure cost estimates, including a breakdown for:

- Final Disposition of each type of Electronic Equipment,
- Clean-up, including cleaning, remediation, and decontamination activities,
- Industrial Hygiene monitoring, and
- Closure certification, if required by law, and

c) A requirement for qualified third party testing, analysis, and remediation upon closure of all facilities and sites which have ever:

- Utilized Potentially Hazardous Processing Technologies, and/or
- Stored or managed Hazardous Electronic Equipment outside of sheltered and impermeably floored buildings.

This requirement includes:

1. Conduct indoor wipe (dust) sampling of areas and items which may have been contaminated by heavy metals, including lead, cadmium, and mercury, using sampling and analysis methodologies that provide results representative of facility and site contamination,

2. If any thermal operations were utilized in the facility (except hand-held soldering), conduct dust sampling on polycyclic aromatic hydrocarbons that likely result from thermally treated Electronic Equipment, and

3. Remediate any contamination above regulatory limits for industrial site remediation.

[56] e.g. in escrow, or insurance or bonds held by a third party, or in a financial tool specified by law.

4.5 Checking

4.5.1 Monitoring and measurement

An e-Stewards *Organization shall create a procedure(s) to monitor, measure, and document appropriate operational characteristics related to its significant environmental* and Stewardship *aspects and impacts on the environment,* data security, and occupational health and safety. *Properly calibrated or otherwise verified equipment shall be used and maintained for required monitoring and measurement.*

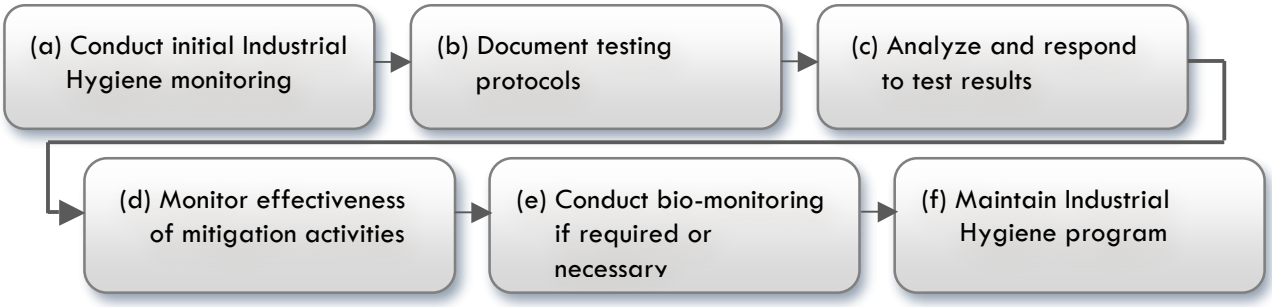
The Organization shall ensure that Industrial Hygiene samples are analyzed by an ISO 17025 certified laboratory or by a nationally accredited laboratory that is capable of testing for the necessary constituents.

4.5.1.1 Environmental, health, and safety incident monitoring and reporting

The Organization shall establish and maintain a process for internal reporting of events including a summary log and up-to-date and accurate records of all environmental releases, health and safety accidents, incidents, injuries, exposures, and near misses.

4.5.1.2 Additional Industrial Hygiene monitoring for Organizations using Potentially Hazardous Processing Technologies (PHPTs)

Organizations using one or more PHPTs shall establish, implement, and maintain a documented Industrial Hygiene monitoring program to reduce or eliminate workplace hazards and exposures to hazardous materials, protect worker health and safety rights, maximize injury and illness protection, and ensure that operational controls (4.4.6.1) are adequate, including:



The requirements for each of these steps are as follows:

a) Conduct initial Industrial Hygiene monitoring

Conduct and document Industrial Hygiene monitoring twice in the first year, at least four months apart, in all areas where Potentially Hazardous Processing Technologies are located and in use, under maximum operating conditions, and in any areas where hazards could be present or likely to develop or migrate. The Organization shall mitigate problems according to requirements in 4.4.6.1. This monitoring shall be conducted by a Certified Industrial Hygienist or Equivalent, and shall include:

1. Noise monitoring in areas where workers may be exposed to excessive noise, including operation of balers and shredders, using technology (such as noise dosimetry equipment) that incorporates impact, continuous and intermittent noise sources so the noise risk assessment (4.3.1) accurately relates to the workers' ongoing workday exposures,
2. Airborne hazards, including worker breathing zones, for both the operators of PHPTs and those working where exposure may occur, to ensure lack of migration of airborne hazards.

The Organization shall monitor specific airborne hazards in accordance with requirements in Appendix A.4.5.1.2 a) 2,

NOTE: In response to information emerging at the time of publishing this Standard regarding the inadequacy of air monitoring alone to determine actual exposures, this Standard will likely add requirements (via a sanctioned interpretation, for additional testing (e.g., for lead, for bio-monitoring of some workers, and/or surface sampling) and reporting test results. The purpose of these changes is to collect data, better understand risks associated with specific types of operations in the electronics recycling/refurbishment industry, and further revise this Standard based on analysis of data. Organizations are urged to immediately apply best management practices. See Guidance Document for best management practices regarding additional initial and ongoing testing, until it becomes a requirement in this Standard.

b) Document testing/monitoring protocols

Maintain thorough written documentation of both initial and ongoing [4.5.1.2.a) and f)] monitoring protocols and activities,

c) Analyze and respond to test results

Ensure a Certified Industrial Hygienist or Equivalent and/or a physician (knowledgeable in occupational medicine and/or medical toxicology) analyzes monitoring results (4.5.1, 4.5.1.1, and 4.5.1.2), including calculating time weighted averages, by comparing the test results to the most stringent (protective) regulatory exposure limits within the Organization's jurisdiction,

d) Monitor and ensure effectiveness of mitigation activities and controls, and impacts of significant changes

Utilizing these test results, the comparison with regulatory limits, and requirements in 4.4.6.1a), establish or take action to create or improve operational controls (4.4.6.1), take corrective and preventive actions (4.5.3), and update and/or improve the risk assessment [4.3.1 c)], responding quickly to test results of concern (i.e. mitigating). Determine that mitigation activities and controls are effective in reducing or eliminating exposures and preventing adverse health effects, and that impacts of significant changes involving PHPTs (e.g. installation of a new shredder) meet requirements in this Standard, including retest mitigated activities, areas of concern, and significant changes as soon as possible, but no longer than 6 months following mitigation efforts and/or significant PHPT changes,

e) Determine medical surveillance needs and conduct biological-monitoring if required

The Organization shall have a designated occupational health provider (i.e. an occupational health physician or occupational health nurse, or occupational physicians' clinic) who is available for medical surveillance (biological monitoring) of workers if the Organization is using one or more PHPTs, for workers that consent. The Organization shall:

1. Determine that biological-monitoring is needed if:
    - Recommended by the occupational health provider who shall be provided with the results of the risk assessment (4.3.1.c),

- Representative[57] Industrial Hygiene exposure data indicates regulatory occupational exposure limits have been exceeded or workers are engaged in high exposure tasks,
- Recommended by the Certified Industrial Hygienist or Equivalent, or
- Requested by the occupational and environmental health and safety team (4.4.3.1.a) 4) or any worker concerned about their potential exposures, and if agreed by the occupational health provider,

2. Develop, document, and implement a medical surveillance program, if needed, as determined in 1 above, in consultation with the Certified Industrial Hygienist or Equivalent. The occupational physician shall decide upon the medical issues, but these decisions may be carried out by an occupational health nurse or physician's assistant. This medical surveillance program shall:

   - Be conducted for all workers whose representative Industrial Hygiene exposure data indicates the occupational exposure limits have been exceeded,
   - Be based on generally accepted methods and regulatory requirements,
   - Inform the physician with written documentation of pertinent activities performed, work practices, materials handled, exposure controls, personal protective equipment used, air monitoring results, and any prior worker test results,
   - Specify frequency of biological testing, medical exams, and conditions where workers are removed or returned to work,
   - Include worker baseline examinations and specify when follow up medical evaluations are required,
   - Be provided without cost to affected or potentially affected workers, and in cooperation with affected workers, and
   - Entitle workers to a second medical opinion for occupational exposures, injuries or illness, within reasonable costs,

3. Ensure laboratory analyses are performed by an ISO 17025 certified laboratory or a nationally accredited laboratory, and

4. Require in writing that the occupational health provider maintains the confidentiality of all workers' non-work-related medical issues by only revealing to the Organization information specifically related to the workers' workplace exposures/hazards, and

f) Update & maintain the ongoing occupational health & safety and Industrial Hygiene program

The Organization shall update and maintain the ongoing occupational health & safety and Industrial Hygiene monitoring program with the Certified Industrial Hygienist or Equivalent to:

1. Identify activities and locations to be retested by reviewing the:

   - Significant Environmental and Stewardship Aspects identified in the risk assessment [4.3.1 c) & d)],

[57] For example, take at least 3 personal samples for each unique task, under full capacity scenarios, and make decisions based on the 95th percentile results. The accuracy of the monitoring and analysis used should have accuracy (to a confidence level of 95%) of not less than plus or minus 20 percent for airborne concentrations of the substance equal to or greater than the occupational exposure limit.

- Results of the initial (4.5.1.2.a) and ongoing (4.5.1.2.d) Industrial Hygiene monitoring,
- Proposed and actual significant changes, and
- Effectiveness of operational controls (4.4.6.1), and

2. Create and implement a schedule for ongoing monitoring, under worst-case scenario operations, of significant Environmental and Stewardship Aspects, based on the results of 4.5.1.2 d) above. The schedule shall also include:

   - Monitoring of other areas or contaminants recommended by the Certified Industrial Hygienist or Equivalent and/or the physician and if needed, other health and safety experts,
   - Noise monitoring as required in 4.5.1.2.a) 1, and
   - Monitoring of airborne hazards, based on testing frequencies required in Appendix A.4.5.1.2.e) 2.

4.5.1.3 Track Electronic Equipment

An Organization shall implement and maintain a documented system for tracking all Electronic Equipment entering and exiting their facility(s) and under their Control. The Organization shall:

a) Track all Electronic Equipment

Establish, document, and implement an effective system for tracking and documenting all Electronic Equipment coming into and going out of the Organization's facility and/or Control, and in accordance with requirements in 4.4.6.5 (Downstream Accountability), including materials managed and destined for reuse, Recycling, and disposal, and those managed by their Ancillary Sites. Even in jurisdictions where the e-Stewards Organization has no control over where or how some of their e-Waste is processed, due to laws, these volumes shall still be accounted for in their tracking and materials balance accounting,

b) Implement material balance accounting

Perform and calculate a documented material balance accounting at least every six months for all Electronic Equipment coming into and going out of the Organization's facility and Control, as well as in inventory[58], reconciling incoming quantities with outgoing quantities, and

c) Link material balance accounting with Shipping Records to downstream vendors

For all Electronic Equipment destined for reuse, HEWs, and PCMs, ensure that the tracking system [a) above] links outgoing quantities documented in each material balance accounting period [b) above] with corresponding subsequent outgoing Shipping Records [4.4.6.5 c) 3] for those same quantities of respective materials, including their corresponding acknowledgments of receipt and Processing (or equivalent) which confirm they have been managed by approved Immediate Downstream Processor(s), with or without Intermediaries involved.

4.5.1.4 Report to e-Stewards database

Prior to initial certification, and by January 31st of every subsequent year, the Organization shall provide the following data, in English language, for each calendar year[59] to the confidential[60] e-

[58] i.e. equipment and components currently being managed and/or stored in-house or under the Organization's Control

[59] January 1st through December 31st. For the initial certification only, the Organization may provide less than a full year of data. In this case, data must be provided from the period of time between when the Organization contracted for initial certification and when they accomplished their Stage One audit, and must include at least three consecutive months of data.

Stewards database by uploading it to https://apps.e-stewards.org/database regarding all Electronic Equipment entering their facility(s) and/or under their Control (including associated Ancillary Sites):

a) Address (including country) for primary location(s), and a description of the site,

b) The number of individuals who worked for more than one month during the twelve month period, including:

   1. Full time (equivalent[61]) employees,
   2. Full time (equivalent) contract workers, and
   3. Volunteers,

c) Description of all Processes taking place at each site, such as:

   1. De-manufacturing of e-Waste for Materials Recovery and/or Final Disposal, in one of more of the following categories:
      - Manual disassembly,
      - Shredding or other mechanical size reduction and separation, and/or
      - Other (define),
   2. Asset recovery, Repair/Refurbishment for reuse,
   3. Metals refining,
   4. Plastics recovery, and/or
   5. Other (define), and

d) Total weight (or unit count) of Electronic Equipment, components, and materials Processed, in inventory, and under Organizational Control.

4.5.2 *Evaluation of compliance*

4.5.2.1 Evaluation of legal requirements

The e-Stewards Organization shall implement and maintain a process for regularly monitoring its compliance with applicable legal requirements, and record its results.

4.5.2.2 Evaluation of other requirements

The e-Stewards Organization shall evaluate its compliance or conformity with other requirements which may apply to the Organization.

The Organization shall document and maintain the results of the regular evaluations.

[60] The e-Stewards program will only publicly report this data in the aggregate. Information from individual Organizations will not be shared in a manner that identifies the Organization, unless the e-Stewards Organization agrees in writing to allow such identification. Except for the names of data entry personnel, this data shall exclude individual names, identifiers, or personal information that could violate laws, or the privacy of people and Organizations.

[61] Combine part time hours worked by all part time workers and calculate how many full time jobs are equivalent.

4.5.3 Nonconformity, corrective action and preventive action

An e-Stewards Organization shall implement and maintain a process for addressing and documenting nonconformities discovered and for correcting nonconformities with closed loop corrective action, including determination of cause.

The Organization shall also implement, document, and maintain a system for taking preventive actions for the purpose of preventing nonconformities from occurring, and reviewing the overall effectiveness of both preventative and corrective actions implemented.

4.5.4 Control of records

An e-Stewards Organization shall maintain and control legible and verifiable records which demonstrate conformity to the requirements of the EMS, including requirements for documentation as found in the complete e-Stewards Standard. *Control of records shall include processes for protected storage and retrieval, retention, naming, and disposal of records.*

4.5.4.1 Records retention

The Organization shall retain all records required by this Standard for a minimum of 5 years with the exception of workplace and worker exposure records, which shall be retained for the length of each worker's employment plus 30 years.

4.5.5 Internal audit

An e-Stewards Organization shall conduct internal audits of its management system at regularly scheduled times, at least Annually, *to check for initial implementation and continuing conformity with system requirements. Results shall be reported to top management.*

The audit program shall be conducted taking into account the relative importance of each element of the EMS and previous audit and performance results, as well as the proper qualification and impartiality of auditors involved.

4.6 Management review

The highest level of management shall review the performance of the environmental management system at regularly scheduled times, at least Annually, *and take appropriate action to correct and improve the system based upon results.*

Consideration shall be given to internal system audit results, input (including complaints) from customers or other outside parties, the degree to which system objectives (including legal requirements) are met, the status of nonconformities and corrective actions, opportunities for improvement and preventive action, and action items from previous reviews.

Records of reviews, suggestions for improving the system, and actions to be taken shall be maintained.

APPENDIX A: REQUIREMENTS FOR ALL e-STEWARDS ORGANIZATIONS

A.4.4.6.5. Downstream Accountability

a) Establish and maintain an up-to-date downstream disposition chart of HEWs and PCMs

The downstream disposition chart shall provide the following up-to-date information for the entire Recycling Chain for each PCM and HEW (including HEW residuals, e.g. hazardous slag and filter residues, CRT Processing residuals), documenting the chain of all Downstream Processors, End Refurbishers, Brokers, End Processors, and Final Disposal facilities used throughout the Recycling Chain for each material, including:

1. Current company/entity name, contact information, address of physical location of facility and office (including country), and type of operation, and
2. Identification of downstream certified e-Stewards Organizations,

b) (No additional requirements)

c) Conduct ongoing Due Diligence on all Immediate Downstream Processors (IDPs), and ensure and track responsible management by IDPs managing each HEW

The Organization's system of controls for all HEWs and their HEW residuals shall begin with their own material balance accounting and corresponding outgoing shipments (see 4.5.1.3 c) to approved IDP facilities, including End Refurbishers, and shall include the following:

1. Evaluate, perform on-site audits, and approve each IDP, including:
   i. At least Annually, and whenever changes in vendors and/or Brokers are made, determine that each IDP has the in-house technical capability, operational capacity (including controls), and willingness to further Process and/or dispose of HEWs in a manner that effectively meets the Organization's obligations for HEWs and in accordance with the IDP's legal requirements, as well as 4.2 b), 4.3.2.1 (Legal Exports and Imports), the Organization's plan for materials (4.3.4), 4.4.6.2 (Reuse) and 4.4.6.3 (Data Security) if applicable, 4.4.6.4 (Management of EE), 4.4.6.5 (Downstream Accountability), 4.4.6.6 (Final Disposition), and 4.4.6.7 (Export & Import Controls),
   ii. Ensure that each IDP maintains and provides to the Organization ongoing records of the IDP receiving and Processing the Organization's HEWs, as well as random sampling of downstream Shipping Records, including acknowledgements of receipt and Processing (see A.4.4.6.5 d) 2),
   iii. Create and enforce written agreements with each IDP, and renew Annually, to restrict, and control the Organization's HEWs according to requirements in section 4.4.6.5. This agreement shall include a requirement for each IDP to immediately (within 5 business days) notify the Organization if any of the IDP's Downstream Processors or Brokers change,
   iv. Annually perform Due Diligence, and determine, via objective evidence, that all IDPs have valid and current business licenses, process and facility permits, control permits, and import permits, as applicable, to properly manage the Organization's materials, and that they have adequate insurance and site closure plans, appropriate to the scope and scale of their operations and potential remediation costs. Verify the

accuracy and adequacy of information obtained, and determine if each IDP has had regulatory violations, fines, and/or related enforcement actions in the past 5 years,

v. Verify with documented evidence that each IDP either:
   - Has a current and accredited certified environmental health and safety management system (EHSMS), or
   - Fully implements, Annually reviews, and updates as needed a documented management system for: identifying and complying with legal requirements; identifying and effectively responding to environmental, health, and safety risks; and continually evaluating and improving that system and their operations accordingly,

   Ensure this management system effectively implements environmental, health & safety procedures, controls, and monitoring to prevent exposure and releases to toxics such as lead, mercury, and cadmium,

vi. If the IDP is an End Refurbisher, confirm on an ongoing basis and at least Annually that all of the outsourced reuse tasks conducted by the End Refurbisher(s) are effectively implemented and completed in-house, in conformity with 4.4.6.2 (Reuse) & 4.4.6.3 (Data Security), and

vii. Determine that transport companies used by IDPs have adequate financial guaranty to cover costs in the event of an accident or error,

2. Ensure that each IDP for each HEW has an effective system of controls to restrict and document downstream destinations of HEWs to approved facilities only, throughout the Recycling Chain, including when Brokers and other Intermediaries are used, in conformity with A.4.4.6.5 d) below. The Organization's system of controls and ongoing Due Diligence shall include:

   i. At least every 2 years, and whenever changes in vendors and/or Brokers are made, visually inspect and create a detailed written report confirming work agreements between each IDP and their next tier downstream vendors that stipulate how the entities downstream of the IDP meet the Organization's obligations in 4.4.6.6 (Final Disposition) and 4.4.6.7 (Export), including when Brokers are involved,

   ii. Annually obtain from each IDP the company name, contact information, facility and office address (physical location, including country), and type of operation for each Downstream Processor, Broker, and Final Disposal facility for each HEW and HEW by-products, and

   iii. Ensure that when Intermediaries (such as Brokers) are used, they restrict the transfer of HEWs only to Downstream Processor(s) and/or Final Disposal facilities approved by the Organization, and

d) Conduct ongoing Due Diligence to ensure responsible management of HEWs beyond IDPs, throughout the Recycling Chain

At least Annually, and whenever changes in vendors and/or Brokers are made, evaluate and approve Downstream Processors & Final Disposal facilities beyond the IDPs, throughout the Recycling Chain, to ensure they operate in conformity with applicable legal requirements, 4.2.b) (Policy), 4.3.2.1 (Legal Exports), 4.4.6.4 (Management of EE), 4.4.6.5 (Downstream Accountability), 4.4.6.6 (Final Disposition), and 4.4.6.7 (Export), as well as the following requirements:

1. Verify business relationships downstream

Know & track HEW outputs to Final Disposition: Identify Process outputs from each facility that meet the e-Stewards definition of HEWs, and track and restrict these to Final Disposition as

required in this Standard. Obtain from each Downstream Processor the company name, contact information, facility and office address (physical location, including country), and type of operation for each Downstream Processor, Brokers involved, and Final Disposal facility for each HEW and their HEW by-products,

2. Confirm ongoing materials flow & records

Random sampling of shipping records: Annually obtain copies[62] (or visually inspect and create a detailed written report) of a sampling of a minimum of 3 randomly chosen months of outgoing Shipping Records from each Downstream Processor for each HEW throughout the Recycling Chain and compare with corresponding acknowledgements of receipt from next tier vendors, to ensure that shipments of HEWs have been transferred to and received by approved facilities in conformity with 4.4.6.6 (Final Disposition), and 4.4.6.7 (Export), including when Brokers are involved, and

3. Ensure Downstream Processors have an environmental health & safety management system: [no additional requirements].

(APPENDIX A continues below)

[62] Copies may be obtained directly from each Downstream Processor or via the Organization's Downstream Processors, but visual inspection of records shall be done by the Organization directly.

A.4.4.6.7 b)

e-Stewards Declaration…

…of Testing, Determination of Full Functionality, and Reuse Destination of Exported Used Electronic Equipment & Components in this Shipment

EXPORT INFORMATION	
Holder who arranges the transboundary movement (responsible for testing)	
Company name:	Contact name:
e-mail:	Phone:
Address:	Country:
Company responsible for evidence of functionality (if different than Holder)	
Company name:	Contact name:
e-mail:	Phone:
Address:	Country:
International Carrier	
Company name:	Contact name:
e-mail:	Phone:
Address:	Country:

IMPORT INFORMATION	
Importer	
Company name:	Contact name:
e-mail:	Phone:
Address:	Country:
User, Retailer, Distributor (if different than Importer)	
Company name:	Contact name:
E-mail:	Phone:
Address:	Country:

DECLARATION	
I, the holder of the Electronic Equipment listed below, hereby declare that prior to export the used equipment/components in this shipment, listed below, were tested and determined to be in good working condition and Fully Functional.* I also confirm that this equipment is being imported for the purpose of Direct Reuse** and not for repair, recycling, or Final Disposal.	Name: Signature: Date:

* **Fully Functional:** Electronic Equipment and/or components are "Fully Functional" when they are tested and demonstrated to meet or exceed the original functionality specifications for the product/component's Essential Functions, or if upgraded, the intended new specifications; are safe for use & handling, without electrical, physical, or fire hazards; do not contain any Hazardous Electronic Equipment which is non-functional (such as non-working circuit boards, mercury-containing devices, batteries, or CRTs), and which

perform the Essential Functions it needs to perform for the end consumer. **Essential Functions**: Product features which a user of an electronic product (equipment or component) can reasonably expect to be present based on the original or upgraded design and marketed description of the Electronic Equipment, and features without which safe or effective use would be unlikely.

** **Direct Reuse:** The continued use, by other than previous user, of Electronic Equipment and components after being tested and determined to be Fully Functional, without the necessity of (further) repair, provided that such continued use is for the originally intended, Repurposed, or upgraded purpose of Electronic Equipment and their components.

SHIPMENT INFORMATION

Official use	1 Type of Equipment ***	2 Model #	3 Serial # (if applicable)	4 Year	5 Date of Testing	6 Type of Tests Conducted and Test Results

*** For all rechargeable batteries going for reuse which power mobile computing devices (including laptops, notebooks, e-readers, and touch-pads):

- When a battery is shipped with the device it powers, identifying information for each battery shall be associated with the device it powers and only needs to include the type of testing conducted and the test results (in column 6), including each battery's state of health/minimum run time, and
- When a battery is not shipped with a device it will power (e.g. separated batteries), identifying information for each battery shall include all of the information (columns) required in this form, in addition to the tested power rating/run time on each used battery going for reuse.

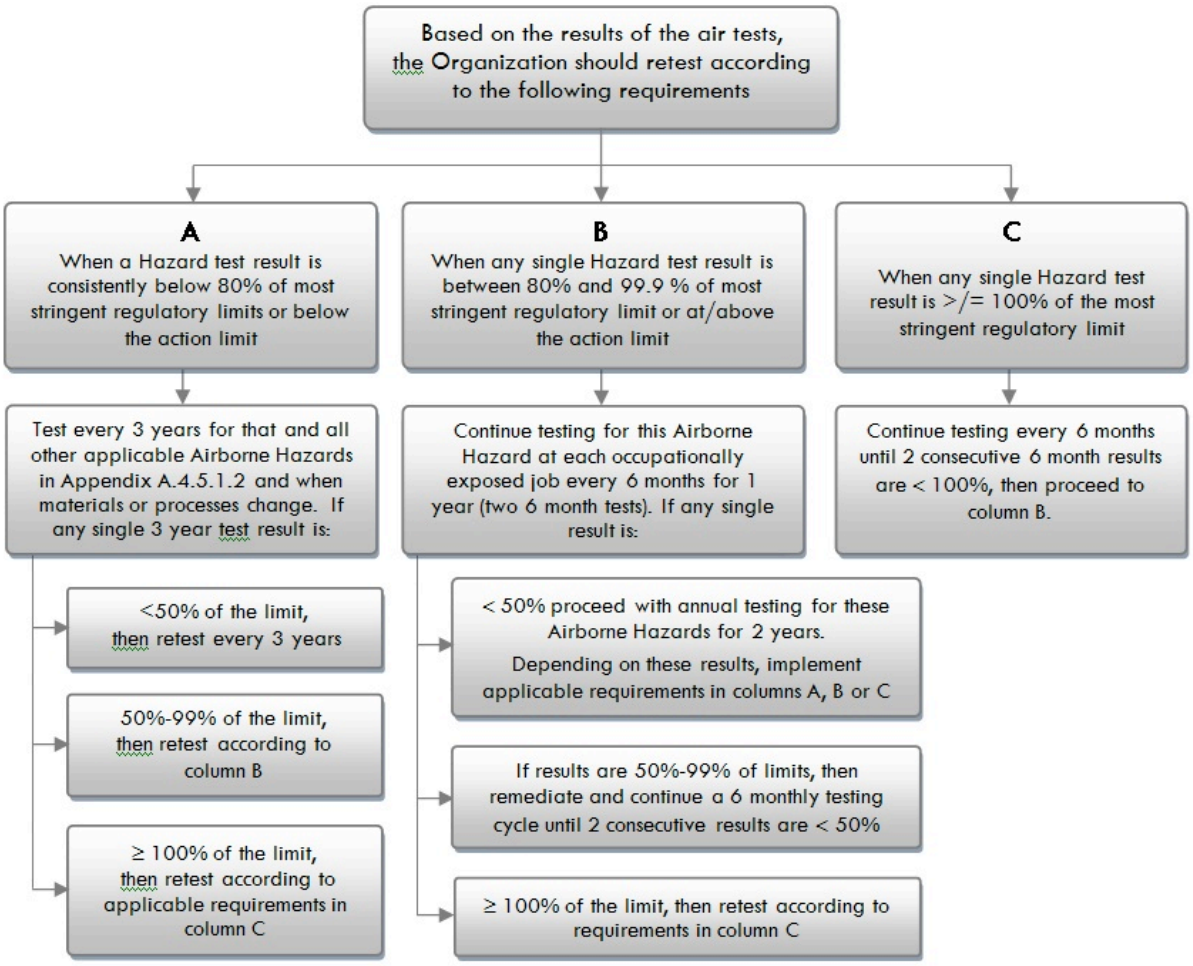
A.4.5.1.2 a) 2: Airborne hazards – Requirements for Testing

If an Organization is performing the following PHPT operations…	…then it shall perform and document Industrial Hygiene tests for the following airborne hazards:
Breaking, cutting, crushing, shredding, or pulverizing devices with cathode ray tubes, (such as CRT monitors and TVs), regardless of technologies or containment controls:	▸ Lead, cadmium, and compounds containing these heavy metals, Phosphors, and crystalline silica dust
Processing, removal, replacement, and/or disposal of mercury-containing components (such as fluorescent lamps in LCD screens):	▸ Mercury and mercury compounds, including in worker breath zones and areas around and on the floor below the mercury-removal and storage areas
Using power machinery to shred, cut, break, pulverize, crack, crush, bale, or chip Hazardous Electronic Equipment or Problematic Components and Materials which may contain these hazardous substances:	▸ Lead, beryllium, cadmium, asbestos, mercury, including compounds of these. If an Organization can demonstrate that the material being Processed and the Processing technology or its by-products do NOT contain one or more of these constituents, and can provide documented evidence of this fact[63], then they do not need to continue to test for the constituent, unless the material being Processed or the Processing technology changes.
Only using a shredder dedicated to hard drives (which contain circuit boards), but not using any other shredding or mechanical size reduction:	▸ Lead, beryllium, cadmium, including compounds of these, as well as fiberglass
Baling and/or shredding separated circuit boards:	▸ Lead, beryllium, fiberglass
Using thermal processes for melting, smelting, or combustion of Electronic Equipment:	▸ Inhalable hydrocarbons (including polycyclic aromatic hydrocarbons), and the elements beryllium, lead, mercury, and cadmium and all compounds of these elements. If it can be shown that the material being Processed and the Processing technology or its by-products do NOT contain one or more of these constituents, and can provide documented evidence of this fact[64], then they do not need to continue to test for the constituent, unless the material being Processed or the Processing technology changes.
Using acids or solvents for precious metals or plastics Materials Recovery, or cleaning procedures:	▸ Workplace exposure tests for any acid or solvent that is indicated as an inhalation hazard in the relevant MSDSs, as well as related digestive acid gases such as hydrogen sulfide, nitrous oxide, and other identified chemical hazards.

[63] For example, due to the Organization's restrictions on acceptance of certain materials and TCLP results indicating the incoming waste stream does not contain specific toxics, an Organization may provide objective evidence that testing is not necessary, at least under certain circumstances.

[64] ibid

A.4.5.1.2 f) 2. Testing frequencies for monitoring (retesting) of airborne hazards (Reference to regulatory limits or action levels below may include use of ACGIH TLVs as described in 4.4.6.1 a).



END OF APPENDIX A

APPENDIX B: ADMINISTRATIVE REQUIREMENTS FOR e-STEWARDS ORGANIZATIONS

The following requirements are applicable to all e-Stewards Organizations, in accordance with the e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment: Version 2.0©

a) General

e-Stewards certification is a voluntary, third-party certification system available to recyclers of electronic equipment globally (see 1.1.3 and 1.1.4). Only Organizations that have been audited by specially-trained and qualified auditors who are employed by accredited e-Stewards Certification Bodies and determined to conform to the e-Stewards Standard, and have signed a license agreement with the e-Stewards program administrator may be recognized as certified e-Stewards recyclers.

b) Scope of Certification

Corporate certification, within one country: The e-Stewards certification program requires certification of all Recycling facilities located within one country and owned (fully owned or owning a controlling interest) by an individual, corporate, organizational, or government entity. While individual Recycling facilities (Processing sites) may receive a site certification, all multi-sited e-Stewards entities shall eventually possess e-Stewards certification for all its eligible Recycling sites held within the entity(s), as well as all its electronics Recycling subsidiaries, regardless of brand, in order to be considered a licensed and valid certified e-Stewards entity. It is not a requirement that a parent company of a certified e-Stewards entity become certified, nor is it a requirement that any other subsidiaries owned by that parent become certified. However, if a certified e-Stewards entity owns another subsidiary that Processes or Controls Electronic Equipment, all subsidiary sites within the same country must also become e-Stewards certified concurrent with or subsequent to the e-Stewards parent company's certification, within 18 months of the initial site certification, irrespective of brand names used by entities. The rules [paragraph e) below] for "use of logo" shall always apply.

Ancillary Sites: When an Organization owns or Controls Ancillary Sites (e.g., collection sites, warehouses, or other non-Processing sites), each Ancillary Site shall be included in the scope of the Environmental Management System of the associated Recycling facility. Certification Bodies (CB's) do not, however, have to conduct on-site audits of Ancillary Sites, but may choose to in order to increase confidence of conformity to applicable requirements.

The certified e-Stewards Organization shall assure through its internal processes that the applicable elements of the environmental health and safety management system have been implemented at each Ancillary Site. When auditing a Recycling facility, the CB shall confirm that the applicable elements of the Standard are implemented and maintained as they apply to corresponding Ancillary Sites, including but not necessarily limited to internal auditing, material balance accounting, safety training, and downstream accountability.

Separate electronics Recycling companies with same ownership: If the top management or owner(s) of an e-Stewards entity also own or own a controlling interest in a separate electronics Recycling entity, all of these Recycling facilities are also required to become e-Stewards certified, regardless of brand names used by the entities, but the rules [paragraph e) below] for "use of logo" shall always apply.

Co-location: While it is permissible that a certified e-Stewards recycler is co-located with other entities, the e-Stewards recycler shall be responsible for controlling their operations in conformity with the Standard, including impacts of their operations upon co-located entities' areas. Additionally, a co-located e-Stewards Organization shall assure that their own workers, visitors, and customers on-site are protected against health and safety hazards caused by co-located entities.

c) Application to Certification Bodies (CB)

Only Certification Bodies which have been accredited under the ANAB e-Stewards® Program or another accreditation program approved by the e-Stewards program administrator are eligible to certify e-Stewards Organizations within the e-Stewards certification program. Unaccredited certificates are not permitted.

An e-Stewards applicant that meets the scope and eligibility requirements of this Standard may apply to any of the approved and accredited CB's that are listed in the www.e-Stewards.org website. When completing the application, the CB will request and the applicant shall provide information necessary to properly document and determine the required time to conduct the certification audits, including information as follows:

1. Has applicant disclosed all Recycling facilities and all Ancillary Sites that are located within the country?
2. Has applicant disclosed all activities being performed at all Ancillary Sites (Ancillary Sites may not perform any Recycling activities, as defined)?
3. Has applicant disclosed all subsidiary Recycling sites that are fully or majority owned by the same owner(s)?
4. Has applicant disclosed all other separate Recycling companies/entities that are fully or majority owned by the same owner(s) or top management?
5. Are data destruction services provided by the applicant? Describe.
6. What Potentially Hazardous Processing Technologies are employed (e.g. shredding, crushing, thermal or chemical processes, etc.)?
7. Has the applicant provided an accurate, up-to-date description or diagram indicating the extent of the Recycling Chain that begins with the applicant e-Stewards Organization and ends with Final Disposition of all Hazardous Electronic Waste, Problematic Components and Materials, and/or equipment/components going for reuse, which originated from the Organization's facility and/or Control?
8. Describe any exportation of Hazardous Electronic Waste and Electronic Equipment, directly or indirectly (e.g. through Downstream Processors or Intermediaries), including Electronic Equipment going for reuse, Recycling, and Final Disposal.
9. Is the applicant currently ISO 14001: 2004 certified by any ANAB-accredited CB, or a CB accredited by another accreditation body approved by the e-Stewards program administrator?
10. Is the applicant currently BS OHSAS 18001 certified?

d) Contracting with a CB

Once a CB has been selected, the e-Stewards applicant will be required to enter into a three-year contract, at a minimum, for audit and certification services covering all required sites to be certified within a given country. This contract shall include a surveillance plan requiring a series of routine surveillance audits which shall be conducted at least annually, but may be conducted more frequently. The applicant and CB shall agree upon the surveillance frequency that best meets the needs of the Organization and the CB's needs to assure conformity to the Standard. Surveillance audits may be announced or unannounced, and may be witnessed by BAN and/or its designated program administrator.

When the Organization to be certified consists of more than one site, it is required that the Organization contracts for the certification of all sites which are eligible and located in the same country. The Organization may elect to certify all sites at one time, or to certify them sequentially. However, all sites required to be certified shall be certified within 18 months of the initial certificate issuance. An Organization that fails to certify all of its required sites within 18 months shall have its certifications suspended or withdrawn. No sampling is permitted for auditing of multi-sited Organizations for the initial certification, but approved sampling methods may be permitted, as approved by the Certification Body, during the surveillance and re-certification stages.

If an eligible new site is opened or acquired after initial site certification, that site must be certified within 18 months of its opening or acquisition.

e) Certification and Use of Logo

When the CB has concluded and confirmed that all certification requirements are met, they must notify the program administrator who will then enter into a license agreement with the Organization. Only after a license agreement is signed can an e-Stewards certificate be issued by the CB. No delivery or announcement of certification shall be made until the certificate is issued. A Marketing and License Fee applies.

An Organization may only claim to meet this Standard and/or be a certified e-Stewards Organization if the Organization is both:

- Licensed to use the e-Stewards name and logo by BAN or the e-Stewards program administrator, and
- Currently certified by an e-Stewards accredited Certification Body.

The Basel Action Network (BAN) retains ownership of this Standard and its use. BAN may license a separate e-Stewards program administrator to manage and oversee the e-Stewards Standard and certification program on its behalf. Any individual, Organization, or entity utilizing the e-Stewards Standard, name, or logo for any commercial purpose or purposes other than reference are required to enter into a license agreement with the Basel Action Network, or the e-Stewards program administrator as required.

The e-Stewards name and logo are trademarked and the Standard is copyright protected by the Basel Action Network. Rules for the use of the logo are described in the e-Stewards Marketing and Licensing Agreement, which must be signed and executed before certification can be finalized.

Any proclamation of self-certification or self-declaration of conformity, or second party certification or declaration of conformity, to this Standard is strictly prohibited. Misrepresentation of the scope of certification may result in suspension or withdrawal of the certificate.

Any unauthorized use of the e-Stewards Standard (i.e. without written permission or under license), all or in part, is strictly prohibited.

f) Significant Changes Following Certification

The Organization shall make their CB aware of any significant changes to ownership, management, facilities, number of workers, Processing methods, emergencies, or other significant changes that may impact ongoing conformance with the Standard, within 14 business days of the change(s) or less if required by their CB. The Organization shall permit the CB to conduct an evaluation of the reported changes and their effects on conformance, including special on-site surveillance audits, as necessary.

g) Critical Non-Conformities

Certified e-Stewards recyclers and those which have contracted for certification are subject to the formal "Critical Nonconformity Policy" which may impose sanctions upon e-Stewards Organizations when and if objective evidence is established of egregious and/or dishonest practices which could bring disrepute upon the e-Stewards certification program. The Policy addresses non-conformities above and beyond the typical minor or major non-conformities that may be raised from time-to-time by the CB auditor during initial, surveillance, or re-certification audits of the Environmental Management System. The Critical Nonconformity Policy, including the e-Stewards appeals process, is located on the website at www.e-Stewards.org/cncpolicy.

h) Oversight by e-Stewards Program Administrator

An Organization shall permit any reasonable level of oversight by the e-Stewards program administrator, or a third party designated by them, of any and all audit and certification activities, including records providing evidence of such. This shall include the program administrator witnessing some onsite audits. Findings shall normally not be released to any third party. However, in cases involving a Critical Nonconformity raised by the e-Stewards program administrator, evidence of Critical Non-Conformities may be used in any way that protects the e-Stewards Certification Program and program administrator.

i) Data Reporting Requirements

The e-Stewards Standard requires that the e-Stewards Organization reports selected informational and performance data to the e-Stewards database (https://apps.e-stewards.org/database) prior to Certification and on a regular basis as defined in the Standard. The Organization shall inform their CB of the person(s) responsible for uploading this data.

END OF APPENDIX B

APPENDIX C: REQUIREMENTS FOR e-STEWARDS CERTIFICATION BODIES AND ACCREDITATION BODIES

The following requirements are applicable to qualified accreditation bodies (AB's) and certification bodies (CB's) which are performing audits and certifying e-Stewards recyclers in accordance with the e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment©, including the latest version of the corresponding Sanctioned Interpretations of the Standard. It is noted that the requirements of the e-Stewards Standard may be altered by the issuance of Sanctioned Interpretations by the e-Stewards program administrator between official versions of the Standard. During transition periods between versions of the Standard, each Standard version may have a unique set of Sanctioned Interpretations applicable. These are posted on the e-Stewards website and shall be binding upon AB's, CB's, and e-Stewards Organizations at all stages.

a) Accreditation of Certification Bodies

Only CB's which have been accredited under the ANAB e-Stewards® Program or another accreditation program approved by the e-Stewards program administrator are eligible to participate in the e-Stewards certification program.

Interested CB's shall first submit a pre-application to the e-Stewards program administrator and be pre-approved in accordance with the e-Stewards CB pre-approval criteria before the application to any qualified e-Stewards Accreditation Body is made. An application fee shall apply.

The e-Stewards program administrator requires that any CB operating within the e-Stewards certification program must demonstrate initial and ongoing satisfactory performance. Satisfactory performance is defined by both adherence to e-Stewards AB rules and the e-Stewards Critical Nonconformity Policy, as well as additional performance measures defined by the e-Stewards program administrator as documented in this Appendix and the current e-Stewards Sanctioned Interpretations. The following are likely to constitute unsatisfactory performance:

1. The CB is not current with any licensing fees required by the e-Stewards program administrator;
2. The CB fails to report certification data as required by Appendix C, paragraph h) of the e-Stewards Standard within 5 business days of initial certification or any certification status changes;
3. The CB has been suspended by an AB approved by the e-Stewards program administrator for non-conformance with ISO 14001 or any industry specific standard (e.g., TL 9000, AS9001) more than once within three years;
4. The e-Stewards CB has been suspended by an AB approved by the e-Stewards program administrator for non-conformance with the e-Stewards program requirements; and/or
5. The CB has operated in any other manner which, at the sole discretion of program administrator's executive management, could bring disrepute to the e-Stewards certification program or the e-Stewards program administrator.

The e-Stewards program administrator will consider the implications of any evidence of unsatisfactory performance, and will make its judgment for action based upon these implications. Corrective action by the CB may be required by the e-Stewards program administrator. Failure to

demonstrate satisfactory performance and/or failure to implement effective required corrective actions may suspend a CB's right to participate in the e-Stewards program for up to three years following the infraction.

The suspension action and duration of suspension will be determined solely at the e-Stewards program administrator's discretion, and there shall be no refund of any application or licensing fees collected.

b) Copyrights

Accredited e-Stewards CB's will be granted the right to use the e-Stewards® mark and Standard(s) in conjunction with their marketing and certification programs. CB's shall be required to sign a Licensing Agreement with the e-Stewards program administrator that controls the use of the e-Stewards registered logo and trademark. A licensing fee is applicable, levied upon accredited CB's in accordance with the program administrator's license fee structure.

Participating CB's shall strictly observe the copyright restrictions related to the e-Stewards Standard(s), which are described inside the title page of this Standard, and the copyrighted restrictions related to the e-Stewards mark, which are described in program administrator's licensing agreement.

The CB shall protect the e-Stewards mark and name from misuse by the CB and by any of its certified clients through the same due diligence required of auditors to guard against misuse of the CB or AB logo.

c) Applications to CB's for e-Stewards Certification and Scope of Certification

All requirements located in Appendix B, letter b) also apply here.

Organizations may provide a range of Recycling services which must be understood and considered during the preparation of a quotation for auditing and certification, and subsequent audit planning. Applications which are provided and received by CB's shall specifically require information needed to identify the scope of services provided by each Organization, relative to the Standard, in order to determine which Recycling facilities and Ancillary Sites [see d) below] are both eligible for and required to fall under e-Stewards certification. Therefore, Organizations must provide CB's with information to determine the following:

1. Has applicant disclosed all Recycling facilities and all Ancillary Sites that are located within the country?
2. Has applicant disclosed all activities being performed at all Ancillary Sites (Ancillary Sites may not perform any Recycling activities, as defined)?
3. Has applicant disclosed all subsidiary Recycling sites that are majority owned by the same owner(s)?
4. Has applicant disclosed all other separate Recycling companies that are majority-owned by the same owner(s) or top management?
5. Are data destruction services provided by the applicant? Describe.
6. What Potentially Hazardous Processing Technologies are employed (e.g., shredding, crushing, thermal or chemical processes, etc.)?

7. Has the applicant provided an accurate, up-to-date description or diagram indicating the extent of the Recycling Chain that begins with the Organization and ends with Final Disposition of all Hazardous Electronic Waste, Problematic Components and Materials, and/or equipment/components going for reuse, which originated from the Organization's facility or Control?
8. Describe any exportation of Hazardous Electronic Waste and Electronic Equipment, directly or indirectly (e.g., through downstream vendors), including Electronic Equipment going for reuse, Recycling, and disposal.
9. Is the applicant currently ISO 14001: 2004 certified by any ANAB-accredited CB, or a CB accredited by another accreditation body approved by the e-Stewards program administrator?
10. Is the applicant currently certified to BS OHSAS 18001?

Prior to conducting any certification audit, the CB shall assure that all affiliated sites (i.e., other Recycling sites, including any subsidiary sites or others owned by the e-Stewards owner, regardless of brand), of the contracting organization are also contracted for certification within 18 months of the certification date of the initial site.

d) Audit Person-Days and Audit Planning

When quoting e-Stewards certification services, the CB shall consider the information required at the application stage (Section c) and quote not less than 150% of audit days than would be quoted for simple, accredited ISO 14001: 2004 certification of the same Organization. International Accreditation Forum (IAF) Mandatory Document for Duration of QMS and EMS Audits, IAF MD 5 - current version (see www.iaf.nu), shall be the basis for this determination.

If the Organization requesting e-Stewards certification services is already ISO 14001:2004 certified, the CB may reduce the audit days calculated for the initial e-Stewards certification audit by no more than 50% from the above calculated audit days to account for this existing certification. The 50% maximum reduction refers to upgrades from an existing ISO 14001audit as a unique event. If the upgrade is planned to be conducted coincident with a pre-planned ISO 14001 surveillance audit, the (up to) 50% reduction pertains only to the e-Stewards-specific portion of the Standard. The number of audit days that would have been spent conducting the routine surveillance or renewal of the existing ISO 14001 certification must be added to the days calculated for the e-Stewards audit.

If the applicant is also already certified to BS OHSAS 18001, the CB shall comply with the requirements of IAF MD 11 when determining what further reductions in minimum audit days are allowable.

Ancillary Sites[65] owned or Controlled by a certified e-Stewards Organization shall be included and documented within the Organization's management system, and applicable operations at Ancillary Sites shall be addressed by the management system, including material balance accounting, internal audit, and downstream accountability. However, the CB need not routinely audit these Ancillary Sites for conformity and these sites shall not appear on the certificate of conformity for the Organization. Auditors should verify, through available objective evidence, that Ancillary Sites are addressed in the management system. Ancillary Sites that are proximate to the Processing site

[65] Please note that Ancillary Sites are not allowed to perform Recycling activities such as dismantling, shredding, exporting, or refurbishing Electronic Equipment (see definition of Ancillary Sites). If so, they shall be considered to be Recycling (Processing) sites, requiring certification.

being certified may be visited, as time permits during routine audits by Auditors, as a means to confirm that appropriate system controls are in place at Ancillary Sites. Otherwise, Auditors should seek evidence of such controls during Recycling facility audits associated with any particular Ancillary Site.

CB's are encouraged to respect the work of and certifications issued by other accredited CB's, relevant to the e-Stewards Standard. Objective evidence of current certification to ISO 14001 by another accredited CB shall be considered in the planning of an e-Stewards audit and associated quotation for services with the intention of minimizing redundancy and maximizing value for the e-Stewards Organization.

e) Contracting with the e-Stewards Organization

CB contracts with all e-Stewards Organizations shall include the following special conditions above and beyond standard contract terms:

1. Organizations shall permit both announced and unannounced audits, including special surveillance audits, by the CB, and/or the program administrator as part of their oversight functions,
2. Organizations shall agree to and allow the CB to share any audit or certification related information with the e-Stewards program administrator upon request by program administrator during or after the contract period,
3. The e-Stewards program administrator is permitted to join any audit as witness,
4. Organizations shall execute a License Agreement with the e-Stewards program administrator prior to receiving their certificate(s) from their CB,
5. All Recycling facilities which Process, manage, or Control Electronic Equipment and are owned or controlled by the Organization shall be included in the contract for certification within 18 months of certification of the initial facility, and
6. All Ancillary Sites which are owned or Controlled by the Organization shall be included and managed appropriately in the scope of the management system.

f) Multi-Site Certification

Organizations with more than one Recycling site must certify all Recycling sites that are majority-owned, franchised, or otherwise legally and operationally Controlled by the client and which are located within the country of the applicant site(s) in order to attain a corporate certification [see letter c) and Appendix B, letter b) above for description of facilities that are required to become certified].

When a multi-sited Organization requests certification, the CB shall not permit any certification process to begin unless all Recycling sites located in that country are contracted for e-Stewards certification. Certifications of other sites under the same ownership shall be completed within 18 months of the initial site certification. When multiple CB's are involved in an Organization's corporate certification, the CB that has certified the headquarters site shall be the CB of record for the corporate certification.

On the lead-up to achieving corporate certification, individual site certificates may be granted. These certificates, however, shall be revoked if all required sites are not certified within 18 months.

Site sampling shall NOT be permitted for the initial certification of any of the company's sites, but may be followed, if allowable in accordance with IAF Mandatory Document for the Certification of Multiple Sites Based on Sampling, IAF MD 1 (current version) after each site has been initially audited and certified (i.e., sampling may be permissible during the surveillance mode and/or recertification).

g) e-Stewards Audit Reporting Requirements

All CB audit reports shall be in English language and clearly indicate that each of the following critical principles was covered during the audits (including surveillance audits):

1. No prohibited export of Hazardous e-Waste or equipment going for reuse,
2. Data security is assured for all customers,
3. Workers are systematically protected from toxic exposures, illness, and injury, and housekeeping and Industrial Hygiene practices minimize migration and take home exposures,
4. Safe practices are defined and followed for handling Hazardous Electronic Equipment,
5. Hazardous e-Wastes (including untested equipment and components destined for refurbishment) are identified and followed to acceptable Final Disposition,
6. Material balance accountings are verified as calculated by the Organization.

For these critical areas (1 - 6 above), the auditor should document how Standard conformity was established by addressing the following:

- Which departments were visited and reviewed for this determination?
- What records were reviewed, including dates and subject matter?
- What observations were made against the Standard and/or documented system requirements?
- Which sites were visited?

h) Data Collection and Reporting

The CB shall report to the e-Stewards program administrator every contract signed in a timely manner following signature.

The CB shall establish employee head count at the application phase, and verify at the initial certification audit and all subsequent routine audits. This information shall be used to assure proper audit time during the course of the certification contract.

Prior to initial certification and at each surveillance audit the CB shall confirm that the certified has a current licensing agreement in place with the e-Stewards program administrator.

During and subsequent to certification, the CB shall assure that use of the e-Stewards logo by the e-Stewards Organization is in accordance with the licensing agreement.

The CB audit teams shall verify, as an element of each audit, that the e-Stewards Organization has reported all required performance data to the designated data repository.

The CB shall report all e-Stewards certifications to the e-Stewards program administrator within 5 business days of certification. Any changes to certification status (i.e., suspension, withdrawal, cancellation) shall be reported to the e-Stewards program administrator within 5 business days.

i) Certificate Issuance

The CB shall issue a site or corporate certificate(s) indicating conformance of the e-Stewards Organization with all applicable requirements of the Standard when and only when:

- All non-conformances have been cleared by review and approval of a suitable corrective action plan in accordance with ISO 17021 paragraph 9.1.15 requirements, and subsequently
- The CB has confirmed that the Organization has a valid and current licensing agreement in place with the e-Stewards program administrator for the use of the e-Stewards name and logo.

The CB shall not issue, or shall withdraw or suspend, as appropriate, a certificate to an Organization if the e-Stewards program administrator has issued a Critical Nonconformity to that Organization until and unless the program administrator has cleared the Critical Nonconformity, in writing.

The certificate issued shall bear the logo of the CB, the AB, and the e-Stewards logo (as provided by the e-Stewards program administrator to the CB in conjunction with its Licensing Agreement). No unaccredited e-Stewards certificates may be issued by a CB.

The e-Stewards certificate issued by the CB may reference concurrent certification with ISO 14001, or the two certificates can be issued separately.

If a change in ownership, a bankruptcy filing, potential Critical Nonconformity, or another significant change or event occurs which could affect the certified e-Steward's capability or conformity with the Standard, the CB shall notify the e-Stewards program administrator of the circumstances within 5 working days, and follow the requirements of ISO 17021 with regard to assuring continual conformance with the Standard. The e-Stewards program administrator requires that a special surveillance audit be conducted of any such-affected certified sites within a maximum of six months of notification, or sooner in exceptional circumstances.

j) Ongoing Training and Qualifications of e-Stewards CB and AB Auditors

The e-Stewards CB and AB program managers and auditors shall participate in refresher/retraining courses at least once every three years. Additionally, when new versions of the e-Stewards Standard are released, an upgrade training provided by the e-Stewards program administrator designated training organization shall be required prior to auditors auditing to the new version of the Standard.

k) Agreement to Oversight of the Certification Process by the e-Stewards Program Administrator

The AB and CB shall agree to a reasonable level of oversight by the e-Stewards program administrator. This oversight may include witnessing of the initial accreditation office audit and witnessed audit, review of AB and CB documents and procedures related to the e-Stewards program, witnessing of CB audits of e-Stewards applicants and/or certified e-Stewards, CB headquarters visits, and review or witnessing of other AB or CB events that the program administrator considers to be relevant to its oversight of the e-Stewards program.

To facilitate this oversight, CB's shall submit to the e-Stewards program administrator a monthly report which notifies and routinely updates it of the following:

1. New e-Stewards quotations issued since last monthly report,

2. New e-Stewards contracts (company and site locations) issued since last monthly report,
3. Confirmed e-Stewards audits (initial, surveillance, special, or renewal) scheduled within the next 60 days from the current report including sites/locations to be audited and specific auditors assigned, and
4. New certificates issued, suspended or withdrawn since last monthly report.

Accreditation Bodies shall report to the e-Stewards program administrator, on a monthly basis, the schedule for the upcoming 60-days, of any applicant CB audits and current e-Stewards CB office and witnessed field audits that are planned, including dates, locations, and CB's to be witnessed.

END OF APPENDIX C

APPENDIX D – GUIDANCE DOCUMENT

The Guidance Document for the e-Stewards® Standard for Responsible Recycling and Reuse of Electronic Equipment: Version 2.0© is a work in progress which will be updated on a continuous basis as new information becomes available on best practices. This document is not binding on e-Stewards Organizations but is for guidance and explanation purposes. However, this document is an essential adjunct for implementation and understanding of this Standard, and its placement on the Worldwide Web is only to facilitate fluid improvement and updating. It is located in its most current version on the Worldwide Web at: www.e-stewards.org.

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R2:2013

THE RESPONSIBLE RECYCLING

("R2")

STANDARD

For

ELECTRONICS RECYCLERS

Effective Date: SEPTEMBER 1 2014

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INTRODUCTION

This document – the R2:2013 Standard – establishes responsible recycling ("R2") practices for the recycling of electronics globally. By certifying to this Standard through an accredited third-party Certification Body, electronics recyclers[1] can help prospective purchasers of their services (customers) make informed decisions and have increased confidence that used and end-of-life electronic equipment are managed in an environmentally responsible manner, protective of the health and safety of workers and the public, and that all data on all media devices is secure until destroyed. Thus, certification to R2:2013 allows electronics recyclers to highlight their value to customers, employees, their community and the public.

R2:2013 was developed by a multi-stakeholder group – the R2 Technical Advisory Committee (TAC) – through an open, transparent, and consensus-based approach in conformance with generally accepted principles for consensus-based standards. The TAC itself consists of representatives from key stakeholder groups, including: recyclers, customers/users of recycling services, regulatory and procurement agencies, manufacturers of electronic equipment, downstream vendors of recyclers, and international trade experts. The process for development of R2:2013 included public comment, response to comments, and an appeals opportunity so that all interested parties had the ability to participate in the revision process. Following completion of this process, R2:2013 was reviewed and adopted by the SERI Board of Directors.

Comprehensive

The requirements contained within R2:2013 are comprehensive, covering environmental, health and safety, and data security practices. To further ensure the integrity and strength of the Standard, R2:2013 now requires facilities to obtain certification to one or more generally-accepted environmental, health and safety management systems.

Legal

The R2:2013 Standard specifically requires that international trade in used and end-of-life electronics be conducted legally and responsibly. This requirement is made explicit in R2:2013, by requiring compliance (including documentation) with the laws and regulations of all importing, transit, and exporting countries. Further, if a requirement of this document conflicts with an applicable legal requirement, the recycler must adhere to the legal requirement.

Conformance

All the provisions of this R2:2013 Standard shall be conformed to by R2:2013 electronics recyclers. Whether conformed to directly, or through a contracted third party, the burden of proof resides with the R2:2013 electronics recycler to demonstrate conformity to each requirement. It is acceptable to outsource certain activities and requirements under the Standard to partners or downstream vendors. However, it is the responsibility of the R2:2013 electronics recycler to ensure that these downstream partners and vendors conform to the requirements of the R2:2013 Standard.

[1] When referred to in this Standard, the term "recycler" encompasses all entities in the recycling chain, including brokers, refurbishers, collectors, resellers, etc. The term "recycler" is used for simplicity of language throughout. "Recycler" is defined in the Definitions Section at the end of this document.

Applicability
The R2:2013 Standard is applicable to all organizations within the recycling chain, regardless of their size or location.

R2:2013 certification is specific to a facility, and not to a company. The R2:2013 Standard shall apply to all electronics recycling related activities at a physical address. It may be extended to multiple physical addresses through a multi-site certificate or additional individual certificates. It may also be extended as a multi-site sampling certificate when the management system is shared by multiple locations in accordance with the International Accreditation Forum Mandatory Documents 1 and 5.

Related Document – R2 Code of Practices
The R2 Code of Practices is a supporting document defining the processes used in applying and administering the R2:2013 Standard. It contains requirements designed to facilitate R2:2013 audit consistency, including requirements related to SERI's oversight of the R2:2013 certification process. Allowances for certain requirements are specifically defined in the R2 Code of Practices. Allowances will only be made where provisions are clearly not applicable to the facility within the recycling chain, and where allowances will not negatively impact the validity of the certification.

About SERI
SERI is the non-profit organization established to administer and promote the R2 Standard. It consists of an independent Board of Directors and a staff. In addition, the R2 Technical Advisory Committee is a voluntary group of concerned stakeholders appointed by the SERIBoard and charged with the responsibility for maintaining the integrity and effectiveness of the R2 Standard and related guidance. SERI is the authoritative administrator and owner of the R2:2013 Standard. Additional resources and information are available at http://www.sustainableelectronics.org.

THE R2:2013 REQUIREMENTS

1. **Environmental, Health, and Safety Management System**

General Principle – *An R2:2013 electronics recycler shall possess and use an Environmental, Health, and Safety Management System (EHSMS) to plan and monitor its environmental, health, and safety practices, including the activities it undertakes to conform to each requirement of the R2:2013 Standard. This EHSMS shall be certified to an accredited management system standard.*

Requirements:

(a) An R2:2013 electronics recycler shall document the scope of activities included in the R2:2013 and EHSMS certifications, including any allowance to the R2:2013 standard expressly listed in the R2 Code of Practices and authorized in writing by the Certification Body.

(b) An R2:2013 electronics recycler shall be certified, throughout the duration of its R2 certification, to one or more environmental, health and safety management system standards (EHSMS) that have been approved by SERI[2]. The R2:2013 electronics recycler shall be certified to the standard(s) and R2:2013 by an independent, Accredited Certification Body.

(c) An R2:2013 electronics recycler shall develop, document, fully implement, review at least annually through internal audits, and update as needed (e.g., as operations, products and/or technologies change) this written EHSMS, which shall include:

(1) Written goals and procedures covering, and requiring the organization to systematically manage, its on-site and downstream environmental, health, safety, and data security matters in a manner consistent with each requirement of the R2:2013 Standard, and

(2) A list of the activities necessary to conform to each requirement of R2:2013, a list of the documentation necessary to show conformity with these requirements, and a commitment to take corrective action to address any issues of non-conformance.

2. **"Reuse, Recover, ..." Hierarchy of Responsible Management Strategies**

General Principle – *An R2:2013 electronics recycler shall develop and adhere to a policy for managing used and end-of-life electronic equipment that is based on a "reuse, recover…" hierarchy of responsible management strategies.*

Requirements:

(a) An R2:2013 electronics recycler shall develop in writing and adhere to a policy stating how it manages used and end-of-life electronics equipment, components, and materials – with respect to both on-site activities and the selection of downstream vendors – that is based on a hierarchy of responsible management strategies:

(1) Reuse – An R2:2013 electronics recycler shall take all practical steps to direct tested equipment and components to reuse and resale, and to direct equipment capable of repair to qualified refurbishers, unless a customer directs otherwise (See Provision 6 for further

[2] As of July 1, 2013, SERI has approved RIOS™, or a combination of both ISO 14001 and OHSAS 18001, to fulfill this requirement. In the future, additional EHSMS standards may be approved. At such time, they will be listed on the SERI website (SERIwww.sustainableelectonics.org).

discussion).

(2) Materials Recovery – An R2:2013 electronics recycler shall take all practical steps to separate as appropriate, through manual dismantling and/or mechanical processing, the materials in equipment and components that are not directed to reuse or refurbishment and direct them to properly-equipped materials recovery facilities.

(3) Energy Recovery or Land Disposal – An R2:2013 electronics recycler shall not direct material[3] to incineration, energy recovery, or land disposal facilities unless no reuse or recycling options are viable. (See Provision 5(d) for the relevant requirements.)

(b) This policy shall incorporate and be consistent with the Focus Material (FM) Management Plan that the R2:2013 electronics recycler develops in accordance with Provision 5.

3. **Legal Requirements**

General Principle – *An R2:2013 electronics recycler shall comply with all applicable environmental, health and safety, and data security legal requirements and shall only import and export equipment and components containing Focus Materials in full compliance with all applicable importing, transit, and exporting countries' laws.*

Requirements:

(a) An R2:2013 electronics recycler shall develop a legal compliance plan to maintain full compliance with all environmental, health, safety, and data security legal requirements applicable to its operations, as well as full compliance with all applicable import and export laws covering shipments of FMs and shipments of untested or non-functioning equipment or components containing FMs. This plan shall be included as a section of its EHSMS.

(1) Facility Compliance: The plan shall identify and document the environmental, health, safety, and data security legal requirements that cover the recycler's operations.

(2) Import/Export Compliance: The plan also shall identify and document the legality – under the laws of the exporting, transit, and importing countries – of all international shipments of FMs and untested or non-functioning equipment or components containing FMs, that have passed through the R2:2013 electronics recycler's facility or control[4]. Prior to shipment, the recycler shall identify the countries that are receiving or transferring such shipments, obtain documentation demonstrating that each such country[5] legally accepts such shipments, and demonstrate compliance of each shipment with the applicable export and import laws.

The documentation shall be in a language understandable to the electronics recycler, and consist of original documentation from the importing or exporting country's Competent Authority or a copy of a law or court ruling, that demonstrates the import country legally accepts such imports, and the export country legally allows such exports.

(3) The recycler shall keep the legal compliance plan up to date, identify and implement the steps necessary to comply with each requirement, and document the implementation of these steps. It shall also periodically audit its compliance with legal requirements, and take corrective action to address any issues of non-compliance.

[3] This includes materials with substances identified in the R2 recyclers' risk assessment of potential hazards in compliance with provision 4(c).
[4] This includes shipments made by any downstream vendors.
[5] This includes both OECD (Organization for Economic Co-operation and Development) and non-OECD countries.

4. **On-Site Environment, Health, and Safety**

General Principle – An *R2:2013 electronics recycler shall use practices and controls at its facilities that protect worker and public health and safety and the environment under both normal and (reasonably foreseeable) exceptional circumstances.*

Requirements:

General

(a) An R2:2013 electronics recycler shall demonstrate the expertise, knowledge, and technical capability to process each type of equipment, component, and material it accepts in a manner that is legal and protective of worker safety, public health, and the environment.

(b) An R2:2013 electronics recycler shall adhere to good housekeeping standards, including keeping all work and storage areas clean and orderly. Housekeeping for all areas of the facility shall be planned, regularly implemented, and monitored.

Workforce and Environmental Protection

(c) An R2:2013 electronics recycler shall conduct on an ongoing basis (e.g., as new types of materials are processed or new processes are used) a hazards identification and assessment of occupational health and safety and environmental risks that exist or could reasonably be expected to develop at the facility. Such risks could result from any sources, including but not limited to emissions of and/or exposure to substances[6], noise, ergonomic factors, thermal stress, substandard machine guarding, cuts and abrasions, etc. The hazards identification and assessment shall be captured in writing and incorporated as a component of the recycler's EHSMS.

(d) An R2:2013 electronics recycler shall manage the environmental, health and safety hazards, minimize the risks it identifies, and prioritize the use of appropriate strategies to implement and maintain controls, including but not limited to:

(1) Engineering controls such as:

(A) Substitution (e.g., replacing a toxic solvent with one less toxic)
(B) Isolation (e.g., automating a process to avoid employee exposure)
(C) Ventilation and, if appropriate, capture (e.g., fume hood)
(D) Dust control, capture, and clean up
(E) Emergency shut-off systems
(F) Fire suppression systems

[6] Risks posed by exposure to substances may arise in a variety of situations – sometimes involving substances that do not under ordinary conditions pose a risk to worker safety or the environment. Such substances may include mercury, lead, beryllium, cadmium, PCBs, some phosphor compounds, certain brominated flame retardants (i.e., polybrominated biphenyls, pentabrominated diphenyl ether, and octabrominated diphenyl ether), silica dust, chlorinated or brominated dibenzodioxins and dibenzofurans, and hexavalent chromium. Special attention should be given to potential lead and cadmium exposures during the creation or handling of broken CRT glass, as well as where lead solder is melted during chip recovery.

(2) Administrative and work practice controls, including appropriate combinations of:

(A) Regular, documented environmental, and health and safety training that covers information from the hazards assessment, as well as safe management handling, spill prevention, engineering controls, equipment safety, and use and care of personal protection equipment along with training for new hires and refresher courses for all employees that is understandable to them given language and level-of-education considerations; and
(B) Job rotation as feasible given workforce size, and
(C) Safe work practices, and
(D) Medical surveillance, and
(E) Safety and environmental meetings.

(3) Personal protective equipment, including respirators, protective eyewear, cut-resistant gloves, etc., as appropriate for the risks involved in the tasks being performed.

(e) An R2:2013 electronics recycler shall use monitoring and sampling protocols as applicable to provide assurances that the practices and EHSMS controls it employs are effectively and continuously managing the risks it has identified. This includes complying with all applicable environmental and health and safety regulations and permissible exposure limits (PELs) for sampling and/or monitoring.

(f) An R2:2013 electronics recycler shall treat its entire workforce, including volunteer workers, consultants, temporary workers, and anyone else performing activities under its direction, using the standard of care established pursuant to Section (d) of this provision.

(g) An R2:2013 electronics recycler shall designate a qualified employee(s) or consultant(s) to coordinate its efforts to promote worker health and safety and environmental protection. This designated individual(s) shall be identified to all employees and two-way communication shall be encouraged between employees and this individual regarding potential hazards and how best to address them.

(h) An R2:2013 electronics recycler shall identify probable emergency situations and exceptional circumstances. R2:2013 electronics recyclers shall prepare, periodically test, and update, as appropriate and necessary, an emergency plan(s) for responding to the identified emergency situations and exceptional circumstances to protect workers (subject to Section (f)), the public, and the environment. Occurrence of emergency events, including exceptional releases, accidents, spills, fires, and explosions shall be reported to the required authorities.

5. **Focus Materials**

General Principle – *An R2:2013 electronics recycler shall manage – both on-site and in the selection of downstream vendors – the Focus Materials that pass through its facility or control in a manner protective of worker health and safety, public health, and the environment. An R2 electronics recycler also shall perform due diligence on downstream vendors to which it ships these materials.*

Requirements:

Development and Adherence to an FM Management Plan

(a) An R2:2013 electronics recycler shall analyze, plan, regularly review, and update as necessary how the FMs that pass through its facility or control will be properly managed both on-site and down the Recycling Chain (and include this analysis and plan as the "FM Management Plan" section of its EHSMS). The FM Management Plan shall state how the recycler and its downstream vendors shall conform to the requirements set forth in the rest of this Provision 5.

Removal of FMs

(b) Prior to shredding or materials recovery of equipment or components, FMs (as well as print cartridges) shall be removed using safe and effective[7] mechanical processing or manual dismantling, with two exceptions:

(1) Items containing mercury if:

(A) They are too small to remove safely at reasonable cost, and
(B) Workers are protected from the potential risks of handling mercury, and
(C) The materials recovery occurs in facilities that meet all applicable regulatory requirements to receive and process mercury, and that use technology designed to safely and effectively manage equipment or components containing mercury.

(2) CRTs, batteries, and circuit boards contained in equipment or components destined for materials recovery need not be removed prior to shredding and/or materials recovery if the shredding and/or materials recovery occurs in facilities that meet all applicable regulatory requirements to receive these FMs, and that use technology designed to safely and effectively manage equipment or components containing these FMs.

Processing, Recovery, and Treatment of FMs

(c) An R2:2013 electronics recycler shall send removed FMs to processing, recovery, or treatment facilities that meet all applicable regulatory requirements to receive the FMs, and that use technology designed and operated to safely and effectively manage the FMs. This shall include:

(1) For items containing mercury – mercury retorting or other legal methods, excluding incineration,

(2) For circuit boards – removal of batteries and mercury, and processing for metals recovery, and

(3) For items containing polychlorinated biphenyls (PCBs) – technology specifically designed for PCB destruction, occurring in facilities that meet all applicable regulatory requirements, and that use technology designed to safely and effectively manage equipment or components containing these FMs.

[7] See Provision 4 for a discussion of "safe and effective" practices and controls.

Prohibition on Energy Recovery, Incineration, and Land Disposal of FMs

(d) An R2:2013 electronics recycler shall not use energy recovery, incineration, or land disposal as a management strategy for FMs or equipment and components containing FMs unless applicable law requires the use of a specific technology (e.g., thermal destruction of PCBs). However, if documented extreme and rare circumstances beyond the control of the R2:2013 electronics recycler disrupts its normal management of an FM, it may consider using these technologies to the extent allowed under applicable law until normal management is again possible.

Selection and Ongoing Due Diligence of Downstream Vendors for FMs[8]

(e) For shipments of removed FMs, and shipments of equipment and components containing FMs, an R2:2013 electronics recycler shall select both domestic and international downstream vendors that:

(1) Conform to the R2:2013 electronics recycler's FM Management Plan (developed in accordance with and including the requirements set forth in Sections (b) - (d) above), and

(2) Adhere to a documented system to manage environmental, health, and safety risks and legal requirements. The management system shall include at a minimum the components of Provision 3 (Legal Requirements and Provision 4 (On-Site Environmental, Health, and Safety), and

(3) Comply with all applicable environmental and health and safety legal requirements and maintain a current list of its environmental permits and copies of each, and

(4) Conform to this Section (e) and Section (f) below, or allow the R2:2013 electronics recycler to confirm this information with each of its relevant downstream vendors, thereby establishing that each facility in the Recycling Chain conforms to these subsections, and

(5) Conform to Provision 6 (Reuse), if applicable, and

(6) Conform to Provision 7 (Tracking Throughput), documenting the flow of all FMs down the Recycling Chain, and

(7) Conform to Provision 10 (Physical Security), ensuring security of the equipment down the recycling chain.

(f) An R2:2013 electronics recycler shall confirm at least annually and document, through audits or other similarly effective means, that each downstream facility to which Section (e) applies continues to conform to the requirements of Section (e) for as long as it receives FMs directly or indirectly from the R2:2013 electronics recycler.

(g) If the R2:2013 electronics recycler uses an R2:2013 certified downstream facility, then verification of conformance to 5(e)(1) and 5(e)(6) satisfies the due diligence requirements of 5(e) and 5(f).

Non-Focus Materials Requiring Specific Management

(h) An R2:2013 electronics recycler shall manage print cartridges in accordance with Provision 2 through print cartridge remanufacturers, recyclers, or Original Equipment Manufacturers (OEM), in facilities that meet all applicable regulatory requirements to receive these print cartridges, and

[8] The R2:2013 electronics recycler is only responsible for due diligence related to the Focus Materials shipped by the R2:2013 electronics recycler.

that use technology designed to safely and effectively manage print cartridges, including both ink and toner.

6. **Reusable Equipment and Components**

General Principle: *An R2:2013 electronics recycler shall repair and refurbish as needed, properly test, and adequately package equipment and components going to reuse to ensure continued use of the equipment and, ultimately, responsible recycling of Focus Materials.*

Requirements:

(a) An R2:2013 electronics recycler shall not allow equipment or components to be sold or donated for reuse if contrary to commercial agreements with those from whom the equipment or components were received.

(b) An R2:2013 electronics recycler shall, with respect to equipment and components it ships downstream:

(1) Label and sort each shipment in a manner sufficient to track throughput in conformity with Provision 7, and

(2) Ensure that all data is sanitized in conformity with Provision 8, and,

(3) Handle and package shipments to prevent damage in conformity with Provision 12.

(c) An R2:2013 electronics recycler shall, prior to shipping used electronics equipment and components that contain FMs, either domestically or internationally, assure and identify each shipment as either: *(1) Tested for Full Functions, R2/Ready for Reuse; (2) Tested for Key Functions, R2/Ready for Resale; and/or (3) Evaluated and Non-Functioning, R2/Ready for Repair*.

(1) Tested and Full Functions, R2/Ready for Reuse[9]

An R2:2013 electronics recycler, prior to shipping equipment and components that contain FMs to an end user, and that will be identified and shipped as Tested for Full Functions, R2 /Ready for Reuse shall:

(A) Use effective test methods to confirm that all functions for equipment and components are working properly and ready for reuse, including properly configured with appropriate legally licensed software where required for operation of equipment and components, and device specific drivers within the product's hardware, and
(B) Implement a written Quality Assurance Plan and policy (or maintain current certification to ISO 9001 or RIOS) to verify the accuracy of test methods, testing equipment (e.g., calibration) and maintain records of effective testing methods, equipment and results, and
(C) Implement a written Product Return Plan and policy appropriate for the final destination of the equipment and components, and
(D) Ensure that all equipment and components are clean and free of major cosmetic defects, as defined in Section (c)(1)(B), and
(E) Ensure that the equipment or components meet the requirements of the recipient.

[9]Tested, fully functioning used equipment that is "out-of-the-box" ready for use by end-users.

(2) Tested for Key Functions, R2/Ready for Resale[10]

An R2:2013 electronics recycler, prior to shipping equipment and components that contain FMs to a recipient vendor or end user, and that will be identified and shipped as Tested for Key Functions, R2/Ready for Resale shall:

(A) Use effective test methods and testing equipment to confirm that the Key Functions of the equipment or components are working properly, and
(B) Implement a written Quality Assurance Plan and policy (or maintain current certification to ISO 9001 or RIOS) to verify the accuracy of test methods and testing equipment (e.g., calibration), and maintain records of effective testing methods, equipment and results as appropriate, and
(C) Disclose in writing to buyers any functions that are not working properly and provide a description of cosmetic defects and missing components for each shipment as applicable, and
(D) Implement a written Product Return Plan and policy appropriate for the final destination of the equipment and components, and
(E) Ensure that the equipment or components meet the specifications of the recipient vendor or the end user.

(3) Evaluated and Non-Functioning, R2/Ready for Repair[11]

An R2:2013 electronics recycler, prior to shipping equipment and components that contain FMs to a recipient vendor, and that will be identified and shipped as Evaluated and Non-Functioning, R2/Ready for Repair shall:

(A) Implement a written Quality Assurance Plan and policy to evaluate equipment and components to ensure the condition, functionality, and sales price of the unit or component is capable of repair and refurbishment in the destination market, and
(B) Confirm through an appropriate combination of contractual agreements, detailed materials tracking, recordkeeping, and auditing that equipment and components containing FMs are only shipped to:
    (i) Electronics recycler(s) that are certified to R2:2013 and verified in accordance with Provision 5(g), or
    (ii) Recipient vendor(s) that can assure that all equipment and components shall be resold in conformance with Section (c)(1), R2/Ready for Reuse or Section (c)(2), R2/Ready for Resale, and
    (iii) Recipient vendor(s) that can manage all equipment and components containing FMs and residual FMs resulting from repair and refurbishing operations in conformance with Provision 3 and 5,

    and,
(C) Ensure that the equipment or components meet the specifications of the recipient vendor.

[10] Tested to assure that key functions are working and that non-functioning attributes are clearly documented for customers.
[11] Evaluated to assure that equipment is repairable for key functions and suitable for its intended market.

(d) An R2:2013 electronics recycler need not conform to Section (c) for sales of "Collectible Electronics" and their associated components or "Specialty Electronics" that the R2:2013 electronics recycler does not possess the technical capability to test or repair. Such sales are restricted to 1% of total individual units by quantity sold on a rolling 12 month average. Sales under this provision must include returns at no cost to the buyer.

(1) An R2:2013 electronics recycler shall conform to the legal requirements (including export) in Provision 3 for these sales/shipments.

(2) An R2:2013 electronics recycler need not conform to the downstream requirements of Provision 5 for these sales/shipments.

(e) An R2:2013 electronics recycler need not conform to the downstream requirements of Provision 5 and the exporting requirements of Provision 3 for shipments that are Tested/Full Function, R2:2013/Ready for Reuse in Section (c)(1), or Tested/Key Functions, R2:2013/Ready for Resale in Section (c)(2), or are new and in original packaging.

7. **Tracking Throughput**

General Principle – *An R2:2013 electronics recycler shall maintain business records sufficient to document the flow of equipment, components, and materials that pass through its facility.*

Requirements:

(a) An R2:2013 electronics recycler shall maintain for at least three years commercial contracts, bills of lading, or other commercially-accepted documentation for all transfers of equipment, components, and materials. An R2:2013 electronics recycler does not need to track non-FMs beyond the first tier downstream vendor.

(b) An R2:2013 electronics recycler shall provide, to each customer that is R2 certified or in the process of R2:2013 certification, upon request and with appropriate intellectual property and commercial controls as legally appropriate and required by the discloser, the names and locations of all downstream vendors in the recycling chain that handle said customer's FMs.

8. **Data Destruction**

General Principle – *An R2:2013 electronics recycler shall be responsible for data destruction of all media it handles using generally-accepted data destruction procedures.*

Requirements:

(a) An R2:2013 electronics recycler shall sanitize, purge, or destroy data on hard drives and other data storage devices (the National Institute of Standards and Technology's (NIST's) Guidelines for Media Sanitization – Special Publication 800-88[12] lists categories of devices which need sanitization consideration), unless otherwise requested in writing by the customer. The R2:2013 electronics recycler shall adhere to the data sanitization, purging, or destruction practices described in the NIST Guidelines for Media Sanitization: Special Publication 800-88 (rev. 1) or another current generally-accepted standard[13], or be certified by a generally-accepted certification program.

[12] See current link to NIST Special Publication 800-88 rev.1 at www.sustainableelectronics.org
[13] Examples include National Association for Information Destruction (NAID) and Asset Disposal & Information Security Alliance (ADISA).

(b) An R2:2013 electronics recycler shall document its data destruction procedures and include this documentation as part of its EHSMS.

(c) Employees involved in data destruction shall receive appropriate training on a regular basis and be evaluated for competency in data destruction processing.

(d) Data destruction processes shall be reviewed and validated by an independent party on a periodic basis as defined in the documentation called for in Section (b).

(e) Quality controls shall be documented, implemented, and monitored internally to ensure effectiveness of data sanitization, purging, and destruction techniques.

(f) Security controls that are appropriate to the most sensitive classification of media accepted at the facility shall be documented, implemented and maintained. Security controls shall consider physical security, monitoring, chain-of-custody, and personnel qualifications.

(g) Adequate records of data destruction shall be maintained by the R2:2013 electronics recycler and each downstream vendor conducting data destruction.

(h) If data destruction is handled by a downstream vendor:

(1) The R2:2013 electronics recycler shall maintain responsibility for data destruction and ensure appropriate security, controls, and processing techniques continue to conform to Provision 8 through audits or other similarly effective means.

(2) Media or devices containing media with data must be tracked and secured during transportation, storage, and processing.

(3) Each downstream vendor must adhere to the requirements of Provision 8.

9. **Storage**

General Principle – *An R2:2013 electronics recycler shall store items and materials that may cause risk to worker health and safety or the environment if inappropriately stored, and equipment and components going to reuse, in a legal and appropriate manner.*

Requirements:

(a) An R2:2013 electronics recycler shall store items removed pursuant to Provision 5, and equipment and components destined for reuse, in a manner that:

(1) Protects them from reasonably foreseeable adverse atmospheric conditions and floods and, as warranted, includes a catchment system, and

(2) Is in full legal compliance, and

(3) Is secure from unauthorized access, and

(4) Is in clearly labeled containers and/or storage areas.

10. **Security**

General Principle – *An R2:2013 electronics recycler shall employ security measures appropriate for the equipment it handles and customers it serves.*

Requirements:

(a) An R2:2013 electronics recycler shall maintain a security program that controls access to all or parts of the facility in a manner and to a degree appropriate given the type of equipment handled, sensitivity of media containing data, and the needs of the customers served.

(b) An R2:2013 electronics recycler shall consider and include necessary controls to secure electronic equipment upon acceptance of said equipment.

11. **Insurance, Closure Plan, and Financial Responsibility**

General Principle – *An R2:2013 electronics recycler shall possess insurance that is adequate to cover the potential risks and liabilities associated with the nature and size of the facility's operations, and shall have adequate legal and financial assurances in place for the proper closure of its facility.*

Requirements:

(a) The R2:2013 electronics recycler shall be able to demonstrate that it has evaluated the risks arising from its certification activities and that it has adequate insurance or reserves to cover liabilities, including environmental pollution and worker health and safety, arising from its operations in each of its fields of activities and the geographic areas in which it operates.

(b) An R2:2013 electronics recycler shall develop and maintain a current, written plan and a sufficient financial instrument that assures proper closure of the facility and assures against abandonment of any electronic equipment, and components and materials from such equipment.

(1) Financial instruments must be assigned to an independent party or corporate parent with responsibility for closure, and the assignment must be consistent with applicable law, and

(2) Financial instruments shall consider the risks identified in Section (a) and applicable law, including reasonably foreseeable costs of processing remaining inventory, sampling for environmental contamination, and site remediation to restore premise to sellable condition, and

(3) Closure plans shall consider the risks identified in Section (a) including details assigning responsibility for closure, funding information, and plans for inventory processing, environmental sampling, and site remediation as needed.

12. **Transport**

General Principle – *An R2:2013 electronics recycler shall transport all equipment, components, and materials using entities that have the necessary regulatory authorizations and in a manner protective of security, public health and the environment.*

Requirements:

(a) An R2:2013 electronics recycler must ensure that all equipment, components, and materials to be transported are packaged appropriately in light of the risk they could pose during transportation to public health or the environment and the level of care warranted by its intended use and secured in accordance with Provision 10.

(b) An R2:2013 electronics recycler must verify that its transporters, including its own fleet, have all the necessary regulatory authorizations, maintain adequate insurance coverage consistent with the material and method of transportation, and maintain an acceptable vehicle and driver safety record during the previous 3 years.

13. **Documentation and Recordkeeping**

General Principle – *An R2:2013 electronics recycler shall maintain all the documentation necessary to demonstrate conformance to the R2:2013 Standard.*

Requirements:

(a) An R2:2013 electronics recycler shall have access at the certified facility to documents and records necessary to demonstrate conformity to each requirement of this document.

DEFINITIONS

Accredited Certification Body

An "Accredited Certification Body" is accredited by an International Accreditation Forum member body under the current ISO/IEC Standard 17021.

Collectible Electronics

"Collectible Electronics" includes items that are rare, vintage, and that are no longer manufactured or supported by original manufacturers.

Downstream Vendors

"Downstream vendors" include any entity to which a recycler transfers used or end-of-life electronic equipment, components, or materials including reuse, refurbishing, demanufacturing, processing, materials recovery, energy recovery, incineration, and disposal facilities.

Electronic Equipment

"Electronic equipment", also referred to as "equipment and components", includes computers and peripheral equipment – central processing units (CPU's); monitors; printers; keyboards; scanners; storage devices; servers; networking systems; copiers; fax machines; imaging systems; printing systems; telephones; televisions; video cassette recorders; camcorders; digital cameras; control boxes; stereo systems; compact disc players; radios; cell phones; pagers; personal digital assistants (PDAs); calculators; organizers; and game systems and its accessories. It furthermore includes any types of equipment that are designed primarily to store or convey information electronically, and any accessories to such equipment.

Focus Materials

"Focus Materials", also referred to as "FMs", are materials in end-of-life electronic equipment that warrant greater care during recycling, refurbishing, materials recovery, energy recovery, incineration, and/or disposal due to their toxicity or other potential adverse worker health and safety, public health, or environmental effects that can arise if the materials are managed without appropriate safeguards.

Focus Materials contain:

(1) Polychlorinated biphenyls (PCBs), or
(2) Mercury, or
(3) CRT glass, except for glass with lead content less than 5 parts per million, and clean of phosphors, CRT fines, coatings, and frit, or
(4) Batteries, or
(5) Whole or shredded circuit boards, except for whole and shredded circuit boards that do not contain lead solder, and have undergone safe and effective mechanical processing, or manual dismantling, to remove mercury and batteries.

Equipment, components, or materials (whole or shredded) that have undergone safe and effective mechanical processing or manual dismantling to remove FMs, yet still retain de minimus amounts of FMs, are not subject to the R2:2013 requirements that are triggered by the presence of FMs.

Key Functions

"Key Functions" are the originally-intended functions of a unit of equipment or component, or a subset thereof, that will satisfactorily serve the purpose(s) of someone who will reuse the unit.

Recyclers

"Recyclers" includes, but need not be limited to organizations that perform the following related to electronics:

(1) Collect
(2) Refurbish
(3) Recycle
(4) Resell
(5) Demanufacture
(6) Recover Assets
(7) Broker

As well as leasing companies that engage in these activities.

Recycling Chain

"Recycling Chain" refers to all the downstream vendors that handle end-of-life equipment, components, or materials that have passed through an R2:2013 electronics recycler's facility or control. It includes, but does not extend beyond materials recovery facilities, and conforms to Provision 5(c) or 5(d). For equipment and components that are sold or donated for reuse, it does not extend beyond the entity that conforms to Provision 6 (c) or (d).

Specialty Electronics

"Specialty Electronics" are rare and specialized equipment that is not generally available in retail. For example, medical, diagnostic, laboratory, or other devices, which are customized for a specific purpose.

DEC's Proposed Changes to the Solid Waste Management Regulations

PRESENTED BY:
Robert M. Rosenthal, Esq.
Jennifer L. Maglienti, Esq.
Thomas S. West, Esq.

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Comprehensive Revisions to 6NYCRR Part 360 Solid Waste Management Facilities Regulations

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Timeline

- Draft regulations posted on DEC website on February 26
- State Register and ENB publication on March 16
- Public hearings in June (Long Island 6/2, Albany 6/6, Rochester 6/7, New York City 6/9)
- Public information and targeted stakeholder workshops
- (April and May)
- Public comment period extended to September 13
- Final regulations in early 2017

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Part 360 Revised Series Structure

- Part 360 General Requirements
- Part 361 Material Recovery Facilities
- Part 362 Combustion, Thermal Treatment, Transfer, and Collection Facilities
- Part 363 Landfills
- Part 364 Waste Transporters
- Part 365 Biohazard Waste Management Facilities
- Part 366 Local Solid Waste Management Planning
- Part 369 State Assistance Projects

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Part 360 General Requirements

- Registration duration limited to 5 years
- New exemptions added
- New pre-determined BUDs added
- Case-specific BUD approvals limited to 5 years
- Specific provisions for case-specific BUDs for navigational dredge material (NDM) and oil/gas brine
- New section for management of historic fill

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Part 360 General Requirements

- Permit applications submitted by private entities must also demonstrate consistency with the goals and objectives of the Local Solid Waste Management Plan for municipalities in facility's service area
- Acceptance rate increases not designated as minor under Part 621 will be treated as new applications
- If financial assurance mechanism is provided by the private operator of a municipally-owned facility, the fully funded mechanism must be transferred to the municipality upon return to municipal operation or control

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Part 361 Material Recovery Facilities

Subpart 361-1 Recyclables Handling and Recovery Facilities
Subpart 361-2 Land Application and Associated Storage Facilities
Subpart 361-3 Composting and Other Organics Processing Facilities
Subpart 361-4 Wood Debris and Yard Trimmings Processing Facilities
Subpart 361-5 Construction and Demolition Debris Processing Facilities
Subpart 361-6 Waste Tire Handling and Recovery Facilities
Subpart 361-7 Metal Processing and Vehicle Dismantling Facilities
Subpart 361-8 Used Cooking Oil and Yellow Grease Processing Facilities

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Part 361 Material Recovery Facilities

- New exemption for small scale composting facilities to facilitate composting at community gardens [< 1cy SSO/wk]
- Registration provisions, instead of permits, for food scrap composting from 1000 to 5000 cubic yards per year
- New subpart established for production of mulch from grinding and storage of clean wood (wood debris & yard trimmings) [Exempt <2 acres; Registration <10ac]

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Part 361 Material Recovery Facilities

- Requires permit rather than registration for RHRFs and C&D debris processors that receive more than 250 tons/day
- Expand tracking of C&D debris to include material leaving registered C&D debris processing facilities
- Requires receiving, processing, and sorting of mixed C&D debris within an enclosed building

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Part 361 Material Recovery Facilities

- Incorporates the requirements of Article 27, Title 23: Vehicle Dismantling Facilities by establishing operating and reporting requirements for these facilities
- Requires registration for large scrap metal processors that store more than 500 cubic yards of metal
- New subpart added to address the processing of used cooking oil and yellow grease [Exempt <1000 gal/yr; Registration <500,000 gal/yr]

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Part 362 Combustion, Thermal Treatment, Transfer, and Collection Facilities

- Subpart 362-1 Combustion Facilities and Thermal Treatment Facilities
- Subpart 362-2 Municipal Solid Waste Processing Facilities
- Subpart 362-3 Transfer Facilities
- Subpart 362-4 Household Hazardous Waste Collection Facilities and Events

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Part 362 Combustion, Thermal Treatment, Transfer, and Collection Facilities

- Clarifies that emerging thermal treatment technologies are regulated under 362-1
- Adds registration provisions for combustion of limited amounts of waste tires [<10 tons/day], unadulterated wood [<1400 tons/day], and used cooking oil or yellow grease [<1000 gal/day]
- Relocates refuse-derived fuel processing facility requirements and post collection recyclables recovery facilities to MSW Processing Facilities under 362-2

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Part 362 Combustion, Thermal Treatment, Transfer, and Collection Facilities

- Expands exemptions for three specific transfer facility types:
  - -vehicle to vehicle transfer
  - -small municipally owned transfer facilities [20 cy/day]
  - -small source separated organic waste transfer facilities [5 cy/day]
- Prohibits source-separated recyclables, electronic waste, rechargeable batteries, mercury-containing products, and other product stewardship items from being transferred from transfer facility to a combustor, thermal treatment facility or landfill

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Part 362 Combustion, Thermal Treatment, Transfer, and Collection Facilities

- Repeals existing Subpart 373-4 for HHW collection and moves requirements into new subpart
- Requires fixed radiation detectors and establishes operating requirements including daily background radiation readings, acceptance thresholds, weekly field checks, annual detector calibration, staff training, records maintenance, and reporting
- (Similar requirements are included for other facilities that accept MSW including landfills, composting facilities, processing facilities, and transfer facilities which ship waste out of state)

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Part 363 Landfills

- Exemptions related to disposal relocated to this Part and several new exemptions added
- Limits exempt disposal of tree debris to no more than 1 acre (Outside Long Island only)
- Replaces the current exemption which allows unlimited disposal of concrete, asphalt, rock, brick, soil and glass (CARBS) at a facility with a limitation of no more than 5,000 cubic yards (Outside Long Island only)
- Removes requirement for a site selection study while still maintaining minimum siting criteria

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Part 363 Landfills

- Adds requirement for notification to the Department for inactive landfills which are encroached upon or which exhibit environmental impacts
- Requires liner integrity testing be conducted on both geomembrane liners of a double composite liner system
- Secondary leachate collection and removal system must be designed to a minimum capacity of 1000 gallons per acre per day for rapid detection of leaks

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Part 363 Landfills

- Consolidates Long Island and C&D Debris landfill requirements
- Reduced separation to bedrock from 10’ to 5’ if material meets $1x10^{-6}$ cm/s permeability specification
- Requires new landfills or subsequent development at existing landfills to utilize aboveground leachate storage tanks

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Part 363 Landfills

- Requires active landfill gas collection for new MSW landfills and subsequent development at existing MSW landfills
- Acceptance of alternate operating cover (AOC) above 20% of annual tonnage must be counted toward tonnage disposed
- Incorporates the concept of custodial care for long-term management of landfill after post-closure care period

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Part 364 Waste Transporters

- Exemption for small loads increased from 500 to 2000 lbs
- Registration criteria added for:
  - self transport of RMW quantities < 50 lbs per month
  - transport of < 50 lbs per shipment of HHW
  - transport of commercial waste > 2000 lbs per shipment
  - transport of C&D debris or historic fill > 10 cubic yards per shipment
  - transport of sharps from a household medical waste sharps collection facility
- Adds tracking forms for C&D debris, drilling and production waste, and historic fill

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Part 365 Biohazard Waste

- New Part that consolidates existing criteria for RMW and adds criteria for waste streams that are similar to RMW including:
  - -trauma scene waste
  - -biohazard/bioterrorism waste
- Registration replacing permitting for:
  - -on-site treatment for small quantity generators of RMW or biohazard waste < 220 lbs. month
  - -radiopharmacies
  - -on-site treatment facilities employing single use containment treatment systems that treat <50 lbs/month

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Part 366 Local Solid Waste Management Planning

- Streamlining and reorganization of the LSWMP content and approval process
- Clarified and enhanced the public participation process
- Current requirement for updates, modifications and biennial compliance reports replaced with an annual planning unit report, accompanied every other year with a biennial update
- The biennial update will be used as the mechanism for modifying (and receiving department approval for) LSWMPS

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Part 369 State Assistance Projects

- Establishes separate funding categories for:
  - -capital projects (waste reduction & recycling, HHW)
  - -education & coordination projects
  - -HHW collection and disposal projects
  - -landfill closure
  - -landfill gas management
  - -targeted WR&R priority area projects

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Part 369 State Assistance

- Establishes an annual application and funding process for Education & Coordination and HHW projects
- Allows Department to target high priority WR&R areas annually
- Requires that funded MWRR projects be included in the approved CRA or LSWMP for the municipality
- Restricts LF closure funding to landfills that stopped receiving waste prior to April 9,1997

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Comments Welcome

- Written public comments will be accepted until 5:00 pm on July 15, 2016 to:

  SolidWasteRegulations@dec.ny.gov

  or

  Melissa Treers, P.E.
  New York State Department of Environmental Conservation
  Division of Materials Management
  625 Broadway
  Albany, NY 12233-7260

Appropriate revisions will be made based on public input

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Questions or Comments?

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Highlights of the Major Changes to the State's Solid Waste Management Regulations

NYSBA, Environmental Law Section
October 15, 2016

Jennifer L. Maglienti, Esq.
NYSDEC, Office of General Counsel
Jennifer.Maglienti@dec.ny.gov

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Major Goals of the Rulemaking

1. **Streamline** regulations to make them easier for the regulated community and Department staff to understand and implement
2. **Address** additional facilities and waste streams that were previously exempt from regulation but have adverse impacts
3. **Update** technical criteria and relax or eliminate regulatory requirements which provided little or no environmental benefit

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Streamline

Consolidate definitions

Group requirements applicable to all facilities in one location

Reflect the solid waste hierarchy

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REGULATED WASTE STREAMS

- MSW
- Recyclables (Metals, Plastics)
- Compost/Organics
- Wood Debris/Yard Waste
- Construction and Demolition Debris
- Waste Tires
- Used Cooking Oil and Yellow Grease
- Metal Processing and Vehicle Dismantling
- Regulated Medical Waste

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FOCUS OF PUBLIC INTEREST

MULCHING
- Wood Debris & Yard Trimmings

CONSTRUCTION & DEMOLITION DEBRIS

RADIATION DETECTION

REGULATED MEDICAL WASTE

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- **Mulch production from wood debris:** larger than 2 acres now regulated. Registration: (2-10 ac); Permit (>10 ac) – Subpart 361-4

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YARD WASTE

Registration <30,000 cy
Permit >30,000 cy

Pile size restrictions and setbacks
- 200 ft to water well
- 25 ft to property line
- 200 ft to residence

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YARD WASTE

Temperature monitoring required at least 2x per week

Piles must be broken down if temp exceeds 140°F

Runoff must be addressed

Subpart 361-4

Department of Environmental Conservation

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Department of Environmental Conservation

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Construction & Demolition (C&D) Debris

- Facilities that receive 250 tons on any day or greater of concrete, asphalt, rock, brick and soil (CARBS) will need permit
- Expanded use of tracking forms for C&D debris transport
- Lowers threshold to trigger need for registration
- Adds new requirement for enclosure of mixed C&D debris processing facilities

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Exempt disposal?

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Exempt disposal?

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Radiation Detection

Facilities that handle MSW would be required to install fixed radiation detectors:

- Landfills
- Combustion facilities
- MSW composters
- Transfer facilities that ship out of state

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Radiation Detection – Commercial and Industrial Use

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REGULATED MEDICAL WASTE (RMW)

Expands scope of program to cover generators

Includes criteria for handling and treatment of RMW including household medical waste sharps

Contains autoclave requirements for RMW treatment facilities

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Feedback on draft rules. . .

- Lower permit threshold for RUCARBS will be disincentive to recycling and lead to more landfilling
- Transition rules lack administrative process
- Timeline for transition is too restrictive
- RMW rules conflict with federal law

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Feedback on draft rules, cont'd. . .

- Revoking BUD through regulation is improper
- Size and time restrictions on stockpiles are too restrictive
- Recycled asphalt pavement should be exempt from tracking
- Setbacks are impossible to meet in urban areas

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THANK YOU!

For More Information:

Draft regulations and supporting documents:
http://www.dec.ny.gov/regulations/81768.html

Contact info:

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Albany, New York 12233
518-402-9188

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Proposed Part 360 Regulations

Thomas S. West, Esq.
The West Firm, PLLC
October 26, 2016

KEY ISSUES FOR THE REGULATED COMMUNITY

Proposed Revisions to 6 NYCRR Part 360 – Something for Everyone; Too Much for Most

THE WEST FIRM
A PROFESSIONAL LIMITED LIABILITY COMPANY

Some Key Issues

- Wastes Originating From Oil and Gas Exploration and Production – Frack Wastes!!!
- Closure/Post-Closure/Custodial Care Issues.
- Local Solid Waste Management Plan ("LSWMP") Issues.
- Beneficial Use Determination ("BUD") Issues.

Frack Wastes

Section 363-4.5(l) & 363-8.1(a)(4) – Radiation Detectors Required for All Landfills.

- Fixed detection units;
- Set point – 2 to 5 times background;
- Daily background, weekly field checks and annual calibration required;
- Procedures for handling potentially contaminated and contaminated loads required.

Frack Wastes

The Single Issue Drawing the Most Comments:

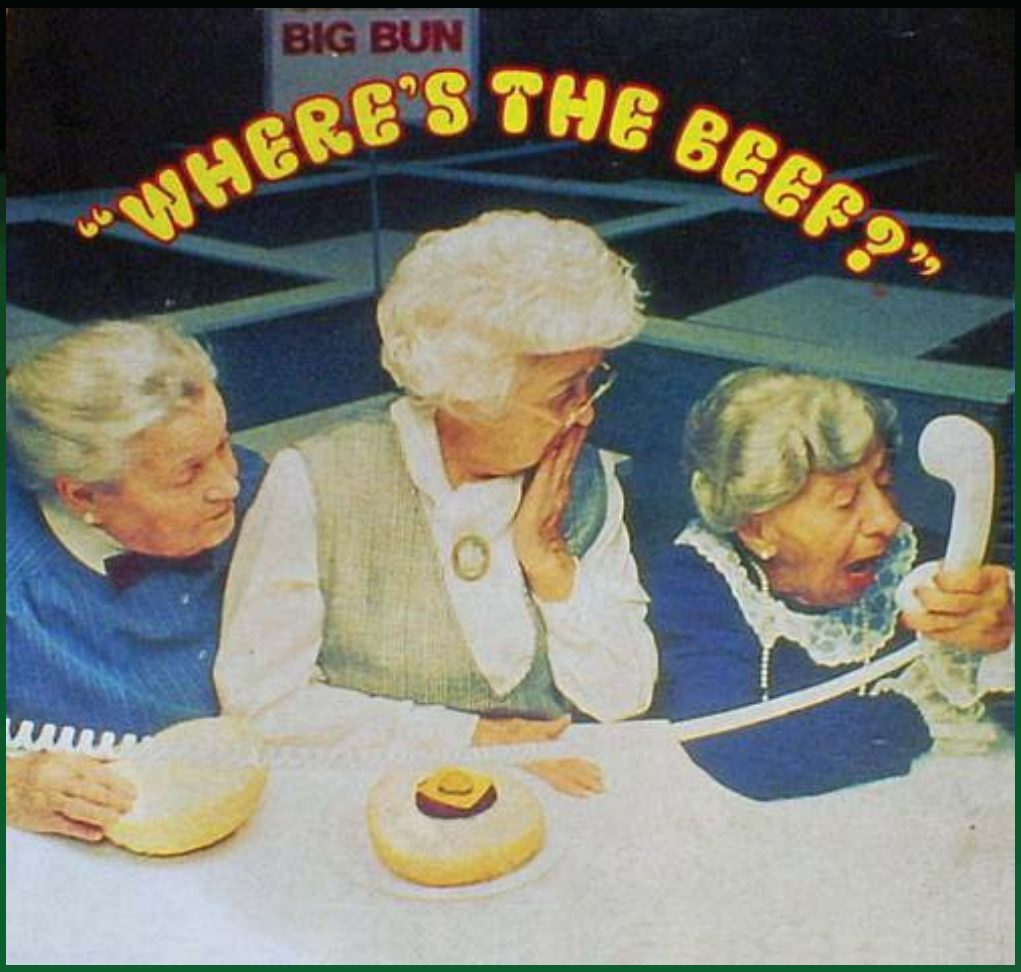
- Separate comment letters from 30+ Assembly and 20 Senate members calling for a complete ban on the disposal of frack wastes.
- Significant issue for environmental advocates of New York.
- Thousands of form comments seeking to ban disposal of frack wastes.

Frack Wastes – History of Issue

- Wastes from the oil and gas industry have been disposed at landfills for decades without incident or problem.
- The disposal of drill cuttings is legal under State law and regulation.
- *Matter of Chemung County,* August 4, 2011, rejected the adjudicability of the disposal of drill cuttings, but directed implementation of a formal monitoring protocol, voluntarily offered by the landfill operator, to monitor incoming loads for radioactivity.
- Since 2010, there have been no exceedances relating to frack wastes.

Frack Wastes – History of Issue

- September, 2015 – DEC issues a formal policy requiring the implementation of the Chemung County Landfill monitoring protocol at all landfills that receive frack wastes.
- December, 2015 – DEC issues a modified Part 360 permit for the Hyland Landfill over the objection of approximately 4000 commenters seeking to adjudicate the disposal of frack wastes. Hyland follows the Chemung County protocol for screening incoming wastes.
- The proposed part 360 regulations will formalize this official guidance.


BIG BUN
"WHERE'S THE BEEF?"

Post Closure Care – Are We Moving To Perpetual Care?

- Current regulations require financial assurance for post-closure care for a period of 30 years following closure of a Part 360 landfill.
- Current policy interprets this as a 30-year rolling time period, which extends the financial assurance requirement.
- The proposed regulations formally implement the 30-year rolling policy and introduce the concept of "custodial care," which follows the post-closure care period and seems to extend indefinitely. Proposed Part 360.22, Part 363-4.5(n), and Part 363-10.

Custodial Care Issues

- Proposed regulations requiring custodial care may exceed the legal authority of the DEC if there is no threat to the environment following the post-closure care period.
- Many of the terms are vague and ambiguous, making the proposed regulations suspect as a matter of law.
- Industry will have difficulty obtaining financial assurance for custodial care, without better definition and certainty regarding time limits.
- Proposed solutions – clarify the regulatory provisions, make custodial care available earlier, and require financial assurance for custodial care every five years.

LSWMP Issues – Potential Trouble for Private Operators

- Under existing regulations, permit applicants need only demonstrate consistency with a LSWMP if they are acting "by or on behalf of a municipality." *See* 6 NYCRR 360-1.2(b)(21).
- Proposed Part 360.16(c)(5), entitled "State and Local Plan Consistency," requires, *inter alia*, "A demonstration that the facility is consistent with the goals and objectives of:

....

(iii) the department-approved Local Solid Waste Management Plan (LSWMP) in effect for the municipalities in the facility's service area."

LWSMP Issues

- How is "consistency" with all LSWMPs in the "facility's service area" demonstrated?
- Private operators serve broad areas of the state & beyond.
- What if the local municipality does not want competition? Can the municipality put a private facility out of business by failing to mention the facility in the LSWMP?
- What about municipalities in other parts of the state that are serviced by the private facility?
- What is the effect on competition if a remote municipality needs to amend its LSWMP or Comprehensive Recycling Analysis before it can switch business to another contractor?

LSWMP Problems

- The Legislature did not grant the DEC the authority to delegate to municipalities the future of private facilities. Therefore, the proposal is *ultra vires*.
- The proposed regulation potentially impacts the vested rights of private operators. Consider the impact on private landfills, with tens of millions of dollars of private sector investment. *See Niagara Recycling v. Town of Niagara*, 83 A.D.2d 316 (4th Dep't 1981) (involving an existing commercial waste disposal facility and new local law giving town board authority to grant or deny permit to operate).

BUD ISSUES

- The proposed regulations limit general BUDs, limit individual BUDs to five years duration, substantially increase the application requirements to obtain an individual BUD, and increase the authority of the DEC to revoke BUDs.
- Many commenters have focused upon the five-year duration of a BUD, requesting permanent BUDs, but the environmental community wants to limit BUDs to three years.
- A related issue exists limiting alternative daily cover at landfills, which is most often a BUD material, to 20% of the volume allowed at the facility.

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Proposed Revisions to the Part 360 Series

Resa A Dimino
RADimino & Associates

ENVIRONMENTAL ADVOCATES OF NEW YORK
YOUR GOVERNMENT WATCHDOG

Based on Analysis Prepared for Environmental Advocates of NY

Enhanced Oversight

- Fewer exemptions
- More facilities and transporters under registration and / or permit
  - Basic operating standards and reporting
    - ***Need for on-line reporting system for easier analysis***
- Revisit registrations every 5 years
  - ***Three years would be preferred***
- Permitting requirements for large MRFs
- Limits on variances
- Integrates planning and permitting

GHG Reduction

- Mandatory landfill gas capture & destruction
- Incentives for food waste recovery
- Incentives for improved recycling

Recycling Incentives

- Strategic use of grant funds with new "Target Priority Area" grants
- Landfill "Sustainability Plans"
  - ***Should be stronger and updated every 3 years***
- Parallel service requirements for permitted drop off sites
- Clarified definition of recycling
- Disposal bans on source separated recyclables and materials in EPR programs

Organics Recovery

- Higher thresholds for registration and permitted facilities
  - Provides flexibility to experiment with small scale food waste recovery
  - Encourages small scale biodiesel production
- Regulatory certainty for developers of Anaerobic Digestion

Beneficial Use Determinations

- Review case-specific BUDs every 5 years
  - ***Should be every three years***
- Ability to rescind pre-determined BUDs
- Reporting requirements for all case-specific BUDs and pre-determined BUDs greater than 10,000 tons per year
- New requirements for Historic Fill, Navigational Dredge Material and Gas Storage and Production Brine
  - ***No BUDs should be issued for gas drilling & production waste***

Drilling & Production Waste

- May be managed at any landfill (C&D, Industrial or MSW), but not near leachate collection or final cover
  - ***Disposal of any oil and gas waste should be prohibited at any of these landfills***
- Tracking requirements in Part 364
- Leachate analysis for Radium, under certain conditions

Part 371 should be amended to eliminate the loophole that exempts oil and gas waste from hazardous waste

Expansion of Part 364

- Greater oversight of a variety of streams
  - Commercial Waste
  - Historic Fill
  - Construction & Demolition Waste
- Will create improved transparency and valuable data

Thank you!

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Constitutional Convention Panel

PRESENTED BY:
Prof. Nicholas Adams Robinson
Katherine Leisch, Esq.
Thomas A. Ulasewicz, Esq.

NEW YRK STATE BAR ASSOCIATION

Environmental Law Section

Fall Meeting

The Otesaga Resort
Cooperstown, New York

October 15, 2016
11:25 a.m.– 12:15 p.m. Constitutional Convention Panel (1.0 CLE Professional Practice)

The Potential for a Constitutional Convention in 2017: Implications for New York's "Forever wild" Forest Preserve and New York's Right to the Environment

Prof. Nicholas Adams Robinson
Elisabeth Haub School of Law
Pace University, White Plains, NY

Introduction

Every twenty years, the New York State Constitution mandates a public decision on whether or not to conduct elections for delegates to convene in a convention to rewrite the constitution. 2017 will focus New Yorkers on this question. This panel examines some of the issues that will arise regarding the constitution and the protection of the environment.

In 1894, New York's Constitutional Convention chose to provide protection for the Forest Preserve of the Adirondack and Catskill regions, in the wake of that era's illegal deforestation and flooding. In 1967, the Convention drafted a "Conservation Bill of Rights" and included it, and when the voters rejected their work (upset over non-environmental issues), the voters adopted that Conservation Bill of Rights in 1969, in the wake of gross levels of air and water pollution and toxic waste mismanagement. Since then the field of environmental law has become an integral part of the rule of law in New York, nationally, and globally. Today, as the State considers whether to amend the constitution, anticipating the wake of the gathering crises of sea level rise, disruption of weather patterns, and other climate change impacts, it is timely to debate debate whether or not New York should add the right to the environment to its constitution.

This Panel will outline the background and legal context for the 2017 Ballot Question and the scope of Article XIV, reviewed in the attached Report of the NYSBA Committee on the State Constitution (Prof. Nicholas A. Robinson), examine current legal issues of New York State law governing the Forest Preserve (Thomas A. Ulasewicz, Esq.) and explore how the State's Public Trust Doctrine provides a foundation or floor sustaining the existing protection for the Forest Preserve (Katherine Leisch, Esq.).

ENVIRONMENTAL CONSERVATION IN NEW YORK'S CONSTITUTION: BACKGROUND & SCOPE

1. The Requirement of Voting on a Convention

- Article XIX, Section 2: "At the general election to be held …every twentieth year … the question "Shall there be a convention to revise the constitution and mend the same?" shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of each Senate district shall elect 3 delegates…[who] shall convene on the first Tuesday in April next ensuing after their election … [and] any proposed constitution … shall be submitted to a vote not less than six weeks after the adjournment of such convention.

  NYSBA Committee on the New York State Constitution studies the legal and policy issues arising out of New York's unique and lengthy constitution:

  The Committee on the New York State Constitution will serve as a resource for the Association with regard to issues related to or affecting the New York State Constitution; finalizing substantive provisions of the state constitution and making recommendations with regard to potential changes; promoting initiatives designed to educate the legal community and the public about the state constitution and providing recommendations with regard to the forthcoming public referendum in 2017 on whether to convene a state constitutional convention, and propose the delegates selection process if the convention takes place. The chair is Henry Greenberg.
  See http://www.nysba.org/nyconstitution/

- NEW YORK STATE BAR ASSOCIATION CONSTITUTIONAL REPORTS:

  Two reports are approved by the House of Delegates. Both are succinct and provide essential briefings.
- www.nysba.org/nyconstitution
- www.nysba.org/homerulereport
  A third report, adopted by the Committee, is pending before the House of Delegates for its November 2016 meeting.

2. The Background for Article XIX

THOMAS JEFFERSON URGED "GENEOLOGICAL SOVEREIGNTY":
constitutions should adapt to changing circumstances
Joseph J. Ellis, The Quarter: Orchestrating the Second American Revolution 1783-1789 (2016)

Writing to a Virginian lawyer, Samuel Kercheval, Jefferson stated that a constitution should be revised every 19 to 20 years. Jefferson's time period was based on the mortality rate of his times. Since a majority of adults could be

expected to be dead in approximately 19 years, Jefferson believed that each new generation should have the right to adapt its government to changing circumstances, rather than being ruled by the past. Some criticize this "utopian vision."
Thomas Jefferson's Letter to Samuel Kercheval (1816

3. The Evolution of the NYS Constitution

- July 1776 – 1st Constitution Convention in White Plains – Reconvenes in April 1777 in Kingston – Constitution adopted April 20, 1777 (**with 7,000 words)**
- Amendments were promptly needed – Convene 1801 Convention – How to organize NY's Governance was an on-going debate
- Peter J. Galie, Ordered Liberty: A Constitutional History of New York (1996)
- 1846 "People's Constitution" adds the rule proposing a 20 year Convention ballot question
- 8 Constitutional Conventions: 1801, **1821** (adopts a bill of rights) , **1846**, 1867, **1894** (adopts Education & Forest Preserve Articles), 1915*, **1938**, 1967* (*voters defeated proposed Constitutions)
- Today's Constitution is still that of 1938, ***with 50,000 words***, and additional specific amendments adopted from time to time

4. The Forest Preserve

In 1894, New York led the world enacting the very first constitutional environmental rights.

- "The lands of the State, now owned or hereafter acquired, constituting **the forest preserve** as now fixed by law**, shall be forever kept as wild forest lands.** They shall not be leased, sold or exchanged, or be taken by any corporation public or private, nor shall the timber thereon be sold, removed or destroyed."
- ***Unanimously adopted in 1894, Article VII; since 1938 Article XIV***
- The history ands case law about Article XIV is reviewed in Nicholas A. Robinson, "Forever Wild": New York's Constitutional Mandates to Enhance the Forest Preserve (Arthur M. Crocker Lecture, Feb. 15, 2007), http://digitalcommons.pace.edu/lawfaculty/284/.; access also at:
- http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1283&context=lawfaculty
- Currently Article XIV is subject to judicial enforcement via a CPLR Article 78 preceding in *Protect the Adirondacks! v. NYS DEC and APA* (Index No 2137-13, Sup. Ct., Third Department); tree cutting for snow mobile path in Forest Preserve enjoined, (See http://www.adirondackalmanack.com/2016/09/court-continues-temporary-ban-on-state-tree-cutting.html); pleadings at http://www.protectadks.org/2016/09/papers-filed-in-major-forever-wild-lawsuit-that-will-shape-the-future-of-the-forest-preserve/

5. New York's "Conservation Bill of Rights"

The Conservation Bill of Rights was adopted in 1969, as Article XIV, Section 4. It is discussed in the attached NYSBA Committee report in one of the only legal critiques of this important, but neglected, provision.

Requires NY to conserve and protect air and water, agricultural lands, wetlands, and preserve scenic beauty and lands beyond the Forest Preserve, due to their beauty, "wilderness character," geological, ecological or historic values."

These Conservation Rights arguably have not been given to the people directly (not "self-executing,") and the New York Legislature is slow to implement laws guaranteeing these rights

6. Historical antecedents for "rights" in fundamental laws and constitutions

Magna Carta (1215): "We shall not sell, or deny, or delay right or justice to anyone."

- What is "due process of law"?
- Should Our Constitution be long and detailed, or be concise and broadly guide government?
- Do we want to pay taxes for some governmental service simply because they were constitutionally mandated in past centuries?
- Since our legislature seems unable to reform itself, should we mandate a Constitutional Commission to prepare reforms, as we did from 1868-1894?
- ***The Forest Charter (1217)***: "These liberties and free customs traditionally held, both within and without the royal forests, are granted to all in our realm, to everyone. Everyone is also obliged to observe the liberties and customs granted in the Forest Charter." [Chap. 17] - Nicholas A. Robinson, The Charter of the Forest: Evolving Human Rights in Nature, in *Magna Carta* and the Rule of Law 311 (Daniel Barstow Magraw et al., eds. 2014), http://digitalcommons.pace.edu/lawfaculty/990/.
- Today Pennsylvania and 6 US States and 174 nations provide a right to the environment in their Constitutions.
- Hawaii's Supreme Court has construed the Public Trust Doctrine, which prevents the sovereign from undermining the levels of protection achieved; this duty to maintain progressive levels of protection, is also known internationally in human rights law and in international environmental law, as the Principle of Non-Regression.
- See James May, ed. Principles of Constitutional Environmental Law (ABA 2011), and D Boyd, The Rights Revolution (2012)

7. The Emergence of Environmental Rights

174 nations have environmental rights in their constitutions (John D. Boyd, The Rights Revolution)

- **Montana's Constitution** preserves its pure trout streams
- **Pennsylvania's Constitution** guarantees that its local governments could ban fracking
- **Philippines Constitution** requires today's governments to guarantee a sound environment to "future generations"
- **India's Constitution** requires educating the public about environmental health threats
- We live in the "Anthropocene" – humans have induced global change – glaciers melt and seas rise, weather patterns change and invasive species migrate
- Today, there are analogues to the environmental problems of the 1890s, e.g. forest fires, erosion and floods
- NY has enacted the "Community Risk and Resilience Act" in 2014 – But Disaster Risk Reduction not yet a high NYS priority. Could a Right to the Environment, judicially enforceable, enable State and local authorities to prepare for climate change and protect the environment?
- Is it time for an update on NY Constitutional "Environmental Rights"?

8. The NYSBA Committee on the State Constitution Report

See attached Report

REPORT AND RECOMMENDATIONS
CONCERNING
THE CONSERVATION ARTICLE IN THE
STATE CONSTITUTION (ARTICLE XIV)
ADOPTED BY
THE COMMITTEE ON THE NEW YORK STATE
CONSTITUTION
AUGUST 3, 2016

The Report provides a review of the Historical Development of Article XIV, including the dawn of Constitutional Conservation in the 1894"Forever Wild" Clause, and the 1915 policies reserving in principle 3% of the Preserve for reservoirs (The Burd Amendment) and the 1915, 1938 and 1967 Constitutional Conventions affirming the Forever Wild Mandate. It reviews also the 1969 enactment of the Constitutional Conservation Bill of Rights. The Report notes that many discrete amendments to Article XIV, as well as the vas expansion of the protected "forever wild" forest area in the years form 1894 until today, and examines how the Sections of Article XIV beyond the first Section related to the Forest Preserve. More attention will be needed to Section 3, which is not discussed. It examines the Conservation Bill of Rights in Section 4 in detail, a much neglected part of New York's constitutional environmental rights.

The full text of Article XIV is annexed to the report, for convenience of reference.

9. Prospects for Constitutional Reform

Several discrete proposal for changes in Article XIV have been studied and proffered by *The Adirondack Council.* See generally, http://www.adirondackcouncil.org/page/information-on-november-2013-adirondack-constitutional-amendments-125.html and http://www.adirondackcouncil.org/page/constitutional-amendments-153.html

The Adirondack Mountain Club is actively involved in constitutional issues involving the Forest Preserve. http://www.adk.org/page.php?pname=current-issues-constitutional-amendments

Beyond the environmental conservation issues, various recommendations of other Civic Groups have been made, e.g. Citizens Union, NY PIRG, and others.

Many education programs will be convened about various aspects of the Constitution in the coming months, including at the Rockefeller Institute in Albany, a law review symposium in the spring convened by the Pace Law Review at the Elisabeth Haub School of Law (White Plains, NY). One upcoming event is the forum on October 20th, 4-6 pm, will be held at Columbia Law School, in New York City, on the Constitution's Home Rule Articles (see the NYSBA Report on that issue, *supra*). Former NYC Mayor David Dinkins, the only living delegate from the 1967 Convention, will be speaking, along with others.

There many other Constitutional Articles that deserve study and present opportunities to improve the constitutional basis for governance in New York State:

- State (Art. VII) and Local (Art. VIII) Finances
- Taxation (Art. XVI)
- Education (Art. XI)
- Corporations (Art. X)
- Canals (Art. XV)
- Social Welfare (Art. XVII)
- Housing (Art. XVIII)
- Defense (Art. XII)

Beyond this Panel Discussion:

> *NYSBA House of Delegates' Meeting November 6, 2016, is scheduled to consider the Committee on the Constitution's Report on Conservation, and any comments yet to be submitted by Environmental Law Section's Executive Committee Recommendations*

Annex: NYSBA Report on environmental conservation in the Constitution.

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

THE CONSERVATION ARTICLE IN THE STATE CONSTITUTION (ARTICLE XIV)

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

AUGUST 3, 2016

The opinions expressed are those of the committee preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

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INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20-years voters be asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning the conservation article in the State Constitution, Article XIV.

In 1894, a New York State Constitutional Convention made world history by adopting the first constitutional provisions mandating nature conservation.[2] In the debates over the establishment of an Adirondack and Catskill Forest Preserve ("the Forest Preserve"), Convention delegates concurred with their President — the eminent lawyer Joseph H. Choate — when he observed: "You have brought here the most important question before this Assembly. In fact, it is the only question that warrants the existence of this convention."[3]

Approved by the voters in 1894, this groundbreaking provision, known as "the forever wild clause," is "generally regarded as the most

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[1] N.Y. CONST. art. XIX, § 2 ("At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .").

[2] PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 245 (1991) [hereinafter, "REFERENCE GUIDE"].

[3] *Quoted in* 2 ALFRED L. DONALDSON, A HISTORY OF THE ADIRONDACKS 190 (1921) [hereinafter, "HISTORY OF THE ADIRONDACKS"].

important and strongest state land conservation measure in the nation."[4] It is now part of Article XIV of the State Constitution,[5] which currently consists of five sections.

Section 1 contains the forever wild clause, establishing and protecting the Forest Preserve, and then carving out exceptions for certain lands and uses in it. The historic language is set forth in Section 1's first two sentences:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.[6]

Section 2 provides for the creation of public reservoirs within the Forest Preserve.[7] Section 3 recognizes that forest and wildlife conservation are public policy and permits acquisition of additional lands outside the Forest Preserve for these purposes.[8] Section 4 — the so-called "Conservation Bill of Rights" — recognizes that the conservation and preservation of the natural resources and scenic beauty of the State are public policy and provides for State acquisition of lands for a "state nature

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[4] WILLIAM R. GINSBERG, The Environment, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 318 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) (paper prepared for the New York State Temporary State Commission on Constitutional Revision established prior to the 1997 mandatory referendum vote on whether to hold a Constitutional Convention).

[5] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 173, 295-97, 347-49 (1996) [hereinafter, "ORDERED LIBERTY"].

[6] N.Y. CONST. art. XIV, § 1.

[7] *Id.* § 2 (on "Reservoirs"; section titles summarize content and are not part of the Constitution).

[8] *Id.* § 3 (on "Forest and wild life conservation; use or disposition of certain lands authorized").

and historical preserve" located outside the Forest Preserve.[9] Finally, Section 5 addresses how violations of Article XIV may be enjoined.[10]

The Forest Preserve has stood the test of time, enjoying widespread public support since its enactment.[11] Constitutional Conventions held in 1915, 1938 and 1967 all concluded that the forever wild clause should be retained, and voters have defeated all efforts to dilute it. Moreover, since 1894, the State has vastly expanded the acreage of the Forest Preserve, purchasing lands with funds approved by bond acts, legislative appropriations and gifts.[12] Voters have only removed a relatively small volume of acres from the Forest Preserve, through surgically-precise amendments.[13]

In 1997, when New York held its last mandatory referendum on whether to call a Constitutional Convention, concern that a Convention might consider ill-advised changes to Article XIV prompted opposition in some quarters.[14] After more than 120 years, however, the forever wild

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[9] *Id.* § 4 (on "Protection of natural resources; development of agricultural lands").

[10] *Id.* § 5 (on "Violations of article; how restrained").

[11] GINSBERG, The Environment, *supra* note 4, at 318.

[12] DAVID STRADLING, THE NATURE OF NEW YORK: AN ENVIRONMENTAL HISTORY OF THE EMPIRE STATE 102-04 (2010).

[13] These amendments appear as the clauses that begin with the word "Notwithstanding" in Section 1 of Article XIV. *See infra* Appendix A (setting forth each "notwithstanding" amendment). An example of such a limited amendment occurred on November 5, 2013, when the voters approved the Raquette Lake amendments to allow 200 landowners and public facilities to clear title of legal impediments since 1848 affecting their properties, while enlarging the size of the Forest Preserve by adding 295 acres on the Marion River. *See* MIKE PRESCOTT, *Commentary: Vote Yes on the Township 40 Amendment*, ADIRONDACK ALMANAC (Oct. 8, 2013), http://www.adirondackalmanack.com/2013/10/commentary-vote-yes-township-40-amendment.html.

[14] For example, in 1997, a task force of the New York City Bar Association concluded that "the risk of elimination or dilution of the 'forever wild' provisions far outweighs the nominal or speculative gains that could be achieved at a constitutional convention." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE

clause remains intact. Throughout its history, there has never been broad-based public support for repealing or diluting the forever wild protections, and nothing in the lengthy record of past Conventions and amendments to Article XIV suggest that delegates to a 2019 Convention would seek to do so. In any event, worries over the forever wild clause's future should not inhibit study and robust debate over other provisions in Article XIV. Simply put, while there is no reason to modify the forever wild clause, opportunities to simplify and enhance other provisions in Article XIV merit serious consideration by policymakers and the public.

Indeed, few New Yorkers know what Article XIV covers, beyond the "forever wild" clause. Analysis of this one article, illustrates how comparable studies of other articles can make a significant contribution to the public's understanding of the State Constitution. The Committee's review of Article XIV suggests at least four potential changes that warrant study and debate:

First, since the forever wild clause's adoption in 1894, the text immediately following it has been the subject of 19 amendments, making Section 1, by far, the most amended section of the Constitution.[15] The net result is a series of detailed exceptions, consisting of 1,401 words, which have also rendered Section 1 one of the longest sections in the Constitution.[16] One way to eliminate this excessive verbiage — and thereby

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TASK FORCE ON THE NEW YORK STATE CONSTITUTIONAL CONVENTION *in* 52 THE RECORD 627-28 (1997) (hereinafter, "CITY BAR REPORT").

[15] PETER J. GALIE & CHRISTOPHER BOPST, *Constitutional "Stuff": House Cleaning the New York Constitution — Part II,* 78 ALB. L. REV. 1531, 1545-46 (2015) [hereinafter, *"House Cleaning"*]; *see also* GALIE, ORDERED LIBERTY, *supra* note 5, at 173 ("The very stringency of [the forever wild clause's] . . . language . . . has frequently interfered with legitimate and important uses of the land, such as scientific forestry. Not surprisingly, this provision has been amended fifteen times [as of 1996] to accommodate other uses.").

[16] GALIE & BOPST, *House Cleaning, supra* note 15, at 1540. *See* N.Y. CONST. art. XIV, § 1, *infra* Appendix A (setting forth each "notwithstanding" amendment).

enhance the forever wild mandate — would be to place it in a separately authorized constitutional document.[17]

Second, Section 2, adopted in 1913, reserving up to 3% of the Forest Preserve for constructing possible water reservoirs, has rarely been invoked, and the reasons behind its adoption may no longer exist.[18] An argument can thus be made that Section 2 should be eliminated.

Third, the mandate in the Conservation Bill of Rights (Section 4) to establish a natural and scenic preserve has been unfulfilled. The State has made little effort to implement this mandate, which lacks the clarity of the forever wild clause in Section 1. Other states have natural and scenic preserves, and their approaches could be emulated in New York.

Fourth, the "rights" set forth in Section 4 are not "self-executing,"[19] meaning that they cannot be invoked absent legislative authorization. Several other states,[20] such as Pennsylvania,[21] and 174 nations,[22] have adopted and implemented constitutional "environmental rights." The object of constitutional environmental rights is to ensure that citizens have a right

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[17] For example, New Jersey includes a list of amendments in a constitutional "Schedule." *See* N.J. CONST. art. XI.

[18] *See infra* notes 49 to 51, and 93 to 102, and accompanying text.

[19] *See* GINSBERG, The Environment, *supra* note 4, at 221-29.

[20] BARTON H. THOMPSON, JR., *The Environment and Natural Resources, in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM ch. 10 (G. Alan Tarr & Robert F. Williams eds., 2006).

[21] *See* PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of the all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people."); *see generally*, James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, *in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305 (James. R. May ed., 2011).

[22] DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION (2012).

— and government has a duty — to provide, resilient and effective responses for environmental problems.[23] Whether New York should amend Article XIV to include an enforceable "Environmental Bill of Rights" to address contemporary environmental challenges is a question worthy of consideration.

This report takes no position on whether a Constitutional Convention should be called in 2017, or if called, how in 2019 it should address potential changes to Article XIV. Even so, if the voters wish to simplify and enhance the present Constitution, Article XIV provides opportunities to do so.

To provide background for public discussion and debate, this report summarizes the Committee's background and study of Article XIV, provides a historical overview of its provisions, and evaluates potential amendments.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee serves as a resource for the State Bar on issues relating to or affecting the State Constitution; makes recommendations regarding potential constitutional amendments; provides advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional

[23] For discussion of other states' constitutional environmental rights provisions, *see infra* notes 119 to 126, and accompanying text. New York State and local governmental have begun to address sea level rise and storm surges, such as experienced in Superstorm Sandy in 2012. In 2014, for example, the State Legislature enacted, and Governor Cuomo signed, The Community Risk and Resilience Act, 2014 N.Y. Sess. Laws ch. 355 (S-6617B) (McKinney) (codified as amended in scattered sections of N.Y. ENVTL. CONSERV. LAW, N.Y. PUB. HEALTH LAW, and N.Y. AGRIC. & MKTS. LAW), which provides for planning to cope with ongoing sea level rise, larger numbers of extreme weather events, and other impacts of climate change. Some other states provide constitutional provisions to cope with climate change impacts. *See, e.g.,* N.J. CONST. art. VIII, § 6(a) (directing, in Tax and Finance Article, that funds shall be available for flood and storm damage). It may be asked whether or not climate change today is an environmental issue comparable to the need in 1894 to save forest lands, or in 1967 to abate extreme pollution through framing a "Conservation Bill of Rights" (adopted just before "Earth Year," 1969), which led to the enactment of laws for pollution control, wetlands preservation, and other environmental legislation of the 1970s and 1980s.

Convention; and promotes initiatives designed to educate the legal community and public about the State Constitution.

On March 10, 2016, the Committee began its study of Article XIV, by listening to a presentation delivered by Committee member Nicholas A. Robinson, Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law Emeritus at the Elisabeth Haub School of Law at Pace University.

At the Committee's next meeting on April 29, 2016, it heard from two additional distinguished experts on environmental law: Michael B. Gerrard and Philip Weinberg. Professor Gerrard is the Andrew Sabin Professor of Professional Practice at Columbia Law School, teaches courses on environmental law, climate change law, and energy regulation, and is director of the Sabin Center for Climate Change Law. Professor Weinberg taught constitutional and environmental law at St John's Law School, after establishing and heading the Environmental Protection Bureau in the New York State Department of Law under Attorney General Louis J. Lefkowitz, and is currently an adjunct member of the faculty of the Elisabeth Haub School of Law at Pace University. Professors Gerrard and Weinberg discussed Article XIV, including its relevance to emerging environmental issues, such as the impacts of climate change in New York.

After further discussion and review, the Committee concluded that the public and legal profession would be well served by a report that provided a review of significant issues concerning Article XIV. On June 2, 2016, the Committee met and reviewed a first draft of this report. The report's final report and recommendations were considered and generally agreed at a meeting held on July 14, 2016, with final unanimous approval, after reviewing editorial refinements, on August 3, 2016.

II. THE HISTORICAL DEVELOPMENT OF ARTICLE XIV[24]

Since 1894, the New York State Constitution has included an article addressing nature conservation. In that year the Constitutional Convention adopted and voters approved the forever wild clause that conferred constitutional protection of the Forest Preserve.[25] Over time, and through numerous amendments, the current provisions of Article XIV took shape. To understand the opportunities that exist for simplifying and enhancing Article XIV, it is essential to recall the history of how it came to be.

A. The Dawn of Constitutional Conservation

New York inaugurated constitutional conservation in the last quarter of the 19th century because citizens were increasingly troubled by mismanagement of forests in both the Catskill and Adirondack regions of the State.[26] Verplank Colvin, appointed State Surveyor in 1870, had been

[24] The Committee acknowledges the research on the legal history of Article XIV by its member Professor Nicholas A. Robinson.

[25] *See* J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF NEW YORK 350 (2d ed. 1915) (In 1894, "[t]he convention initiated the sound policy of protecting the lands of the State known as the forest preserve, forbad their being leased, sold or exchanged or taken . . . This was the first constitutional recognition of forestation . . ."). Previously, the Forest Preserve had been established by statute. 1885 N.Y. Laws ch. 283, §§ 7 & 8. The Forest Preserve is today defined in Article 9 of the Environmental Conservation Law. *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(6) ("The 'forest preserve' shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster, and Sullivan . . . .").

[26] Extreme forest fires, erosion, flooding and loss of flora and fauna accompanied extensive logging operations, in the Catskills and Adirondacks. In THE ADIRONDACK PARK, Frank Graham, Jr. described the public debates and legislative lobbying of the time. The issues included: intense debates about economic trade-offs between advocates of scientific forestry as opposed to unbridled timber exploitation; distress about unlawful corruption by lumber interests; concerns to preserve watersheds to ensure water supplies for many uses, especially the flow for the Erie Canal; and vocal calls to preserve resources for fish and game, other recreation, health and for spiritual values. *See* FRANK GRAHAM, JR., THE ADIRONDACK PARK *passim* (1978) [hereinafter, "THE ADIRONDACK PARK"].

mapping the Adirondacks for the first time. He and others alerted the State to growing environmental degradation in the wake of undisciplined timbering. As early as 1868, Colvin had urged "the creation of an Adirondack Park or timber preserve under the charge of a forest warden and deputies."[27] Vast areas of trees were being clear-cut and the lands abandoned to fires and erosion. Based on Colvin's topographical survey reports, in 1883, the Legislature banned sales of State lands in the 10 Adirondack counties, appropriated funds for the first time to buy lands, and directed Colvin to locate and survey all State lands.[28] In 1884, the State Comptroller issued a report of investigations into unpaid taxes on abandoned lands. That report featured maps of the State's lands in the Forest Preserve, along with a more extensive map depicting the wider Adirondack region as a "park," with its borders delineated in blue. This is the origin of the term "Blue Line," which continues to refer to the Adirondack Park's borders, an area encompassing both the Forest Preserve and other public and private lands.[29]

On May 15, 1885, the Legislature adopted legislation to establish the Forest Preserve in both the Catskills and Adirondacks, with a State Forest Commission to oversee it.[30] Just prior to the Forest Preserve's

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[27] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 164-65.

[28] *Id.* at 171-75.

[29] The Forest Preserve was defined by the N.Y. Laws of 1885 (ch. 283) to be situated in "the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan." The Adirondack Park was established by the N.Y. Laws of 1892 (ch. 707). The Adirondack and Catskill Forest Preserve and the Adirondack Park were re-enacted in the N.Y. Laws of 1893 (ch. 332, §§ 100 & 120).
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[30] N.Y. Laws of 1885 (ch. 283, § 7) provided:

> All the lands now owned or that any hereafter be acquired by the State of New York within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Laurence, Warren, Washington, Greene, Ulster, and Sullivan, shall constitute and be known as the Forest Preserve.

establishment, on April 20, 1885, the Legislature had transferred the mountain lands and forests, then held by Ulster County, to the State in settlement of the State's outstanding claims for tax revenues.[31] Many parcels of land in the North Woods had escheated to the State,[32] because loggers, after clear-cutting the timber had ceased to pay annual taxes due and abandoned their properties.[33] These damaged lands became the first Forest Preserve acreage.

In the decade after 1885, despite the Forest Commission's oversight, 100,000 acres of forest were logged unlawfully in the Adirondacks. These years saw both increased land degradation and public demands for enhanced protection. In 1886, William F. Fox, a representative of the State Forest Commission, visited the Forest Preserve in the Catskills and noted its value for watershed and recreation, encouraging its protection.[34] By 1890, the Forest Commission had issued a special report, "Shall a Park be established in the Adirondack Wilderness?"[35] However, in 1893 the Forest Commission

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The statute further provided that the lands of the Forest Preserve "shall be kept forever wild" and "shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." *Id.* § 8.

[31] ALF EVERS, THE CATSKILLS: FROM WILDERNESS TO WOODSTOCK ch. 77 (1972) [hereinafter, "CATSKILLS"].

[32] *See, e.g.*, *People v. Turner,* 72 Sickels 227, 117 N.Y. 227, 22 N.E. 1022 (1889) (involving a plea that defendant had not cut state trees unlawfully based on defects in an 1877 tax sale of lands in default of taxes for the years 1864 through 1871).

[33] In 1885, New York State owned 681,374 acres in the Adirondacks and 34,000 acres in the Catskills. Today, the State owns 2.6 million acres in the Adirondack Preserve and 286,000 acres in the Catskill Preserve. N.Y. DEPT. Envtl. Conserv., http://www.dec.ny.gov/lands/4960.html.

[34] EVERS, CATSKILLS, *supra* note 31, at 579-80.

[35] NEW YORK STATE FOREST COMMISSION, THE SPECIAL REPORT OF THE NEW YORK FOREST COMMISSION ON THE ESTABLISHMENT OF AN ADIRONDACK STATE PARK (1891).

also approved extensive wood cutting contracts, which the State Surveyor and the State Engineer disapproved.[36]

B. 1894: The Forever Wild Clause

Concerns over the destruction of the State's forests, and the resulting impact on the public's health and well-being, became a central issue during the 1894 Constitutional Convention.[37] A delegate from New York City, David McClure,[38] introduced an amendment to the Constitution that was supported by delegates committed to nature conservation, led by Louis Marshall, a prominent constitutional lawyer.[39] The heart of the proposed amendment read: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private."[40] This language was refined a bit and during the Convention's debates, Judge William P. Goodelle, a delegate from Syracuse, proposed the addition of a few extra words. The Convention adopted the revised text of New York's first "forever wild" clause by a vote of 122 to 0, which made it the only amendment to be unanimously embraced at that Convention or any prior Convention.[41]

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[36] *Id.* at 186.

[37] GALIE, ORDERED LIBERTY, *supra* note 5, at 173.

[38] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 189-92.

[39] OSCAR HANDLIN, *Introduction, in* LOUIS MARSHALL: CHAMPION OF LIBERTY xi, (Charles Reznikoff ed., 1957). *See also* HENRY M. GREENBERG, *Louis Marshall: Attorney General of the Jewish People*, *in* NOBLE PURPOSES: NINE CHAMPIONS OF THE RULE OF LAW at 111 (Norman Gross ed., 2006).

[40] GEORGE A. GLYNN, ed., DOCUMENTS AND REPORTS OF THE [1894] CONSTITUTUTIONAL CONVENTION 172 (1895).

[41] *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF ALBANY, ON TUESDAY, THE EIGHTH DAY OF MAY, 1894 786-87; DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 189-92.

The 1894 Convention also addressed how violations of the forever wild clause were to be enjoined. The delegates settled on an enforcement mechanism (the current Section 5) that authorized proceedings brought for this purpose by the State, or by a private citizen with the consent of the Appellate Division of the Supreme Court, on notice to the State Attorney General.[42]

The forever wild clause and its companion enforcement mechanism were placed in Article VII, Section 7, which was approved by the voters on November 6, 1894.[43] Opponents of the forever wild mandate immediately challenged the scope of the provision. In 1896, the Legislature placed before the electorate an amendment that would allow timbering on State lands. However, the proposed amendment was resoundingly defeated, by a vote of 710,505 to 321,486.[44]

New York courts soon took notice of the forever wild clause. In an 1899 case, the Court of Appeals observed: "The primary object of the park, which was created as a forest preserve, was to save the trees for the threefold purpose of promoting the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving the timber for use in the future."[45]

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[42] Former N.Y. CONST. art. VII, § 7 (now N.Y. CONST. art. XIV, § 5). Examples of such lawsuits include: *Helms v. Reid,* 90 Misc.2d 583, 394 N.Y.S.2d 987 (Sup. Ct. Hamilton Cnty. 1977); *Slutzky v. Cuomo,* 128 Misc. 2d 365, 490 N.Y.S.2d 427 (Sup. Ct. Albany Cnty. 1985).

[43] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 193.

[44] *See* HISTORICAL SOCIETY OF THE NEW YORK COURTS, VOTES CAST FOR AND AGAINST PROPOSED CONSTITUTIONAL CONVENTIONS AND ALSO PROPOSED CONSTITUTIONAL AMENDMENTS, https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf [hereinafter, "VOTES CAST FOR AND AGAINST"].

[45] *People v. Adirondack Ry. Co.,* 160 N.Y. 225, 248, 54 N.E.2d 689, 696 (1899), *aff'd,* 176 U.S. 335 (1900).

Nearly every year since the forever wild clause's enactment, the State has acquired lands in the Catskills and Adirondacks to add to the Forest Preserve, with funds provided by Bond Acts approved by the voters, or from appropriations enacted by the Legislature.[46] For example, in 1916, by a majority of 150,496, voters approved a Bond Act to acquire lands for the Palisades Interstate Park and to increase lands in the Forest Preserve.[47] Many subsequent Bond Acts have financed acquisitions expanding the Forest Preserve.[48]

C. 1913: The Burd Amendment

In 1911, a constitutional amendment (known as the "Burd Amendment") was proposed allowing up to 3% of the Forest Preserve to be flooded for reservoirs. This would allow water to be diverted for municipal drinking water, wells, canals, and flood control.[49] Voters approved the Burd Amendment in 1913, and it appears today in Section 2 of Article XIV.[50]

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[46] JANE EBLEN KELLER, ADIRONDACK WILDERNESS: A STORY OF MAN AND NATURE 194-95 (1980). After the great "blowdown" of 1950, a storm of hurricane proportions, on the advice of the New York Attorney General, the Legislature authorized the removal of vast amounts of destroyed trees to avert forest fires and disease, and funds from the wood collected and sold were used to buy more lands to add to the Forest Preserve. *Id.* at 228-30.

[47] 1916 N.Y. Laws ch. 569.

[48] For example, Bond Acts approved by the voters in 1960, 1965, 1986, 1993, and 1996 authorized acquisitions of parks lands. *See* N.Y. State Fin. Law § 97-d (entitled, Environmental Quality Bond Act Fund"). Legislative appropriations and gifts have also enabled additions to the Forest Preserve. As of July 2016, the Forest Preserve contains three million acres in the Adirondacks and 287,500 acres in the Catskills. *See* N.Y. Dep't of Envtl. Conserv., *New York's Forest Preserve*, http://www.dec.ny.gov/lands/4960.html.

[49] STACEY LAUREN STUMP, "Forever Wild," *A Legislative Update on New York's Adirondack Park,* 4 ALB. Gov't L. REV. 682, 694 (2011) [hereinafter, "Forever Wild"].

[50] Former N.Y. CONST. art. VII, § 16 (now N.Y. CONST. art. XIV, § 2).

However, this allotment of potential reservoir sites has been rarely invoked.[51]

D. 1915, 1938 and 1967: Constitutional Conventions Affirm the Forever Wild Mandate

Delegates to the 1915 Constitutional Convention reaffirmed the 1894 forever wild mandate.[52] Similarly, the 1938 Constitutional Convention restated the "forever wild" clause and its enforcement mechanism in a revised Article XIV, with Sections 1 and 5 protecting the Forest Preserve.[53] Additionally, the 1938 Convention added forest and wildlife conservation measures in Section 3.1, in order to facilitate increasing the land area of the Forest Preserve;[54] and Section 3.2, to provide that State lands, situated

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[51] *See infra* notes 93 to 102, and accompanying text.

[52] GINSBERG, The Environment, *supra* note 4, at 318 ("The commitment to forest preservation and a strict interpretation of the 'Forever Wild' clause was reaffirmed by delegates to the 1915 Constitutional Convention.") (citing N.Y. CONSTITUTIONAL CONVENTION, UNREVISED RECORD 1336 (1915)). *See also Ass'n for the Protection of the Adirondacks v. MacDonald,* 228 A.D. 73, 79-80, 239 N.Y.S. 31, 38 (3d Dept. 1930) ("The constitutional convention of 1915 incorporated the 1894 provision verbatim, except that it added the words 'trees and' before the word 'timber' and then expressly added provisions for reforestation, for the construction of fire trails, for the removal of dead trees and dead timber for reforestation and fire protection solely, and for the construction of a state highway from Long Lake to Old Forge."), *aff'd* 253 N.Y. 234, 170 N.E. 902 (1930).

[53] *See* GALIE, ORDERED LIBERTY, *supra* note 5, at 295 ("The 1938 convention created a separate article for the conservation provisions of the constitution. At that time these provisions were primarily, but not exclusively, concerned with the forest preserves of the state. The central provision placed an absolute prohibition on the use of the preserve in the desire to keep it 'forever . . . wild.'").

[54] N.Y. CONST. art. XIV, § 3.1 ("Forest and wild life conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation. The prohibitions of section 1 of this article shall not apply to any lands heretofore or hereafter acquired or dedicated for such purposes within the forest preserve counties but outside of the Adirondack and Catskill parks as now fixed by law, except that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private.").

outside contiguous Forest Preserve acres, might be sold in order to permit further acquisitions within the Forest Preserve.[55]

The last Constitutional Convention of the 20th century occurred in 1967. Then, as before, there was little partisan disagreement. The delegates left the historic language of the forever wild clause intact.[56]

E. 1969: The Conservation Bill of Rights

At the 1967 Constitutional Convention, significant amendments to strengthen the State's environmental stewardship were adopted, without a single dissenting vote, and became known as the "Conservation Bill of Rights."[57] These amendments failed when the voters rejected the Convention's proffered Constitution in 1967.[58] These same provisions were again presented to the electorate in 1969 as a separate constitutional amendment, and adopted by a vote of 2,750,675 to 656,763.[59] It now appears as Section 4 of Article XIV and reads as follows:

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[55] *Id.* § 3.2 ("As to any other lands of the state, now owned or hereafter acquired, constituting the forest preserve referred to in section one of this article, but outside of the Adirondack and Catskill parks as now fixed by law, and consisting in any case of not more than one hundred contiguous acres entirely separated from any other portion of the forest preserve, the legislature may by appropriate legislation, notwithstanding the provisions of section one of this article, authorize: (a) the dedication thereof for the practice of forest or wild life conservation; or (b) the use thereof for public recreational or other state purposes or the sale, exchange or other disposition thereof; provided, however, that all moneys derived from the sale or other disposition of any of such lands shall be paid into a special fund of the treasury and be expended only for the acquisition of additional lands for such forest preserve within either such Adirondack or Catskill park.").

[56] HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 245 (1996) [hereinafter, "1967 CONSTITUTIONAL CONVENTION"].

[57] *Id.* at 250 ("The Conservation Bill of Rights was adopted, 175-0, with support from all sides.").

[58] *Id.* at 349-50.

[59] VOTES CAST FOR AND AGAINST, *supra* note 44.

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.[60]

Following the adoption of this provision, Governor Nelson A. Rockefeller reconstituted the New York State Conservation Department into the Department of Environmental Conservation. Additionally, in the 1970s the Legislature enacted laws dealing with air and water pollution and other environmental issues.[61] These developments fulfilled the spirit of Section 4 while rendering some provisions of little practical effect.[62]

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[59] DULLEA, 1967 CONSTITUTIONAL CONVENTION, *supra* note 56, at 349-50.

[60] N.Y. CONST. art. XIV, § 4.

[61] GINSBERG, The Environment, *supra* note 4, at 319 n.12.

[62] *See* N.Y. STATE BAR ASS'N, NEW YORK ENVIRONMENTAL LAW HANDBOOK §1.1, at 1-4 (Nicholas A. Robinson ed., 1988) ("The Rapid Development of Environmental Law"); *cf.* GINSBERG, THE Environment, *supra* note 4, at 319 n.12 ("It cannot be ascertained whether these statutes were to some degree a consequence of the

F. Adjustments to the Forest Preserve (1894-present)

Voters have periodically approved small changes to remove or exchange discrete parcels of land from the Forest Preserve to permit clearly defined developments.[63] Such decisions to remove lands have always been narrowly framed and today appear immediately after the forever wild clause in Section 1 of Article XIV.

Examples of such voter approved exceptions include the following:

- 1918: construction of a State Highway from Saranac Lake to Long Lake, and on to Old Forge by way of Blue Mountain Lake and Raquette Lake; [64]
- 1927: construction of a road to the top of Whiteface Mountain as a Memorial to veterans of World War I;[65]
- 1941, 1947 & 1987: ski trails on Whiteface, Belleayre, Gore, South and Peter Gay Mountains;[66]
- 1957 & 1959: 400 acres to eliminate dangerous curves and grades on state highways, as well as lands for the "Northway" Interstate highway, in response to Congress's enactment of the Interstate Highway Act.[67]

Conversely, voters have periodically rejected attempts to carve exceptions to the forever wild mandate. In 1930, for example, Robert Moses campaigned for adoption of the "Closed Cabin Amendment," which would

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constitutional mandate or a reflection of nationwide federal and state legislative activity concerning the environment in the 1970s and 1980s.").

[63] GALIE, ORDERED LIBERTY, *supra* note 5, at 347-349.

[64] DONALDSON, HISTORY OF THE ADIRONDACKS, *supra* note 3, at 248-49.

[65] VOTES CAST FOR AND AGAINST, *supra* note 44.

[66] GINSBERG, The Environment, *supra* note 4, at 319.

[67] *Id.*

have allowed construction of lodges, hotels and recreational facilities on Forest Preserve lands. The Legislature approved the placement of this amendment on the ballot in 1932, but voters overwhelmingly defeated it.[68]

The voters have also approved exchanges of parcels of Forest Preserve for other parcels of equal or greater acreage and value. For example:

- 1963: 10 acres conveyed to the Village of Saranac Lake in exchange for 30 other acres;[69]
- 1965: 28 acres exchanged for 340 acres in the Town of Arietta;[70]
- 1979: 8,000 acres exchanged with the International Paper Company for an equivalent acreage;[71]
- 1983: conveyance of Camp Sagamore and its historic buildings, to the Sagamore Institute, in exchange for 200 acres;[72]
- 2013: swap of land for a mining operation to expand into Forest Preserve Lands by removing those lands in exchange for a larger expansion of the Forest Preserve elsewhere.[73]

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[68] GRAHAM, THE ADIRONDACK PARK, *supra* note 26, at 187; STUMP, "*Forever Wild,*" *supra* note 49, at 696.

[69] GINSBERG, The Environment, *supra* note 4, at 319 n.10.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] The proposal placed before the voters for this amendment was as follows:

> The proposed amendment to section 1 of article 14 of the Constitution would authorize the Legislature to convey forest preserve land located in the town of Lewis, Essex County, to NYCO Minerals, a private company that plans on expanding an existing mine that adjoins the forest preserve land. In exchange, NYCO Minerals would give the State at least the same

This pattern of carefully framing and debating amendments to Article XIV on a case-by-case basis, in order to adjust the strictures of the "forever wild" Forest Preserve, has persisted until today. The forever wild clause itself is preserved as first adopted.

In sum, over the 122 years that the forever wild clause has been a part of the Constitution, it has been debated and amended, but the mandate to safeguard the Forest Preserve remains as critical a component of the Constitution as when adopted in 1894.[74] The provision is unique among state constitutions in the United States. It rightly occupies a treasured place in our State Constitution and has been consistently protected but never weakened.[75]

III. THE FOREST PRESERVE, SECTIONS 1, 2 & 5

Today, the Constitutional provisions for the Forest Preserve are found in Sections 1, 2 and 5 of Article XIV. While the Forest Preserve is renowned worldwide,[76] it has a unique legal status under New York law.[77]

> amount of land of at least the same value, with a minimum assessed value of $1 million, to be added to the forest preserve. When NYCO Minerals finishes mining, it would restore the condition of the land and return it to the forest preserve.

New York Land Swap With NYCO Minerals Amendment, Proposal 5 (2013), Ballotpedia.org, https://ballotpedia.org/New_York_Land_Swap_With_NYCO_Minerals_Amendment,_Proposal_5_(2013)#cite_note-quotedisclaimer-5. Implementation of this amendment is the subject of judicial review as of July 2016.

[74] ALFRED S. FORSYTHE & NORMAN J. VAN VALKENBURGH, THE FOREST PRESERVE AND THE LAW (1996).

[75] *See* CITY BAR REPORT, *supra* note 14, at 627 ("The 'forever wild' provision is important and uniquely protective of the environment, and should be retained in the constitution.").

[76] In 1969, it was included by UNESCO in the Champlain-Adirondack Biosphere Reserve. *See* UNESCO, *Champlain-Adirondak* [sic], in MAB BIOSPHERE RESERVES DIRECTORY, http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?code=USA+45&mode=all.

A. Sections 1 & 5

The clarity and mandatory nature of the "forever wild" clause is a classic illustration of an enforceable constitutional norm. Through periodic amendments to Section 1 proposed by the Legislature and approved by the voters, the State has determined the appropriateness of any derogation from the Constitution's "forever wild" mandate. These discrete adjustments to allow non-wilderness uses within the Blue Line boundaries of the Forest Preserve are of relatively little moment, in light of the substantial enlargements to the Forest Preserve over the years. Once placed in the Forest Preserve, new acreage enjoys "forever wild" status and constitutional protection.

Although there has been little litigation under Article XIV,[78] the enforceability of the forever wild clause is not open to question. A violation of Article XIV may be enjoined under Section 5, which authorizes the State to seek such relief through a judicial proceeding, or a private citizen with the

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[77] The Forest Preserve exists in the Catskills and Adirondacks, where it is distinct from the Adirondack Park. It is under the stewardship of the New York State Department of Environmental Conservation. *See, e.g., Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conserv.,* 153 Misc. 2d 606, 583 N.Y.S. 2d 119 (Sup. Ct. Ulster Cnty. 1991), *aff'd,* 199 A.D.2d 852, 605 N.Y.S. 2d 795 (3d Dep't 1993), *app. withdrawn,* 83 N.Y.2d 907, 637 N.E.2d 280, 614 N.Y.S.2d 389 (Table) (1994). The Legislature recognized the Adirondack Park in the N.Y. Laws of 1892 (ch. 707). The Forest Preserve is not legally in the purview of local authorities or the Adirondack Park Agency, both of which govern privately-held lands in the Adirondack Park, or the local authorities in the Catskills, or the New York City Department of Environmental Protection which manages the reservoirs in the Catskills. When State agencies, such as the Department of Transportation, violate the Forest Preserves "forever wild" status, enforcement proceedings result. *See* 26 THE N.Y. ENVTL. LAWYER (N.Y. State Bar Ass'n Sec. on Envtl. Law), spring 2006, at 31-34; *id.*, summer 2006, at 9-20.

[78] GALIE, REFERENCE GUIDE, *supra* note 2, at 251. *See also Helms v. Reid,* 90 Misc. 2d at 586, 394 N.Y.S.2d at 992 ("There is almost a total absence of court decisions construing this important provision in our State Constitution and the time has now come for a judicial interpretation of this provision so as to guide the future preservation of the unique Adirondack region of our State.").

consent of the Appellate Division.[79] The intent of Section 5 was to remove the Forest Preserve from the control of the legislature and to vest oversight of its mandates within the powers of the judiciary.[80]

Soon after the 1894 Convention, several New Yorkers formed a civic group to monitor compliance with the "forever wild" mandate. In the 1920s, the Association for the Preservation of the Adirondacks availed itself of its constitutional rights and sought judicial enforcement of the "forever wild" clause.[81] Specifically, the Association opposed siting Winter Olympic facilities in the Forest Preserve. The Appellate Division, Third Department, determined that the Constitution required that the Forest Preserve be preserved "in its wild nature, its trees, its rocks, its streams. It must be a great resort for the free use of all the people, but it must be a wild resort in which nature is given free rein."[82] The Court of Appeals affirmed, declaring that

> [t]he Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole. Whatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for everyone within the state and for the use of the people of the State.[83]

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[79] Formerly N.Y. CONST. art VII, § 9, renumbered and approved on November 8, 1938.

[80] *See* CHARLES Z. LINCOLN, 3 CONSTITUTIONAL HISTORY OF NEW YORK 395 (1906) ("By including these subjects in the Constitution they are withdrawn from legislative control, and this withdrawal is in most cases the chief reason for constitutional interference.").

[81] *Association for the Protection of the Adirondacks v. MacDonald,* 228 A.D. 73, 239 N.Y.S. 31 (3d Dept.), *aff'd* 253 N.Y. 234, 170 N.E. 902 (1930).

[82] *Id.* at 82.

[83] *Association for the Protection of the* Adirondacks *v. MacDonald*, 253 N.Y. 234, 238, 170 N.E. 902, 904 (1930).

Thus, the State's highest court has recognized that the people's rights in the Forest Preserve, established under Section 1, are effective and enforceable through Section 5. The means by which the public may access or enjoy the Forest Preserve can be regulated by the Legislature, but only if it does not infringe on the "wild" characteristics.[84] Courts have had no difficulty construing and applying these straightforward principles.[85]

Although the "forever wild" clause itself is a model of clarity, the balance of Section 1 is unwieldy and unreadable. After the first two elegant sentences comes a dreary and prolix recitation of each specific exception amending the Constitution's rule of "forever wild."[86]

The text of Section 1 could easily be shortened and improved by authorizing a public roster of Forest Preserve Amendments. The roster can be maintained as an official record of amendments' terms, along with a record of land and waters that have been added to enlarge the Forest Preserve. Once an amendment has been adopted, derogation from "forever wild" is realized (such as when a road is built or lands transferred to allow a rural cemetery expanded in exchange for adding wild river lands to the Forest Preserve), and there would seem to be no reason for the Constitution

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[84] *See id.* at 238-39, 170 N.E. at 904 ("Unless prohibited by the constitutional prohibition, the use and preservation are subject to the reasonable regulations of the Legislature.").

[85] *See* CITY BAR REPORT, *supra* note 14, at 627 ("This provision, first enacted in 1894, has been consistently enforced by the courts as a powerful tool to protect New York's irreplaceable natural resources."). For example, construing Court of Appeals precedent, the court in *Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conserv.,* Supreme Court, Ulster County, found it clear "that insubstantial and immaterial cutting of timber-sized trees was constitutionally authorized in order to facilitate public use of the forest preserve so long as such use if consistent with the wild forest lands." 153 Misc. 2d 606, 609, 583 N.Y.S. 2d 119, 122 (Sup. Ct. Ulster Cnty. 1991), *aff'd,* 199 A.D.2d 852, 605 N.Y.S. 2d 795 (3d Dep't 1993), *app. withdrawn,* 83 N.Y.2d 907, 637 N.E.2d 280, 614 N.Y.S.2d 389 (Table) (1994).

[86] One commentator has referred to the amendments in Article XIV, Section 1, as reading like a road "gazetteer." PHILLIP G. TERRIE, CONTESTED TERRAIN: A NEW HISTORY OF NATURE AND PEOPLE IN THE ADIRONDACKS (2d ed. 2008).

to be used as an historical record of enactments. Indeed, when acres are added to the Forest Preserve, this fact does not appear in the Constitution, even though the "forever wild" safeguard applies to them at once.[87]

Also, the implicit reference in the first sentence of Section 1 to the 1885 Forest Act,[88] through the use of the phrase "as now fixed by law," appears redundant, since "now" has evolved and the Forest Preserve is defined today in the State Environmental Conservation Law.[89] The excision of this phrase would shorten Section 1 without any substantive impact.

While subject to debate, the Forest Preserve's judicial enforcement provisions in Section 5 have proven to be effective.[90] Section 5 anticipated by 78 years the enactment in 1972 of procedures for citizen suits, which appear in many environmental statutes, such as Section 505 of the federal Clean Water Act[91] and its New York State analogue.[92] Section 5 was

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[87] In a similar vein, two noted commentators have suggested condensing the exceptions into a general exception. "For example, the section could be amended to delete everything after the second sentence and simply add to the end of the first sentence the words 'as heretofore guaranteed by constitutional provision." GALIE & BOPST, *House Cleaning, supra* note 15, at 1546.

[88] 1885 N.Y. Laws ch. 283.

[89] *See* N.Y. ENVTL. CONSERV. LAW § 9-0101(6) ("The 'forest preserve' shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster, and Sullivan . . . .").

[90] *Compare* GINSBERG, The Environment, *supra* note 4, at 320 ("This section is unusually restrictive in its limitation on citizens' suits. It may also prohibit other remedies such as damages. Thus, if trees are wrongfully destroyed in the Forest Preserve, the wrongdoer can be enjoined from further cutting, but a court may not be able to award damages to the state for the value of the trees destroyed." (citing *Matter of Oneida County Forest Preserve Council v. Wehle*, 309 N.Y 152, 128 N.E.2d 282 (1955)).

[91] 33 U.S.C. § 1365.

[92] *See* N.Y. DEP'T OF ENVTL. CONSERV., DEE-19: CITIZEN SUIT ENFORCEMENT POLICY (July 23, 1994), http://www.dec.ny.gov/regulations/25226.html.

adopted to permit enforcement of the "forever wild" mandate, and has not been used to enforce other potential rights within Article XIV.

B. Section 2

Adopted by the voters in 1913, Section 2 (known as the Burd Amendment) reserves up to 3% of the Forest Preserve for reservoirs and dams. However, in stark contrast to the forever wild mandate in Section 1, Section 2 is rarely used,[93] and has been contested whenever its provisions have been invoked.[94]

Most notably, in 1953, by a vote of 1,002,462 to 697,279, the electorate approved an amendment that revoked the Legislature's power to provide for use of portions of the Forest Preserve for the construction of reservoirs to regulate the flow of streams.[95] As a consequence, Section 2 "was cancelled and withdrawn" to the extent that "the People of the State . . . rendered the lands of the State Forest Preserve inviolate for use in regulating the flow of streams."[96]

Another example of public opposition to the placement of reservoirs and dams in the Forest Preserve occurred in 1955. Voters then defeated (1,622,196 to 613,727) a proposed amendment to use Forest Preserve lands

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[93] In 1915, the Legislature enacted the Machold Storage Law, which allowed a Water Power Commission in the Conservation Department to authorize dams. 1915 N.Y. Laws ch. 662. In general, use of Section 2 to site reservoirs for waterpower in the Forest Preserve has been highly contested; and section 2 has gone largely unused for municipal water supplies. While the Stillwater Reservoir was expanded in 1924, little other use was sought to be made of Forest Preserve lands, until the City of New York in the 1960s sought additional water sources.

[94] For example, when proposals were made to flood the Moose River Valley with a dam, they were challenged in *Adirondack League Club v. Board of Black River Regulating Dist.*, 301 N.Y. 219, 93 N.E.2d 647 (1950).

[95] VOTES CAST FOR AND AGAINST, *supra* note 44.

[96] *Black River Regulating Dist. v. Adirondack League Club,* 307 N.Y. 475, 484, 121 N.E.2d 428, 430-31 (1954), *rearg. denied,* 307 N.Y. 906, 123 N.E.2d 562 (1954), *app. dismissed,* 351 U.S. 922 (1956).

for the construction and operation of the Panther Mountain reservoir to regulate the flow of the Moose and Black rivers.[97] Likewise, in 1947 Governor Thomas E. Dewey opposed proposals for constructing the proposed Higley Mountain Dam, which the Legislature authorized in the 1920s.[98]

In recent years, few reservoirs and dams have been constructed nationally, and even less in New York.[99] Worries that cities would deplete their water supplies have dissipated. Moreover, statutes enacted long after the adoption of Section 2 would constrain future attempts to place reservoirs, dams and the like in the Forest Preserve. For example, among the provisions of the Environmental Conservation Law is protection of the extensive fresh water wetlands found in the Adirondacks,[100] along with rules for environmental impact assessment,[101] both of which would restrict any contemplated use of Section 2.[102]

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[97] VOTES CAST FOR AND AGAINST, *supra* note 44; GRAHAM, THE ADIRONDACK PARK, *supra* note 26, at 206-07.

[98] PAUL SCHNEIDER, THE ADIRONDACKS: A HISTORY OF AMERICA'S FIRST WILDERNESS 291-94 (1998).

[99] In 2014, the Lake Placid Village Dam was removed from the Chubb River. In 2015, the Saw Mill Dam in Willsboro was removed from the Bouquet River. There is an increasing nationwide trend of dam removals to restore ecological systems. *See* AMERICAN RIVERS, MAP OF U.S. DAMS REMOVED SINCE 1916, https://www.americanrivers.org/threats-solutions/restoring-damaged-rivers/dam-removal-map/.

[100] *See* N.Y. ENVTL. CONSERV. LAW art. 24; N.Y. COMP. CODES R. & REGS. tit. 6.

[101] N.Y. ENVTL. CONSERV. LAW art. 8 (the "State Environmental Quality Review Act" or "SEQRA").

[102] Beyond locating possible dam sites, enabling legislation would be required to select the sites, in addition to further constitutional amendments to remove the sites chosen along with access roads for construction equipment, eminent domain procedures to condemn private or other public rights unavoidably impacted by the dam and reservoirs, and appropriations to pay for the dam construction.

Thus, a question exists as to whether Section 2 continues to serve a constitutional purpose and should remain part of New York's fundamental law. As noted, Section 2 has rarely been invoked, and any future use of it would be constrained by statute. Arguably, too, the repeal of Section 2 from the Constitution would enhance Section 1's "forever wild" norms.

IV. THE CONSERVATION BILL OF RIGHTS, SECTION 4

Although Section 4 was intended to be a "Conservation Bill of Rights,"[103] it is debatable whether it has attained fundamental constitutional stature. After Section 4's adoption, and at the request of Governor Rockefeller in 1970, the legislature authorized a codification of the 1911 Conservation Law, which it then re-enacted in 1972 as the Environmental Conservation Law. The Legislature thereafter enacted new legislation, including the State's Endangered Species Act,[104] Tidal and Freshwater Wetlands Acts,[105] Wild and Scenic Rivers Act,[106] and New York's implementing statutes for the federal Clean Air Act,[107] Clean Water Act,[108] and laws on solid[109] and hazardous wastes.[110]

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[103] Proposals for strengthening the environmental rights in the Constitution predate the 1967 Convention. *See, e.g.*, ANNUAL REPORT OF THE JOINT LEGISLATIVE COMM. ON CONSERV., NAT'L RES. AND SCENIC BEAUTY, Legislative Document No. 13 (1967). On the continuing debate over a broader environmental rights, *see* CAROLE L. GALLAGHER, *Movement to Create an Environmental Bill of Rights: From Earth Day 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 107 (1997).

[104] 1970 N.Y. Laws ch. 1047 & 1048; N.Y. ENVTL. CONSERV. LAW § 11-0535.

[105] N.Y. ENVTL. CONSERV. LAW art. 24 (Freshwater wetlands) and art. 25 (Tidal wetlands).

[106] 1972 N.Y. Laws ch. 869 ; N.Y. ENVTL. CONSERV. LAW art. 24, tit. 22.

[107] The Clean Air Act of 1970, Pub. L. No. 88-206, 77 Stat. 392 (1970), *codified at* 42 U.S.C. §§ 7401, *et seq.*, implemented in New York as N.Y. Comp. Codes R. & Regs. tit. 6, §§ 200, *et seq.*; *see Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977), *cert denied* 434 U.S. 902 (1977).

[108] *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), *codified at* 33 U.S.C. § 1251, *et seq.* (the "CLEAN WATER

In one sense, the broad policy goals of the Conservation Bill of Rights have been realized through federal and State environmental statutes.[111] In fact, Section 4 was enacted on the eve of the first "Earth Day" in 1970, which was a time when the State suffered severe water and air pollution, acute loss of wetlands and species, and widespread contamination of hazardous and toxic waste. It was apparent that the voters in 1969 wanted a constitutional mandate to oblige government to restore and secure their environmental public health and quality of life, and the Legislature responded accordingly.

In another sense, the more profound environmental rights contemplated by Section 4 have not been effectuated. Section 4 expressly provides for State acquisition of lands for a "state nature and historical preserve" located outside the Forest Preserve.[112] Although this provision has been on the books for nearly fifty years "with questionable effect,"[113] the State has not established a "Preserve" for natural resources and scenic beauty, either on par with the Forest Preserve or with such preserves in other states.[114]

ACT"); N.Y. ENVTL. CONSERV. LAW art. 17; N.Y. Comp. Codes R. & Regs. tit. 6, §§ 750, *et seq*.

[109] The Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976), *codified at* 42 U.S.C. 6901, *et seq*.; N.Y. ENVTL. CONSERV. LAW art. 27.

[110] N.Y. ENVTL. CONSERV. LAW art. 27, tit. 9 *and* N.Y. Comp. Codes R. & Regs. tit. 6, §§ 200, *et seq*.

[111] *See* GALIE, REFERENCE GUIDE, *supra* note 2, at 251 ("Protection of the kind envisaged by this section had already been provided by statute, at least in part. . . . The broad policy goals of this section were implemented by statues in the 1970s.").

[112] N.Y. CONST. art. XIV, § 4.

[113] GINSBERG, The Environment, *supra* note 4, at 326.

[114] Comparable provisions are found in the states of Arkansas, Florida, Hawaii, Illinois, Indiana, Maryland, Michigan, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Virginia and Washington. *See* Frank P. Grad, 10 TREATISE ON

Furthermore, Section 4 does not appear to be self-executing. At least one court has held that Section 4's provisions afford no constitutionally-protected property right enforceable by courts.[115] Hence, the provision amounts to little more than an exhortation for the government to act.[116] Citizens apparently cannot seek judicial enforcement of the Conservation Bill of Rights, as they can the "forever wild" clause.[117]

Over 20 years ago, Professor William R. Ginsberg argued that New York should move "toward 'self-executing' status for the existing constitutional statement of environmental goals."[118] He recommended converting the general language of Section 4 into a specific "environmental right," such as exists in other states. For example, the constitution for the Commonwealth of Pennsylvania provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are

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ENVIRONMENTAL LAW § 10.03(v) (1986). Although laws in New York exist to protect wild plants and biodiversity, sufficient funding has not been provided to implement them nor integrated them with Article XIV's provisions. *See* PHILIP WEINBERG, *Practice Commentaries,* N.Y. ENVTL. CONSERV. LAW § 3-0302, at 54 (McKinney's 2005).

[115] *See Leland v. Moran,* 235 F.Supp.2d 153, 169 (N.D.N.Y. 2002) ("Article 14, section 4 of the New York State Constitution requires the legislature to include adequate provision for the abatement of various types of pollution. It has done so by enacting the ECL [Environmental Conservation Law]. Nothing in the language of this constitutional provision sufficiently restricts the DEC's discretion in enforcing the ECL such that it provides plaintiffs with a source of a constitutionally protected property right."), *aff'd,* 80 Fed. Appx. 133, 2003 WL 22533185 (2d Cir. 2003).

[116] *See* GINSBERG, The Environment, *supra* note 4, at 320 ("This section is similar to other provision of other state constitutions that mandate state legislatures to enact environmentally protective legislation. The efficacy of such provisions is limited. Courts usually refuse to compel legislatures to act on the basis of constitutional mandates. Since the judiciary is a coordinate branch of government, it does not have the power to compel the legislature to act in a purely legislative function.") (citations omitted).

[117] *See id.*

[118] *Id.* at 326 (Conclusion #2).

> the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people.[119]

Florida,[120] Hawaii,[121] Illinois,[122] and Montana[123] provide comparable constitutional environmental rights (as do 174 nations),[124] and 19 states provide constitutional rights for hunting and fishing.[125] Establishing such rights in state constitutions serve varied objectives,[126] and afford a unique dimension of environmental protection.[127]

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[119] PA. CONST. art. I, § 27. The Pennsylvania Supreme Court gave direct effect to this provision in *Robinson Township, Washington Cnty., Pa. et al. v. Commonwealth,* 623 Pa. 564, 683-87, 83 A.3d 901, 974-977 (Pa. 2013).

[120] FLA. CONST. art. II, § 7 ("It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.").

[121] HAW. CONST. art. XI, § 9 ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.").

[122] ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").

[123] MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities . . . .").

[124] DAVID R. BOYD, THE RIGHTS REVOLUTION *passim* (2012).

[125] *See* NAT'L CONFERECE OF STATE LEGISLATURES, *State Constitutional Right to Hunt and Fish* (Nov. 9, 2015), http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx.

[126] *See* ART ENGLISH & JOHN J. CARROL, *State Constitutions and Environmental Bills of Rights*, *in* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 18 (2015), http://knowledgecenter.csg.org/kc/content/state-constitutions-and-environmental-

But it is by no means clear that New York would benefit from the inclusion in the State Constitution of a self-executing environmental right. Current State and federal law provide ample environmental protections, and regulators already police environmentally harmful conduct. Judicial review of most environmental issues is readily available under Article 78 of the Civil Practice Law & Rules, and citizen suits can be brought to authorize enforcement of most environmental statutes.[128] Thus, it is debatable whether the addition of a self-executing constitutional environmental right could do more; indeed, it might even lead to needless, duplicative litigation, which would discourage economic development, especially in economically-depressed regions of the State.

To be sure, though, there is another side of the argument. Arguably, the narrow scope of Section 4 in Article XIV is insufficient to address New York's new environmental challenges. In 1894, the destruction of forests was deemed a crisis worthy of constitutional reform. The "forever wild" mandate was thus born. In 1969, pollution presented a comparable crisis. The "Conservation Bill of Rights" was thus created.[129] Today's analogue may be impacts associated with climate change, as evaluated in reports by

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bills-rights; *see also* JAMES R. MAY, PRINCIPLES OF CONSTITUIONAL ENVIRONMENTAL LAW *passim* (2011).

[127] *See generally,* JOHN C. DERNBACH, JAMES R. MAY & KENNETH T. KRISTL, *Robinson Township v. Commonwealth of Pennsylvania*: *Examination and Implications,* 67 RUTGERS L.J. 1169 (2015).

[128] *See, e.g.,* CLEAN WATER ACT § 505; *supra* note 92.

[129] Environmental constitutionalism began in New York, and was expanded in 1969, influenced in part by Dr. Rachel Carson's seminal book, *Silent Spring.* Dr. Carson wrote that "[i]f the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem." RACHEL CARSON, SILENT SPRING 12-13 (1962).

the New York Academy of Sciences,[130] the U.S. National Academy of Sciences,[131] and the Intergovernmental Panel on Climate Change.[132]

CONCLUSION

In 2017, voters will have a unique opportunity to debate whether the provisions of the State Constitution's conservation article, Article XIV, are sufficient to meet current needs or can otherwise be improved. As this report illustrates, Article XIV presents opportunities to simplify its text, address obsolete aspects, and to consider how to enhance its effectiveness. At a minimum, if and when the State establishes a preparatory constitutional commission, it has ample reason to carefully study Article XIV.

[130] *See* NEW YORK CITY PANEL OF CLIMATE CHANGE, *Building the Knowledge Base for Climate Resiliency: New York City Panel on Climate Change 2015 Report*, 1336 ANNALS N.Y. ACAD. SCI. 1-150 (2015), http://onlinelibrary.wiley.com/doi/10.1111/nyas.2015.1336.issue-1/issuetoc.

[131] *See* U.S. NAT'L ACAD. OF SCI. & U.K. ROYAL SOCIETY, *Climate Change: Evidence and Causes* (2014), nas-sites.org/americasclimatechoices.

[132] *See* INTERGOVT'L PANEL ON CLIMATE CHANGE, *Fifth Assessment Report* (2013-14), https://www.ipcc.ch/report/ar5/. *Fifth Assessment Report*

APPENDIX A

ARTICLE XIV

CONSERVATION

{Text, annotated with subject headings in brackets}

[Forest preserve to be forever kept wild; authorized uses and exceptions]

Section 1.[1] *The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.* (Italics added.)

Nothing herein contained shall prevent the state from constructing, completing and maintaining any highway heretofore specifically authorized by constitutional amendment, nor from constructing and maintaining to federal standards federal aid interstate highway route five hundred two from a point in the vicinity of the city of Glens Falls, thence northerly to the vicinity of the villages of Lake George and Warrensburg, the hamlets of South Horicon and Pottersville and thence northerly in a generally straight line on the west side of Schroon Lake to the vicinity of the hamlet of Schroon, then continuing northerly to the vicinity of Schroon Falls, Schroon River and North Hudson, and to the east of Makomis Mountain, east of the hamlet of New Russia, east of the village of Elizabethtown and continuing northerly in the vicinity of the hamlet of Towers Forge, and east of Poke-O-Moonshine Mountain and continuing northerly to the vicinity of the village

[1] Article 14 was formerly Section 7 of N.Y. CONST. art. VII in the Constitution of 1894. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 4, 1941; November 4, 1947; November 5, 1957; November 3, 1959; November 5, 1963; November 2, 1965; November 6, 1979; November 8, 1983; November 3, 1987; November 5, 1991; November 7, 1995; November 6, 2007; November 3, 2009; November 5, 2013.

of Keeseville and the city of Plattsburgh, all of the aforesaid taking not to exceed a total of three hundred acres of state forest preserve land, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than five miles of such trails shall be in excess of one hundred twenty feet wide, on the north, east and northwest slopes of Whiteface Mountain in Essex county, nor from constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than two miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Belleayre Mountain in Ulster and Delaware counties and not more than forty miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than eight miles of such trails shall be in excess of one hundred twenty feet wide, on the slopes of Gore and Pete Gay mountains in Warren county, nor from relocating, reconstructing and maintaining a total of not more than fifty miles of existing state highways for the purpose of eliminating the hazards of dangerous curves and grades, provided a total of no more than four hundred acres of forest preserve land shall be used for such purpose and that no single relocated portion of any highway shall exceed one mile in length.

Notwithstanding the foregoing provisions, the state may convey to the village of Saranac Lake ten acres of forest preserve land adjacent to the boundaries of such village for public use in providing for refuse disposal and in exchange therefore the village of Saranac Lake shall convey to the state thirty acres of certain true forest land owned by such village on Roaring Brook in the northern half of Lot 113, Township 11, Richards Survey.

Notwithstanding the foregoing provisions, the state may convey to the town of Arietta twenty-eight acres of forest preserve land within such town for public use in providing for the extension of the runway and landing strip of the Piseco airport and in exchange therefor the town of Arietta shall convey to the state thirty acres of certain land owned by such town in the town of Arietta.

Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title, the state, in order to consolidate its land holdings for better management, may convey to International Paper Company approximately eight thousand five hundred acres of forest preserve land located in townships two and three of Totten and Crossfield's Purchase and township nine of the Moose River Tract, Hamilton county, and in exchange therefore International Paper Company shall convey to the state for incorporation into the forest preserve approximately the same number of acres of land located within such townships and such County on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands to be conveyed by the state.

Notwithstanding the foregoing provisions and subject to legislative approval of the tracts to be exchanged prior to the actual transfer of title and the conditions herein set forth, the state, in order to facilitate the preservation of historic buildings listed on the national register of historic places by rejoining an historic grouping of buildings under unitary ownership and stewardship, may convey to Sagamore Institute, Inc., a not-for-profit educational organization, approximately ten acres of land and buildings thereon adjoining the real property of the Sagamore Institute, Inc. and located on Sagamore Road, near Racquette Lake Village, in the Town of Long Lake, county of Hamilton, and in exchange therefor; Sagamore Institute, Inc. shall convey to the state for incorporation into the forest preserve approximately two hundred acres of wild forest land located within the Adirondack Park on condition that the legislature shall determine that the lands to be received by the state are at least equal in value to the lands and buildings to be conveyed by the state and that the natural and historic character of the lands and buildings conveyed by the state will be secured by appropriate covenants and restrictions and that the lands and buildings conveyed by the state will reasonably be available for public visits according to agreement between Sagamore Institute, Inc. and the state.

Notwithstanding the foregoing provisions the state may convey to the town of Arietta fifty acres of forest preserve land within such town for

public use in providing for the extension of the runway and landing strip of the Piseco airport and providing for the maintenance of a clear zone around such runway, and in exchange therefor, the town of Arietta shall convey to the state fifty-three acres of true forest land located in lot 2 township 2 Totten and Crossfield's Purchase in the town of Lake Pleasant.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, the state may convey to the town of Keene, Essex county, for public use as a cemetery owned by such town, approximately twelve acres of forest preserve land within such town and, in exchange therefor, the town of Keene shall convey to the state for incorporation into the forest preserve approximately one hundred forty-four acres of land, together with an easement over land owned by such town including the riverbed adjacent to the land to be conveyed to the state that will restrict further development of such land, on condition that the legislature shall determine that the property to be received by the state is at least equal in value to the land to be conveyed by the state.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, because there is no viable alternative to using forest preserve lands for the siting of drinking water wells and necessary appurtenances and because such wells are necessary to meet drinking water quality standards, the state may convey to the town of Long Lake, Hamilton county, one acre of forest preserve land within such town for public use as the site of such drinking water wells and necessary appurtenances for the municipal water supply for the hamlet of Raquette Lake. In exchange therefor, the town of Long Lake shall convey to the state at least twelve acres of land located in Hamilton county for incorporation into the forest preserve that the legislature shall determine is at least equal in value to the land to be conveyed by the state. The Raquette Lake surface reservoir shall be abandoned as a drinking water supply source.

Notwithstanding the foregoing provisions and subject to legislative approval prior to actual transfer of title, the state may convey to National Grid up to six acres adjoining State Route 56 in St. Lawrence County where it passes through Forest Preserve in Township 5, Lots 1, 2, 5 and 6 that is

necessary and appropriate for National Grid to construct a new 46kV power line and in exchange therefore National Grid shall convey to the state for incorporation into the forest preserve at least 10 acres of forest land owned by National Grid in St. Lawrence county, on condition that the legislature shall determine that the property to be received by the state is at least equal in value to the land conveyed by the state.

Notwithstanding the foregoing provisions, the legislature may authorize the settlement, according to terms determined by the legislature, of title disputes in township forty, Totten and Crossfield purchase in the town of Long Lake, Hamilton county, to resolve longstanding and competing claims of title between the state and private parties in said township, provided that prior to, and as a condition of such settlement, land purchased without the use of state-appropriated funds, and suitable for incorporation in the forest preserve within the Adirondack park, shall be conveyed to the state on the condition that the legislature shall determine that the property to be conveyed to the state shall provide a net benefit to the forest preserve as compared to the township forty lands subject to such settlement.

Notwithstanding the foregoing provisions, the state may authorize NYCO Minerals, Inc. to engage in mineral sampling operations, solely at its expense, to determine the quantity and quality of wollastonite on approximately 200 acres of forest preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county provided that NYCO Minerals, Inc. shall provide the data and information derived from such drilling to the state for appraisal purposes. Subject to legislative approval of the tracts to be exchanged prior to the actual transfer of the title, the state may subsequently convey said lot 8 to NYCO Minerals, Inc., and, in exchange therefor, NYCO Minerals, Inc. shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land, on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the land to be conveyed by the state and on condition that the assessed value of the land to be conveyed to the state shall total not less than one million dollars. When NYCO Minerals, Inc. terminates all mining operations on such lot 8 it shall remediate the site and

convey title to such lot back to the state of New York for inclusion in the forest preserve. In the event that lot 8 is not conveyed to NYCO Minerals, Inc. pursuant to this paragraph, NYCO Minerals, Inc. nevertheless shall convey to the state for incorporation into the forest preserve not less than the same number of acres of land that is disturbed by any mineral sampling operations conducted on said lot 8 pursuant to this paragraph on condition that the legislature shall determine that the lands to be received by the state are equal to or greater than the value of the lands disturbed by the mineral sampling operations.

[**Reservoirs]**

§2.[2] The legislature may by general laws provide for the use of not exceeding three per centum of such lands for the construction and maintenance of reservoirs for municipal water supply, and for the canals of the state. Such reservoirs shall be constructed, owned and controlled by the state, but such work shall not be undertaken until after the boundaries and high flow lines thereof shall have been accurately surveyed and fixed, and after public notice, hearing and determination that such lands are required for such public use. The expense of any such improvements shall be apportioned on the public and private property and municipalities benefited to the extent of the benefits received. Any such reservoir shall always be operated by the state and the legislature shall provide for a charge upon the property and municipalities benefited for a reasonable return to the state upon the value of the rights and property of the state used and the services of the state rendered, which shall be fixed for terms of not exceeding ten years and be readjustable at the end of any term. Unsanitary conditions shall not be created or continued by any such public works.

[2] An addition made in 1913 to former N.Y. CONST. art. VII, §7, which was renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November of 1953, and November of 1955.

[Forest and wild life conservation; use or disposition of certain lands authorized]

§3.[3] 1. Forest and wild life conservation are hereby declared to be policies of the state. For the purpose of carrying out such policies the legislature may appropriate moneys for the acquisition by the state of land, outside of the Adirondack and Catskill parks as now fixed by law, for the practice of forest or wild life conservation. The prohibitions of section 1 of this article shall not apply to any lands heretofore or hereafter acquired or dedicated for such purposes within the forest preserve counties but outside of the Adirondack and Catskill parks as now fixed by law, except that such lands shall not be leased, sold or exchanged, or be taken by any corporation, public or private.

2. As to any other lands of the state, now owned or hereafter acquired, constituting the forest preserve referred to in section one of this article, but outside of the Adirondack and Catskill parks as now fixed by law, and consisting in any case of not more than one hundred contiguous acres entirely separated from any other portion of the forest preserve, the legislature may by appropriate legislation, notwithstanding the provisions of section one of this article, authorize: (a) the dedication thereof for the practice of forest or wild life conservation; or (b) the use thereof for public recreational or other state purposes or the sale, exchange or other disposition thereof; provided, however, that all moneys derived from the sale or other disposition of any of such lands shall be paid into a special fund of the treasury and be expended only for the acquisition of additional lands for such forest preserve within either such Adirondack or Catskill park.

[Protection of natural resources; development of agricultural lands]

§4.[4] The policy of the state shall be to conserve and protect its natural

[3] Formerly N.Y. CONST. art. VII, §16, this provision as renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 5, 1957; November 6, 1973.

[4] First proposed and accepted by the Constitutional Convention in 1966, whose proposed constitution was not accepted, and thereafter added by amendment adopted by

resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.

[Violations of article; how restrained.]

§5.[5] A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in the appellate division, on notice to the attorney-general at the suit of any citizen.

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the legislature and approved by vote of the people November 4, 1969.

[5] Initially adopted in 1894 in former N.Y. CONST. art. VII, §7; retained by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938, and renumbered §5 by vote of the people November 4, 1969.

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

THE ESTABLISHMENT OF A PREPARATORY STATE COMMISSION ON A CONSTITUTIONAL CONVENTION

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

Approved by the House of Delegates on November 7, 2015

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INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20 years New Yorkers are asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning the establishment of a non-partisan preparatory commission in advance of the upcoming vote on a Constitutional Convention.

The State Constitution is the governing charter for the State of New York. More than six times longer than the U.S. Constitution, the State Constitution establishes the structure of State government and enumerates fundamental rights and liberties. It governs our courts, schools, local government structure, State finance, and development in the Adirondacks — to name only a few of the countless ways it affects the lives of New Yorkers.

The State Legislature can propose amendments to the State Constitution, subject to voter approval. However, the framers of the Constitution wanted to make sure that there was an even more direct way for the citizenry to review fundamental principles of governance. That is why at least once every 20 years New Yorkers get to decide for themselves whether to hold a Constitutional Convention.

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[1] N.Y. CONST. art. XIX, § 2 ("At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .").

The Convention vote in 2017 presents the electorate with a constitutional choice of profound importance. Absent a legislative initiative, we will not have this opportunity for another twenty years. So, the State should properly prepare for this referendum, regardless of the outcome.

In the Twentieth Century, every Constitutional Convention in New York was (and two mandatory Convention votes were) preceded by a preparatory commission created and supported by the State government. Conventional wisdom was that if a referendum vote approved a Constitutional Convention, expert, non-partisan preparations were required well in advance of the Convention delegates' assembly.[2] Indeed, most delegates to a Convention had insufficient time or resources to plan or carry out factual investigations or legal research on their own initiative. To a significant degree, the delegates had to rely on research and materials developed by others.[3]

Thus, since 1914, the State has vested in temporary constitutional commissions the important — indeed indispensable — responsibility of doing the research, data-collection and other preparations necessary to conduct a Constitutional Convention. "Some [commissions] were appointed by the governor; others were established by the legislature. Some were created in anticipation of a vote on the mandatory Convention question;

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[2] *See, e.g.,* Robert Moses, *Another New York State Constitutional Convention,* 31 ST. JOHN'S L. REV. 201, 207 (1957) ("Today here in New York much depends on the preliminary work of the Constitutional Convention Commission if there is to be a Constitutional Convention at all. The importance of a genuinely expert, non-partisan approach cannot be overstated.").

[3] *See* Samuel McCune Lindsay, *Constitution Making in New York,* THE SURVEY, July 31, 1915, at 391, 392 ("What a convention can attempt in the study of new problems depends largely upon the preparation made in advance of the assembly of the convention. There is not time for the committees to plan or carry out investigations of their own initiative, and in a constitutional convention there is not the accumulated experience and tradition of special subjects that are often carried over from session to session in a legislative committee through the hold-over members who serve several terms. The constitutional convention can do little more than study the materials put in their hands by interested parties.").

others resulted from the need to prepare quickly after the question passed."[4] And some produced bodies of research and work product useful not only to Convention delegates, but also policymakers, courts and scholars decades after.[5]

The State's extensive history with preparatory commissions makes clear that the formation of such an entity — with adequate funding, top-notch staff, and support from all branches of government — is necessary to properly plan and prepare for the mandatory Convention vote and a Convention, if the voters approve the call for one. Accordingly, this Committee recommends as follows:

First, the State should establish a non-partisan preparatory commission as soon as possible.

Second, the commission should be tasked with, among other duties: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

Third, the commission should have an expert, non-partisan staff.

Fourth, the commission and its staff should be supported by adequate appropriations from the State government.

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[4] Robert F. Williams, *The Role of the Constitutional Commission in State Constitutional Change* [hereinafter *Constitutional Commission*], *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 49 (Gerald Benjamin & Hendrik N. Dullea eds., 1997) [hereinafter DECISION 1997].

[5] *Id.*

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides a historical overview of past preparatory commissions for Constitutional Conventions. Part III presents the Committee's recommendations and discusses various lessons from past preparatory commissions and Conventions. Part IV concludes that the importance of the mandatory referendum in 2017 and a potential Convention obliges the State to appropriately plan and prepare, and recommends that the establishment of a preparatory commission is the best way to do so.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

At the Committee's first meeting on August 27, 2015, President Miranda requested that the members study and make recommendations on whether the State should establish a preparatory commission to plan and prepare for a Constitutional Convention. The Committee then heard from Professor Gerald Benjamin, Associate Vice President for Regional Engagement and Director of the Benjamin Center for Public Policy Initiatives at SUNY New Paltz, a nationally respected political scientist and commentator on state and local government. Professor Benjamin presented an overview of issues relating to the 2017 mandatory referendum and the conduct of a Constitutional Convention, and spoke about his service as Research Director of the Temporary Commission on Constitutional Revision from 1993 to 1995. Next, the Committee reviewed and discussed a research memorandum that surveyed the history of past preparatory commissions for

Constitutional Conventions, described the work product created by them, and identified key issues that must be considered in creating such a commission today.

After further discussion and review, the Committee concluded that the State government should establish, in advance of the mandatory Convention referendum in 2017, a non-partisan preparatory commission, as it has done in the past. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on September 30, 2015.

II. HISTORICAL OVERVIEW OF PREPARATORY COMMISSIONS AND CONVENTIONS

In the Twentieth Century, the question of whether to hold a Constitutional Convention was placed before the voters on six occasions (1914, 1936, 1957, 1965, 1977 and 1997) and was answered in the affirmative three times, resulting in Constitutional Conventions held in 1915, 1938 and 1967. Preparatory commissions were established by the State in advance of these Conventions as well as the mandatory Convention votes in 1957 and 1997. Each of these commissions is discussed in turn, highlighting the circumstances leading to their establishment, composition, work product, staff support and funding.

A. Constitutional Convention Commission (1914-1915)

On April 7, 1914, the voters approved the call for a Constitutional Convention by a slim majority (153,322 to 151,969).[6] Shortly thereafter, the Governor signed into law a bill establishing the "New York State Constitutional Convention Commission" with full power and authority to "collect, compile and print such information and data as it may deem useful for the delegates to the constitutional convention . . . in their deliberations at

[6] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 193 (1996) [hereinafter ORDERED LIBERTY].

such convention."[7] The Commission was specifically tasked to supply research materials to the Convention delegates before the Convention was to convene in April 1915.[8]

The Commission consisted of the Majority Leader of the Senate, the Speaker of the Assembly, and three citizens of the State appointed by the Governor.[9] The Commission's enabling legislation provided for no compensation to the members, but provided expenses, and also provided for the employment of paid "clerical, expert and other assistance."[10] For this purpose, the Legislature initially appropriated $5,000.[11]

The Commission's Chair was Morgan J. O'Brien, a former Justice of the State Supreme Court. The Commission selected its staff and fixed their compensation.[12] The State agency responsible for providing assistance to the Commission, the Department of Efficiency and Economy, relied heavily on a newly formed private organization dedicated to producing research of government organizations, the New York Bureau of Municipal Research.[13] The Bureau assigned 20 people to this project, including Charles A. Beard,

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[7] L. 1914, ch. 443. *See also* THOMAS SCHICK, THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1915 AND THE MODERN STATE GOVERNMENT 42 (1978) [hereinafter CONSTITUTIONAL CONVENTION OF 1915].

[8] *Id.*

[9] L. 1914, ch. 261, § 1; *see* Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 12-13 (1996) (discussing constitutional commissions established in 1872, 1875, 1890, 1915, 1921, 1936, 1956, 1958, 1965 and 1993).

[10] L. 1914, ch. 261, § 1.

[11] *Id.* § 2.

[12] *Id.* § 1.

[13] GALIE, ORDERED LIBERTY, *supra* note 6, at 193.

later to become one of the most influential historians and political scientists in American history.[14]

The Commission produced a 768-page report for the 1915 Convention delegates that contained a comprehensive and detailed description of the organization and functions of the State government.[15] The Commission also produced a 246-page appraisal of the State Constitution and government.[16] The comprehensiveness and quality of these materials established New York as the first state in the nation to lay a solid research foundation for a Constitutional Convention.[17] In fact, "[t]he report of the commission was the first comprehensive description of a state government ever prepared."[18] These materials ensured that the delegates to the Convention arrived well-prepared[19] and established a precedent of detailed preparation for two future mandatory Convention referenda (1957 and 1997) and Constitutional Conventions (1938 and 1967).[20]

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[14] *Id.*; SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 43-44.

[15] NEW YORK STATE DEPARTMENT OF EFFICIENCY AND ECONOMY, GOVERNMENT OF THE STATE OF NEW YORK: A SURVEY OF ITS ORGANIZATION AND FUNCTIONS (1915).

[16] NEW YORK BUREAU OF MUNICIPAL RESEARCH, THE CONSTITUTION AND GOVERNMENT OF THE STATE OF NEW: AN APPRAISAL (1915). *See* SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 44-49 (discussing the appraisal).

[17] GALIE, ORDERED LIBERTY, *supra* note 6, at 193. *See also* SCHICK, CONSTITUTIONAL CONVENTION OF 1915, *supra* note 7, at 43.

[18] Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1299 (2001) [hereinafter *A Worthy Tradition*].

[19] *Id.* at 1299. The 1915 Constitutional Convention convened on April 4, 1915 and adjourned on September 4, 1915.

[20] *Id.* at 1300.

B. Constitutional Convention Committee (1937-1938)

On November 3, 1936, the voters approved the call for a Constitutional Convention by a vote of 1,413,604 to 1,190,275.[21] In response, Governor Herbert H. Lehman recommended in his annual message to the Legislature that past practice be followed by establishing a non-partisan committee to assemble and collate data for the use of the Convention.[22] "It seems to be extremely short-sighted," he observed, "for us to do nothing until the day the convention assembles." The two Houses of the Legislature, however, did not adopt the Governor's recommendation.[23]

In the face of the Legislature's inaction, on July 7, 1937, Governor Lehman announced the appointment of the "New York State Constitutional Committee."[24] Consisting of 42 members, the Committee was "non-partisan and non-political in character and in motive," and responsible for undertaking and directing "the preparation and publication of accurate, thorough, and above all, impartial studies on the important phases of government, certain to be considered at the Constitutional Convention."[25] Governor Lehman made clear that the Committee's purpose was not "to

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[21] *Id.* at 1304.

[22] VERNON A. O'ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE 67 (1915) [hereinafter CONSTITUTION-MAKING]; Franklin Feldman, *A Constitutional Convention in New York: Fundamental Law and Basic Politics,* 2 CORNELL L. REV. 329, 336 (1957) [hereinafter *A Constitutional Convention*].

[23] O'ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 22, at 67 ("[Governor Lehman's] . . . recommendation . . . was unable to scale the heights of partisanship. A bill was passed by the Senate, but the legislature adjourned without authorizing such a fact-finding committee, despite Governor Lehman's assurance that the committee would be restricted to fact-finding, with no power over the order or the character of business to be handled by the convention.").

[24] 1937 PUBLIC PAPERS OF GOVERNOR LEHMAN 664 [hereinafter LEHMAN PAPERS].

[25] *Id.*

determine an agenda for the Convention . . . Its functions will be confined to fact-finding studies and to the collection of data."[26] Although all of the Committee's members were appointed by the Governor, the Legislature appropriated money in support of its work.[27]

The Committee's Chair was then-State Supreme Court Justice (later Lieutenant Governor and Governor) Charles Poletti. He and the other Committee members were supported by a substantial staff of at least 16 people. In addition, at Governor Lehman's direction, 15 people were assigned from the State Law Revision Commission to work with the Committee. More than 100 others, including leading academics, government officials, and private citizens, also provided assistance, advice and counsel.[28]

The Committee produced 12 reports: five reference volumes, along with volumes devoted to problems related to the bill of rights, taxation and finance, and issues of home rule and local government. As constitutional historian Peter J. Galie has observed, "despite the haste in gathering this material, the Poletti Committee, as it became known, produced one of the most comprehensive and reliable source[s] of information on the New York Constitution."[29]

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[26] *Id.*

[27] Feldman, *A Constitutional Convention, supra* note 22, at 337.

[28] Information regarding the Poletti Committee's staff and other support was gleaned from introductory notes at the front of each of the 12 reports produced by the Committee. The reports are accessible online from the New York State Library: http://128.121.13.244/awweb/main.jsp?flag=collection&smd=1&cl=library1_lib&field11=1301505&tm=1442777021299&itype=advs&menu=on (last visited on Sept 20, 2015).

[29] GALIE, ORDERED LIBERTY, *supra* note 6, at 233; Williams, *Constitutional Commissions, supra* note 4, at 50 (the "Committee produced a body of work extraordinary for its depth, breath, and quality"). The Poletti Committee's reports are often cited by New York courts. *See, e.g., People v. Peque*, 22 N.Y.3d 168, 187 (2013) ("As noted in the Poletti Committee's report in preparation for the State's constitutional convention of 1938 . . . ."); *Bordeleau v. State*, 18 N.Y.3d 305, 317 (2011) ("Such

C. Temporary Commission on the Constitutional Convention (1956-1958)

In 1956, more than a year before the mandatory referendum on a Constitutional Convention, the Legislature established the "New York State Temporary Constitution Convention Commission."[30] The Commission was given three responsibilities: (1) to study proposals for change and simplification of the Constitution; (2) to collect and present information and data useful for the delegates and electorate prior to and during the convention; and (3) to issue reports to the Governor and the Legislature. The interim reports were due not later than March 1, 1957, and from time to time thereafter until March 1, 1959, provided, however, that if the voters decided against the Convention the Commission would terminate on February 1, 1958.[31]

The Commission was composed of 15 members, five named by the Governor, five by the Majority Leader of the Senate, and five by the Speaker

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concerns were the subject of debate during the 1938 Constitutional Convention. But the Convention and subsequent ratification of the amendments by the electorate demonstrated the approval for the ability of public benefit corporations to receive and expend public monies, enable the development and performance of public projects and be independent of the State [*see Problems Relating to Executive Administration and Powers,* 1938 Rep. of N.Y. Constitutional Convention Comm., vol. 8, at 325–326 . . . .") (citing the Poletti Report)].

[30] L. 1956, ch. 814; Feldman, *A Constitutional Convention, supra* note 22, at 337-338. As the future Chair of the Commission observed: "The action taken by the Legislature in passing the bill creating the Temporary State Commission on the Constitutional Convention and the Governor's signing of it marked the first time in our State's history, or in that of any other state so far as we can ascertain, that a Commission has been established prior to the referendum on the calling of a convention." Nelson A. Rockefeller, *The Work of the State Constitutional Convention Commission*, 29 N.Y. St. B. Bull. 314, 315 (July 1957) [hereinafter *Work of the State Constitutional Convention Commission*].

[31] GALIE, ORDERED LIBERTY, *supra* note 6, at 262-63; Moses, *Another State Constitutional Convention, supra* note 2, at 205-206.

of the Assembly.[32] When a dispute developed between Republican leaders and Governor W. Averell Harriman over who would serve as the Commission's chair, Harriman appointed Nelson A. Rockefeller (who later became Governor).[33]

The Commission had an outstanding staff, with nearly 70 expert consultants to conduct policy reviews.[34] On September 26, 1956, the Commission held its first organizational meeting,[35] and issued its First Interim Report on February 19, 1957.[36] The report provided a brief outline of the State's constitutional history, a description of methods of amending the Constitution, and staff studies that updated the compilation of state constitutions that had served the 1938 Convention and presented an outline of proposed background studies in local government. The Commission indicated that it would look for opportunities to simplify the existing Constitution in non-controversial ways.[37]

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[32] L. 1956, ch. 814, § 2.

[33] GALIE, ORDERED LIBERTY, *supra* note 6, at 262. *See* RICHARD NORTON SMITH, ON HIS OWN TERMS: A LIFE OF NELSON ROCKEFELLER 267-269 (2014) [hereinafter ROCKEFELLER].

[34] Smith, ROCKEFELLER, *supra* note 33, at 270. The Commission's Executive Director was Dr. William J. Ronan, the 44-year old Dean of the New York University Graduate School of Public Administration and Social Science. The Counsel to the Commission was George L. Hinman, a highly respected 51-year-old lawyer from Binghamton. *Id.* at 270-271.

[35] HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 33 (1997) [hereinafter CHARTER REVISION].

[36] TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, FIRST INTERIM REPORT (1957), *reprinted in* N.Y. Legis. Doc. No. 8 (1958); *see* DULLEA, CHARTER REVISION, *supra* note 35, at 33 (summarizing First Interim Report).

[37] *Id.*

In June 1957, the Commission held public hearings in Buffalo, Albany and New York City to provide the public an opportunity to present suggestions and proposals for constitutional revision and simplification.[38] At the hearings more than 80 people representing their individual points of view or those of organized groups appeared before the Commission.[39]

In the spring of 1957, the Commission created an Inter-Law School Committee on Constitutional Simplification. The Committee examined 54 sections of the Constitution, recommending elimination of 23 of them as superfluous and outmoded. Other sections were deemed so cumbersome and "harmfully detailed" that they could "be rewritten and substantially shortened."[40]

At the summer meeting of the State Bar in June 1957, Chairman Rockefeller said that the two questions voters would face in November were (1) whether the state Constitution needs amending, and if so, (2) whether a convention or the alternative legislative method would be more effective. He observed that there was "no group in the state which is more interested in these questions or whose judgment and informed opinion can be more helpful to the voters in deciding these issues than the New York State Bar Association."[41]

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[38] DULLEA, CHARTER REVISION, *supra* note 35, at 34-35.

[39] Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 320.

[40] GALIE, ORDERED LIBERTY, *supra* note 6, at 263 (quoting THE INTER-LAW SCHOOL COMMITTEE, THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION (1958), *reprinted in* N.Y. Legis. Doc. No. 57, at xiii (1958)); Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 318.

[41] Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 314.

On September 19, 1957, the Commission issued a Second Interim Report[42] that summarized the proposals gathered by the Commission from individuals and 107 organizations during public hearings. The subjects receiving the greatest attention were local governments and home rule, legislative apportionments, organization and procedure.[43]

On November 5, 1957, the electorate voted against a Constitutional Convention by a vote of 1,368,068 to 1,242,538. Nevertheless, the Commission remained in existence under the name Special Committee on the Revision and Simplification of the Constitution. Before going out of existence in 1961, this body issued a number of reports, some of which provided the basis for amendments to the Constitution subsequently proposed by the Legislature and approved by the people.[44]

D. Temporary State Commission on the Constitutional Convention (1965-1967)

As a result of legislative action calling for a referendum vote, in November 1965, the voters approved the call for a Convention by a vote of 1,681,438 to 1,468,431.[45] That same year, the Legislature established the "temporary state commission on the revision and simplification of the constitution and to prepare for a constitutional convention."[46] The Commission was charged with making "a comprehensive study of the constitution with a view to proposing simplification of the constitution," in addition to the traditional assignment of collecting and compiling useful

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[42] TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, SECOND INTERIM REPORT (1957), *reprinted in* N.Y. Legis. Doc. No. 57 (1957).

[43] *Id.*; *see* DULLEA, CHARTER REVISION, *supra* note 35, at 34-35 (summarizing Second Interim Report).

[44] Williams, *Constitutional Commission, supra* note 4, at 50.

[45] GALIE, ORDERED LIBERTY, *supra* note 6, at 307.

[46] L. 1965, Ch. 443, § 1.

information and data for the delegates and public before the convening of, and during the course of, the Constitutional Convention.[47]

The Commission was comprised of 18 members, with the Governor, the Speaker of the Assembly, and the Senate Majority Leader each appointing six members.[48] However, the Commission's work was delayed because of policy conflicts, personality clashes, and disputes over the Commission's leadership and staff.[49] The Commission's membership roster was not announced until December 20, 1965, and its first planning meeting was not held until January 20, 1966.[50]

Also, delays in appropriating money to support the Commission's work strained the relationship between the Commission's initial chair (who resigned) and the Legislature.[51] Moreover, whereas earlier Commissions had been able to pick and choose among those subjects they wished to present to the Legislature, the Commission's enabling legislation was construed to require the Commission to address every article of the Constitution.[52]

The Commission had a 28-person staff, supported by numerous consultants on a wide range of subject areas.[53] The Legislature initially

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[47] *Id.*

[48] *Id.*, at § 2.

[49] Galie & Bopst, *A Worthy Tradition, supra* note 18, at 1312-1313.

[50] DULLEA, CHARTER REVISION, *supra* note 35, at 131.

[51] The Commission's initial chair was Henry T. Heald, president of the Ford Foundation, who resigned on June 30, 1966. He was replaced by Sol Neil Corbin, a former Counsel to Governor Nelson A. Rockefeller. *Id.* at 130-132.

[52] *Id.* at 131-134; *see* L. 1965, ch. 443, § 1 (requiring the commission to undertake a comprehensive study of the Constitution).

[53] The Commission's staff and consultants are listed at the front of the Commission's 16 reports, which are accessible online from the New York State Library:

appropriated $150,000 for the Commission, although the State eventually spent over a million dollars on it.[54]

Hampered by partisan divisions, the Commission issued 16 reports relatively late in the process, with modernization, simplification and reorganization as the dominant themes.[55] The reports were "non-controversial and uneven in quality" and had little impact on the Convention.[56]

E. 1977 Referendum on a Constitutional Convention

No commission was established by the Governor or the Legislature during the run up to the mandatory Convention vote in 1977.[57] The City of New York was engulfed in a major fiscal crisis, and the legislative leaders were openly hostile to a Convention. "There are a substantial number of issues that require hefty analysis," said a key staffer to the Speaker of the Assembly. "The Legislature for the past several years has been dealing with daily crises."[58] On November 8, 1977, the electorate voted against a

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http://128.121.13.244/awweb/main.jsp?flag=collection&smd=1&cl=library1_lib&field11=4116707&tm=1442777963096 (last visited on Sept 20, 2015).

[54] William J. van den Heuvel, *Reflections on Constitutional Conventions*, 40 N.Y.S.B.J. 261 (June 1968) [hereinafter *Reflections*].

[55] GALIE, ORDERED LIBERTY, *supra* note 6, at 309; Williams, *Constitutional Commission, supra* note 4, at 50. The 1967 Constitutional Convention convened on April 4, 1967 and adjourned on September 26, 1967.

[56] DONNA E. SHALALA, THE CITY AND THE CONSTITUTION: THE 1967 CONVENTION'S RESPONSE TO THE URBAN CRISIS 134 (1972); *see* Galie & Bopst, *A Worthy Tradition, supra* note 18, at 1313 ("the reports were largely ignored by the convention . . . .").

[57] Williams, *Constitutional Commissions, supra* note 3, at 50.

[58] Gerald Benjamin, *A Convention for New York: Overcoming Our Constitutional Catch-22*, 12 GOVT. LAW & POLICY J. 13, 15 (Spring 2010) (quoting Michael DelGiudice, a key staffer to Assembly Speaker Stanley Steingut).

Constitutional Convention by a substantial margin (1,668,137 to 1,126,902). The State's failure to prepare for a Convention was used as an argument against calling it.[59]

F. Temporary Commission on Constitutional Revision (1993-1995)

In May of 1993, four years in advance of the next mandatory Convention vote, Governor Mario M. Cuomo established by executive order the "Temporary New York State Commission on Constitutional Revision."[60] The Commission had 18 members. Its chair was Peter Goldmark, Jr., President of the Rockefeller Foundation, and its work was supported by the Rockefeller Institute of Government of the State University of New York.[61]

In his executive order creating the Commission, Governor Cuomo called attention to the mandatory Convention vote to be held in 1997 and the need to prepare for and educate the public about it (or an earlier Convention if one were called).[62] Specifically, Governor Cuomo directed the Commission to:

- consider the constitutional change process and the range of constitutional issues to be considered by the people;
- study the processes for convening, staffing, holding and acting on the recommendations of a Convention;
- determine the views of New Yorkers on constitutional matters;

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[59] *Id.*

[60] Exec. Order No. 172 (May 1993).

[61] *Id.*; DECISION 1997, *supra* note 4, at viii.

[62] *See* Exec. Order No. 172 ("WHEREAS, it is important that the people be educated so that they make an informed decision on whether a convention is desirable in 1997 or earlier if the Legislature agrees to pose the question; . . . "WHEREAS, the State government must be prepared if the people decide that a convention should be held . . .").

- develop "a broad-based agenda" of constitutional issues and concerns;

- provide "an objective and non-partisan outline" of the range of constitutional issues; and

- engage in a range of activities designed to focus attention on constitutional change.[63]

The Commission lacked the approval or financial support of the Legislature.[64] It did have a distinguished (albeit small) staff of seven persons who operated on a budget of approximately $200,000 to $250,000.[65] The Commission held hearings throughout the State and in March 1994 issued an interim report that explored and made recommendations regarding the delegate selection process.[66] It also issued a periodic newsletter entitled *Constitutional Matters* and a briefing book relating to the State Constitution.[67]

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[63] *Id.* ¶¶ II-IV; GALIE, ORDERED LIBERTY, *supra* note 6, at 351 (citing TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, MISSION STATEMENT (1993)).

[64] GALIE, ORDERED LIBERTY, *supra* note 6, at 353.

[65] The Commission's Counsel and Executive Director was Professor Eric Lane of the Hofstra University Law School, and its Research Director was Dean Gerald Benjamin of the State University of New York at New Paltz. Both of their work for the Commission was on a part-time basis. They were supported by a staff of five.

[66] *Id.*; TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, THE DELEGATE SELECTION PROCESS: AN INTERIM REPORT (Mar. 1994) [hereinafter DELEGATE SELECTION PROCESS].

[67] GALIE, ORDERED LIBERTY, *supra* note 6, at 353; TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK (Mar. 1994).

The Commission's final report was published in February 1995,[68] two years and nine months before the mandated 1997 Convention vote. In particular, the Commission called on the Legislature and the Governor to create "Action Panels" to develop a coherent reform package in four important subject areas: State fiscal integrity, State and local relations, education and public safety. If policymakers failed to adequately address these issues, a majority of the Commission's members maintained that a Convention should be held.[69]

On November 4, 1997, the electorate voted against a Constitutional Convention by a substantial margin (1,579,390 to 929,415).[70]

III. RECOMMENDATIONS

The following recommendations were approved by the Committee voting at its September 30, 2015 meeting when the recommendations were discussed.

Recommendation 1: The State should establish a non-partisan preparatory Constitutional Convention commission as soon as possible.

As it has done several times in the past, the State should create a preparatory Constitutional Convention commission as soon as possible. Nearly 50 years have passed since New York last held a Constitutional Convention. Likewise, 18 years have passed since the last referendum vote in 1997. As a result, the collective memory on preparing for and organizing a Convention has waned significantly. The Commission will face not only a herculean task reviewing New York's Constitution and the numerous

[68] TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY: A REPORT TO THE PEOPLE, THE GOVERNOR AND THE LEGISLATURE OF NEW YORK (Feb. 1995).

[69] *Id.* at 12-21.

[70] Gerald Benjamin, *Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context,* 65 ALBANY L. REV. 1017, 1041 (2001).

subjects it encompasses, but also a massive historical reclamation project to develop and provide information on the mechanics of a Convention itself.

Although past commissions have been created both before and after the referendum vote, we recommend creation of a preparatory commission as soon as possible and, in any event, well in advance of the November 2017 referendum.[71] A hastily set up commission, after an affirmative decision to hold a Convention has been made, will likely be of little use either to the public or the delegates. As Governor Lehman once observed, "[i]t seems to be extremely short-sighted for us to do nothing until the day the convention assembles."[72] "Without adequate planning," he explained, "there will inevitably be great waste of money, time and effort to the end that the very objects of the Convention will be defeated."[73]

Thus, with the 2017 referendum only two years away, there is a pressing need for a preparatory commission to begin work immediately.

The Legislature created the commissions for the 1915 Convention, the 1957 referendum and the 1967 Convention; Governors established commissions for the 1938 Convention and the 1997 referendum. History teaches that regardless how a preparatory commission is formed, it requires the support of all branches of government to produce useful and

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[71] *See* O'ROURKE & CAMPBELL, CONSTITUTION-MAKING, *supra* note 22, at 273-274 (recommending that a preparatory commission "should function, at least, during the two years prior to the submission to the voters of the question of a convention"). In 1956 and 1993, Commissions were created in advance of referendums; whereas in 1914, 1936 and 1965, Commissions were created subsequent to the electorate's call for a Constitutional Convention.

[72] LEHMAN PAPERS, *supra* note 24, at 664.

[73] *Id.*.

comprehensive work product for the benefit of New York voters, lawmakers, interested groups, and delegates if a Convention is held.[74]

Likewise, it is critical that the membership of the preparatory commission be technically proficient, experienced, and diverse in every way. More, the commission must be non-partisan in character and motive, "commanding by its impartial mandate" the confidence of the general public and the delegates if a Convention is held.[75]

> ***Recommendation 2: The commission should be tasked with (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.***

Past preparatory commissions have been given various assignments, such as investigating the entirety of the Constitution in 1967, or only selected portions in 1997. Commissions have also varied in their approach to resulting work products. The Poletti Committee reports provided comprehensive study of nearly all areas, while the 1967 Commission's work product to the delegates was primarily questions framing the issues that the Commission felt to be important.[76] However, one contemporary commentator noted that the 1967 Commission's approach of posing

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[74] A cautionary tale is the delay in funding of the Commission created for the 1967 Convention, which delay unsteadied the Commission's leadership and staff. DULLEA, CHARTER REVISION, *supra* note 35, at 132.

[75] Van den Heuvel, *Reflections*, *supra* note 54, at 263.

[76] *Id.*

questions to the delegates as opposed to providing substantive information was ineffective.[77]

The State Constitution and its ramifications "are so complex and the structure of the Government that has been erected within the framework of the constitution has so many wide and varied implications that a broad frame of reference is essential."[78] Therefore, among its other duties, the preparatory commission should:

> Make a comprehensive study of the Constitution and compile recommended proposals for change and simplification;
>
> Research the conduct of, and procedures used at, past Constitutional Conventions;
>
> Study and make recommendations regarding the selection process for Convention delegates;
>
> Undertake and direct the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held;
>
> Brief the principal constitutional questions that were debated and considered at previous Conventions;
>
> Collect data on the constitutional amendments proposed and adopted in other states on subjects of substantial interest to New Yorkers; and

[77] *Id.*

[78] Rockefeller, *Work of the State Constitutional Convention Commission*, *supra* note 30, at 317.

Collect and collate data on the important changes that have been made in the State's structure of government since the adoption of the present Constitution in 1894/1938.

Finally, the preparatory commission should recommend ways to educate the public about the State Constitution and the constitutional change process. Indeed, "[s]ome New Yorkers do not know there is a state constitution, much less how it may affect their lives."[79]

Recommendation 3: The preparatory commission should have an expert, non-partisan staff.

The preparatory commission must have a dedicated, full-time, expert staff under the direction and assistance of an executive director, a research director and a counsel. Adequate support staff will be necessary, too. The commission will face the daunting task not only of examining the substantive areas of the Constitution and related issues, but also surveying and educating the public, and helping to plan and prepare for a Convention, if one is held. The preparatory commissions created for the 1915 and 1938 Conventions, and the one created in the 1957 Convention referendum — all hailed as successful — had the support of sizable research and support staffs, state agencies, good government groups, and leading academics. Nothing less is required today for a preparatory commission to successfully plan and prepare the State for the mandatory referendum in 2017 and a potential Convention in 2019.

Recommendation 4: The preparatory commission and its staff should be supported by adequate appropriations from the State government.

A preparatory constitutional convention commission will require significant appropriations to accomplish its substantial task. As noted, the preparatory commission created for the 1967 Convention received an initial

[79] DELEGATE SELECTION PROCESS, *supra* note 66, at 36.

$150,000[80] that grew to approximately one million dollars by the time its work was completed in 1967.[81]

Based on past experience, a preparatory commission will require financial support from the State government in order to hire qualified staff and ensure a high quality work product. Given the substantial governmental expenditure that an actual Constitutional Convention would require, a significant appropriation for a commission's work is a wise investment. Should the voters approve the call for a Constitutional Convention in 2017, additional appropriations will be necessary.

IV. CONCLUSION

In the November 2017 general election, New York voters will decide whether to hold a Constitutional Convention commencing in April 2019. This will be a constitutional choice of profound importance; a rare opportunity to debate fundamental principles of governance. Absent a legislative initiative, the State will not have this opportunity for another twenty years.

Whatever the outcome of the referendum, the public should be educated about the relevant issues. The establishment of a preparatory commission is a first step in beginning the "deliberative process that could result in our later being offered either an entirely new Constitution or a series of amendments to the existing Constitution."[82] The 1957 and 1997 mandatory Convention votes were preceded by such commissions. The need for a commission today is even greater than those past cycles. There are few living delegates from the last Convention in 1967, and little, if any, institutional memory on how to hold one. The hard, complex work of preparing for a vote and Convention cannot begin too soon.

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[80] L. 1965, ch. 443 § 11.

[81] Van den Heuvel, *Reflections*, *supra* note 54, at 263.

[82] DELEGATE SELECTION PROCESS, *supra* note 66, at 1.

NEW YORK STATE BAR ASSOCIATION

REPORT AND RECOMMENDATIONS

CONCERNING

CONSTITUTIONAL HOME RULE

ADOPTED BY

THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION

Membership of the New York State Bar Association's Committee on the New York State Constitution

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INTRODUCTION AND EXECUTIVE SUMMARY

The New York State Constitution mandates that every 20 years voters are asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning Constitutional Home Rule.

In New York State, local government has a greater impact on the day-to-day lives of the public than any tier of government. Our thousands of towns, villages, counties, cities, boroughs, school districts, special districts, authorities, commissions and the like play a vital governance role. They are responsible for drinking water, social services, sewerage, zoning, schools, roads, parks, police, courts, jails, trash disposal — and more. Without local government, public services often taken for granted would not be delivered.

Befitting its stature and importance, local government is a longstanding constitutional concern.[2] Indeed, since the 19th Century, "Home Rule" — the authority of local governments to exercise self-

[1] N.Y. CONST. art. XIX, § 2 ("At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question 'Shall there be a convention to revise the constitution and amend the same?' shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . . .").

[2] Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL'Y SYMP. 79, 79 (1996) ("A longstanding constitutional concern in New York is local government and the relations between local governments and the State.").

government — has been a matter of constitutional principle in New York.[3] The continuing dilemma has been to strike the right balance of furthering strong local governments but leaving the State strong enough to meet the problems that transcend local boundaries.[4] The competing considerations were aptly summarized by the commission tasked with preparing for the last Constitutional Convention held in New York in 1967:

> On the one hand, there is the question of how to leave a legislature free to cope with possible problems of state-wide concern and to intervene in local affairs when, in the judgment of the legislature, they reach a point of state-wide concern. On the other, is the question of how to determine the responsibilities appropriate for local governments, the powers needed for carrying out those responsibilities and the kind of protection from state legislative intervention that should be provided to permit and sustain responsive and responsible local self-government.[5]

Article IX, the so-called "Home Rule" article, contains protections for local government that are more extensive than those in many other states.[6] Constitutional Home Rule is established by granting local governments affirmative lawmaking powers, while carving out a sphere of local autonomy free from State interference.

[3] *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428, 548 N.Y.S.2d 144, 146, 547 N.E.2d 346, 348 (1989) (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").

[4] *Id.* at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348.

[5] N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT 11 (Mar. 31, 1967) [hereinafter LOCAL GOVERNMENT].

[6] *See* ROBERT B. WARD, NEW YORK STATE GOVERNMENT 545 (2d ed. 2006) ("New York's constitutional and statutory provisions regarding home rule are more extensive than those in many states.").

Despite Article IX's intent to expand the authority of local governments, Home Rule in practice has produced only a modest degree of local autonomy. The powers of local governments have been significantly restricted by two legal doctrines developed through decades of litigation ("preemption" and "State concern"). Local governments must also follow mandates enacted by the State Legislature.

The preemption doctrine is a fundamental limitation on the power of local governments to adopt local laws. Under the preemption doctrine, a local law is unenforceable when it collides with a State statute; that is, the local law prohibits what a State statute allows, or the State statute prohibits what the local law allows. But even in the absence of an outright conflict between State and local law, a local government may not act where the State has acted comprehensively in the same area.

The State concern doctrine represents an exception to the constitutional limitations on the State Legislature's authority to enact special laws targeted at one or more, but not all local governments. Under this doctrine, the State Legislature is empowered to regulate local matters, yet which also relate to State concerns, such as waste disposal on Long Island, sewers in Buffalo, and taxicabs in New York City.

Home Rule is further limited by the State Legislature's imposition of mandates that compel local governments to provide specific services and meet minimum State standards, often without providing fully supporting funds necessary to comply with such mandates. New York imposes more unfunded mandates on localities than any other state in the nation.[7]

Blue ribbon panels and local government scholars have called for revisions to Article IX's Home Rule provisions. Nevertheless, a half-century has passed since the State has had a serious discussion on this subject. The time to do so again is long overdue. This is especially so, given the myriad challenges facing local government today.

[7] PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 279 (2d ed. 2012) [hereinafter THE NEW YORK STATE CONSTITUTION].

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides an overview of Constitutional Home Rule. Part III describes legal doctrines and laws that restrict the ambit of Home Rule. Part IV concludes that New Yorkers would benefit from a thorough consideration of Constitutional Home Rule and potential reforms that would strengthen and clarify it.

I. BACKGROUND OF THE REPORT

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

On October 8, 2015, the Committee issued its first report and recommendations, entitled "*The Establishment of a Preparatory State Commission on a Constitutional Convention.*"[8] The Committee recommended that, in advance of the 2017 referendum on a Constitutional Convention, the State should establish a non-partisan preparatory commission, as it has done in the past. The commission's duties should include: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the

[8] N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMM'N ON A CONSTITUTIONAL CONVENTION (2015), *available at* http://www.nysba.org/nysconstitutionreport/ (last visited on Mar. 6, 2016).

preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

On November 7, 2015, the State Bar's House of Delegates unanimously adopted the Committee's report and recommendations.[9] Two months later, during his State of the State Address, Governor Andrew M. Cuomo proposed as part of his Executive Budget the creation of a preparatory commission on a Constitutional Convention. The Governor proposed investing $1 million to create the commission to develop a blueprint for a convention. The commission would also be authorized to recommend fixes to the current Convention delegate selection process.[10]

The Committee has now turned its attention to the subject of Constitutional Home Rule. At its meeting on December 17, 2015, the Committee heard a presentation from Professor Richard Briffault, the Joseph P. Chamberlin Professor of Legislation at Columbia Law School, and a nationally respected authority on local government. At its next meeting, on January 27, 2016, the Committee heard from another eminent authority on local government, Michael A. Cardozo, a partner at the law firm of Proskauer Rose and the former Corporation Counsel for the City of New York from 2002 through 2013. As the City's 77th and longest serving Corporation Counsel, Mr. Cardozo was the City's chief legal officer, headed the City's Law Department of more than 700 lawyers, and served as legal counsel to Mayor Michael Bloomberg, elected officials, the City and its agencies.

[9] Press Release, N.Y. State Bar Assn., *New York State Bar Association Calls on State Government to Prepare Now for Statewide Vote on State Constitution in 2017* (Nov. 13, 2015), *available at* http://www.nysba.org/NYSConstitutionVote/ (last visited on Mar. 6, 2016).

[10] Press Release, N.Y. State Div. of Budget, *Governor Cuomo Outlines 2016 Agenda: Signature Proposals Ensuring That New York is — and Will Continue to Be Built to Lead* (Jan. 13, 2016), *available at* http://www.budget.ny.gov/pubs/press/2016/pressRelease16_eBudget.html (last visited on Mar. 6, 2016).

After further discussion and review, the Committee concluded that the public and legal profession would be well served to have a serious conversation about, and debate over, whether the Home Rule provisions in Article IX of the State Constitution should be clarified and strengthened. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on March 10, 2016.

II. CONSTITUTIONAL HOME RULE — GENERALLY

Home rule — the right of localities to exercise control over matters of local concern[11] — has long "been a matter of constitutional principle"[12] in New York State. Beginning in the 19th Century, the home rule movement represented a determined effort to provide local governments with autonomy over local affairs and freedom from State legislative interference.[13] The path of home rule has been "unsettled and tortuous" through the years, reflecting "the difficult problem of furthering strong local governments but leaving the

[11] *See People ex. rel. Metropolitan St. Ry. Co. v. State Board of Tax Comm'rs*, 174 N.Y. 417, 431, 67 N.E. 69, 70 (1903), *aff'd*, 199 U.S. 1 (1905) ("The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution."); *see also* John R. Nolon, *The Erosion of Home Rule Through The Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. LAW REV. 497, 505 (1993) ("[Home Rule's] purpose is to permit local control over matters that are best handled locally and without state interference."); James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 713 n.1 (1985) ("'home rule' can be described as a method by which a state government can transfer a portion of its governmental power to a local government") [hereinafter *Ghost of Home Rule*].

[12] *See Kamhi*, 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").

[13] Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1145 (1966).

State just as strong to meet the problems that transcend local boundaries, interests and motivations."[14]

New York's basic system of local governance is set forth in Article IX of the State Constitution. Adopted in 1963 with high hopes,[15] Article IX was intended to expand and secure the powers enjoyed by local governments.[16] Governor Nelson A. Rockefeller predicted at the time that Article IX and its implementing legislation would "strengthen the governments closest to the people so that they may meet the present and emerging needs of our times."[17]

Article IX declares "[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state";[18]

[14] *Kamhi*, 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (internal quotation marks & citations omitted).

[15] *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 266 (Article IX was "meant to embody a new concept in state-local relationships by constitutionally recognizing that the 'expansion of powers for effective local self-government' is a purpose of the people of the state.") (citation omitted).

[16] *See Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 496, 393 N.Y.S.2d 949, 953, 362 N.E.2d 581, 585 (1977) ("Undoubtedly the 1963 home rule amendment was intended to expand and secure the powers enjoyed by local governments."); *Matter of Town of E. Hampton v. State of New York*, 263 A.D.2d 94, 96, 699 N.Y.S.2d 838, 839 (3d Dep't 1999) ("The unquestioned purpose behind the home rule amendment was to expand and secure the powers enjoyed by local governments.") (internal quotation marks omitted); James L. Magavern, *Fundamental Shifts Have Altered the Role of Local Government*, N.Y. ST. B.J., Jan. 2001, at 52, 53 (the Home Rule Amendments to the State Constitution were "presented as 'a significant new contribution to the principle that local problems can best be solved by those familiar with them and most concerned with them'") (quoting N.Y. STATE OFFICE FOR LOCAL GOVERNMENT, NEWSLETTER, No. 15, Sept. 18, 1963).

[17] WARD, THE NEW YORK STATE GOVERNMENT, *supra* note 6, at 547 (quoting Governor Rockefeller's memorandum of approval of Article IX's implementing legislation, the Municipal Home Rule Law (L. 1963, ch. 843 & 844), upon its adoption on Apr. 30, 1963).

[18] N.Y. CONST. art. IX, § 1. "Local government" is defined in Article IX to consist of counties, cities, towns, and villages. *Id.* § 3(d)(2).

creates a "Bill of Rights" for local governments to secure certain enumerated "rights, powers, privileges and immunities";[19] and vests in the State Legislature the power to create and organize local governments.[20]

Constitutional home rule is established through two assertions of local government power in Article IX.[21] One is affirmative grants of power to local governments to manage their affairs through the adoption of local laws. The other restricts the State Legislature from intruding upon matters of local, rather than State, concern, except as provided in the Constitution.[22] Each is described more fully in turn.

[19] *Id.* § 1. The local government Bill of Rights sought to lay the groundwork for stronger and more effective local government. *See Town of Black Brook v. State of New York,* 41 N.Y.2d 486, 488-89, 393 N.Y.S.2d 946, 362 N.E.2d 579, 581 (1977). It lists various rights, amongst which are: the right to have an elective body with authority to adopt local laws; the right to elect and appoint local residents or officers; the power to agree, as authorized by the Legislature, with the federal government, a State or other government to provide cooperatively governmental services and facilities; the power of eminent domain; the power to make a fair return on the value or property used in the operation of certain utility services, and the right to use the profits therefrom for refunds or any other lawful purpose; and the power to apportion costs of governmental services of functions upon portions of local areas as authorized by the Legislature. N.Y. CONST. art. IX, §§ (1)(a)-(b), (c), (e)-(g).

[20] *Id.* § 2(a) ("The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.").

[21] *See* James D. Cole, *Local Authority to Supersede State Statutes,* N.Y. ST. B.J., Oct. 1991, 34, 34 ("Under Article IX of the State Constitution, home rule in New York has two basic components.").

[22] *See City of New York v. Patrolmen's Benevolent Assn. of City of New York,* 89 N.Y.2d 380, 385-86, 654 N.Y.S.2d 85, 87, 88, 676 N.E.2d 847, 849 (1996) ("Article IX, § 2 of the State Constitution grants significant autonomy to local governments to act with respect to local matters. Correspondingly, it limits the authority of the State Legislature to intrude in local affairs. . . ."); *Kamhi*, 74 N.Y.2d at 428-29, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 ("two-part model for home rule: limitations on State intrusion into matters of local concern and affirmative grants of power to local governments").

A. Grants of Lawmaking Authority

Section 1 of Article IX declares that "[e]very local government shall have power to adopt local laws as provided by this article."[23] Section 2(c) — the "center of home rule powers"[24] — elaborates on the lawmaking power, by providing that local governments "shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government."[25]

Section 2 also confers on local governments the power to adopt local laws regarding ten specified areas, regardless of whether or not they relate to the local government's property, affairs or government.[26] These ten areas include: membership and composition of the local legislative body;[27] powers, duties, qualifications, number, mode of selection, and removal of officers and employees;[28] transaction of the local government's business;[29]

[23] N.Y. CONST. art. IX, § 1(a).

[24] PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 290 (1996) [hereinafter ORDERED LIBERTY].

[25] N.Y. CONST. art. IX, § 2(c)(i). The phrase "property, affairs or government" was first codified in the 1894 State Constitution, and has been at the center of the Home Rule dialogue ever since. "Although, literally construed, it might cover an extremely broad area, it has never been accorded its literal significance but has been treated as excluding all matters of state concern." N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67. *See also Adler v. Deegan*, 251 N.Y. 467, 473, 167 N.E. 705, 707 (1929) ("When the people put these words in . . . the Constitution, they put them there with a Court of Appeals' definition, not that of Webster's Dictionary.").

[26] RICHARD BRIFFAULT, *Intergovernmental Relations* [hereinafter *Intergovernmental Relations*], *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 156-57 (Gerald Benjamin & Hendrik N. Dullea eds., 1997); GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

[27] N.Y. CONST. art. IX, § 2(c)(ii)(2).

[28] *Id.* §§ 2(c)(ii)(1).

[29] *Id.* § 2(c)(ii)(3).

the incurring of obligations;[30] presentation, ascertainment and discharge of claims against the local government;[31] acquisition, care, management and use of highways, roads, streets, avenues and property;[32] acquisition of transit facilities and the ownership and operation thereof;[33] levying and collecting local taxes;[34] wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for the local government;[35] and the government, protection, order, conduct, safety, health and well-being of persons or property therein.[36]

Outside of the ten enumerated subjects, the State government retains all power otherwise delegated to it by law.[37] Unlike the State government, local governments are not sovereigns in their own right.[38] Accordingly,

[30] *Id.* § 2(c)(ii)(4).

[31] *Id.* § 2(c)(ii)(5).

[32] *Id.* § 2(c)(ii)(6).

[33] *Id.* § 2(c)(ii)(7).

[34] *Id.* § 2(c)(ii)(8).

[35] *Id.* § 2(c)(ii)(9).

[36] *Id.* § 2(c)(ii)(10).

[37] *See id.* § 3(a)(3) ("Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to: . . . [m]atters other than the property, affairs or government of a local government.").

[38] *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 265 ("In American constitutional theory, there is no inherent right of local self-government. Local Government units are creatures of the state.").

local governments have only the lawmaking powers delegated by the State Constitution and Legislature.[39]

Article IX requires the State Legislature to enact a "statute of local governments" granting local governments additional powers "including but not limited to" matters of local legislation and administration.[40] A power granted in such statute has quasi-constitutional protection against challenge, because it can be "repealed, diminished, impaired or suspended" only by a law passed and approved by the Governor in each of two successive calendar years.[41] In 1964, the Legislature complied with the constitutional directive and enacted a Statute of Local Government,[42] as well as the Municipal Home Rule Law,[43] both of which are to be liberally construed.[44]

[39] *See Kamhi*, 74 N.Y.2d at 427, 548 N.Y.S.2d at 145, 547 N.E.2d at 347 ("In general, towns have only the lawmaking powers the Legislature confers on them . . . . Without legislative grant, an attempt to exercise such authority is ultra vires and void.").

[40] *See* N.Y. CONST. art. IX, § 2(b)(1) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (l) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article.").

[41] *Id.* § 2(b)(1) ("A power granted in such statute [of local governments] may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year."); *see also Wambat Realty Corp.*, 41 N.Y.2d at 496, 393 N.Y.S.2d at 953-54, 362 N.E.2d at 586 ("In particular, the direction to enact a Statute of Local Government, including the innovative double enactment procedure to impede encroachment on the granted local powers, was expressly aimed at 'proving a reservoir of selected significant powers.'") (citations omitted); GALIE, ORDERED LIBERTY, *supra* note 24, at 290 ("although it was not feasible to grant the home rule powers contained in the statute constitutional status, the statute provided quasi-constitutional protection for these powers").

[42] *Wambat Realty Corp.*, 41 N.Y.2d at 490, 393 N.Y.S.2d at 951, 362 N.E.2d at 583. The powers in the Statute of Local Governments include the ability to acquire real and personal property, adopt, amend, and repeal ordinances, resolutions, etc., acquire, construct, and operate recreational facilities, and levy, impose, collect, and administer rents, charges and fees. N.Y. STAT. LOCAL GOV. § 10. The Legislature also made certain reservations, and if State legislation which impinged on a power granted to local

The Legislature may confer on local governments powers not relating to their property, affairs or government and not limited to local legislation and administration "in addition to those otherwise granted by or pursuant to this article" and may withdraw or restrict such additional powers.[45]

Other constitutional provisions authorize the Legislature to grant additional powers to local governments.[46] For example, the Legislature may grant the power to apportion the cost of a government service or function upon any portion of the area within the local government's jurisdiction and exercise of eminent domain outside local boundaries.[47] The

governments by the statute is within the ambit created by those reservations, the change can be achieved by ordinary legislative process. *Id.* § 11. In the view of an eminent constitutional scholar, the powers granted local governments by the Legislature in the Statute of Local Governments are not significant. GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

[43] *See DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 94, 725 N.Y.S.2d 622, 625, 749 N.E.2d 186, 189 (2001) ("To implement Article IX, the Legislature enacted the Municipal Home Rule Law."). The Municipal Home Rule Law put in one place and organized, for the first time, the statutory provisions relating to Home Rule for various types of local government. This replaced Home Rule provisions previously contained in the City Home Rule Law, the Village Home Rule Law, the Town Law, the County Law and a number of other laws. N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68; *see also* N.Y. MUN. HOME RULE L. § 10 (describing general powers of local governments to adopt and amend local laws).

[44] *See* N.Y. MUN. HOME RULE LAW § 51 (providing that home rule powers "shall be liberally construed"); N.Y. STAT. LOCAL GOV. § 20(5) (same).

[45] N.Y. CONST. art. IX, § 2(b)(3) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.").

[46] Briffault, *Intergovernmental Relations*, *supra* note 26, at 158.

[47] *See* N.Y. CONST. art. IX, §§ 1(e) ("The legislature may authorize and regulate the exercise of the power of eminent domain and excess condemnation by a local government outside its boundaries."), (g) ("A local government shall have power to

Legislature is also authorized to grant various powers to cities, towns and villages for the financing of low-rent housing and nursing home accommodations for persons of low income.[48]

Article IX, Section 3(c) provides that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."[49]

B. Immunity from Legislative Interference

At the same time that Article IX authorizes local governments to adopt local laws in a wide range of fields, it also sets procedural limits on the ability of the State Legislature to impinge on local authority. Specifically, Section 2(b)(2) of Article IX — the so called "Home Rule clause" — limits the State Legislature's power to enact laws regulating matters that fall within the purview of local government. The Home Rule clause states as follows:

> [T]he legislature . . . [s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter

apportion its cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature.").

[48] BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158 (citing N.Y. CONST. art. XVIII).

[49] N.Y. CONST. art. IX, § 3(c).

> case, with the concurrence of two-thirds of the members elected to each house of the legislature.[50]

Under this provision, the State Legislature may freely regulate the property, affairs or government of local governments through the enactment of a "general law" that "in its terms and in effect applies to all counties . . .[,] all cities, all towns or all villages."[51] However, if the Legislature seeks to enact a special law that would apply to one or more, but not all local governments,[52] it must follow one of two procedures intended to protect the Home Rule powers of the affected localities.[53] The State Legislature must receive either (1) a request of two-thirds of the total membership of the local legislative body or of the local chief executive officer concurred in by a majority of the membership of the local legislature; or (2) a certificate of necessity from the Governor reciting facts that constitute an emergency requiring enactment of such law and the concurrence of two-thirds of each house of the State legislature.[54] The first option's directives are commonly referred to as the "Home Rule message" requirement "because whenever a special law is enacted it should be at the locality's request."[55] "The second

[50] CONST. art. IX, § 2(b)(2).

[51] *See id.* § 3(d)(1) ("'General law.' A law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.").

[52] *See id.* § 3(d)(4) ("'Special law.' A law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages.").

[53] *Id.* § 2(b)(2).

[54] BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158 (construing Home Rule clause).

[55] *Greater N.Y. Taxi Assn. v. State of New York,* 21 N.Y.3d 289, 301, 993 N.E.2d 970 N.Y.S.2d 907, 914, 993 N.E.2d 393, 400 (2013).

option — the Governor's emergency message and legislative super-majority — is unavailable for special laws concerning New York City."[56]

A particularly striking example of special laws enacted pursuant to either Home Rule message or Gubernatorial message of necessity are State legislative enactments establishing emergency financial control boards for distressed municipalities, which effectively allow the State government to temporarily assume control of these municipalities' finances and daily operations.[57]

III. RESTRICTIONS ON HOME RULE

While Home Rule is provided for in Article IX, it has been left to the State's judiciary to interpret the constitutional Home Rule provisions. Drawing lines between what is properly the domain of local government under Home Rule and the State's ability to legislate has been a recurring role for the courts.[58] Home rule "reflects a far-flung effort over more than a century's time" to find meaning in the ambiguous phrases "property, affairs or government" and "matters of state concern."[59] "The result of these efforts has been a highly developed, and still developing, case law . . . ."[60]

[56] BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158-59 (citing N.Y. CONST. art. IX, § 2(b)(2)).

[57] *See, e.g.*, City of Yonkers Financial Emergency Act, L. 1975, ch. 871, § 5 (legislation passed on both message of necessity and Home Rule message establishing emergency financial control board for City of Yonkers).

[58] Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER L. REV. 1337, 1338 (2009) [hereinafter *Constitutional Home Rule*]; *see also* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67 ("The duty of determining whether particular matters pertain to the property, affairs or government of local governments or are matters of state concern has devolved upon the judiciary with, at least to many persons, unsatisfactory results.").

[59] Baker & Rodriguez, *Constitutional Home Rule, supra* note 58, at 1338.

[60] *Id.*

Indeed, the current status of Home Rule in New York has been largely shaped by the judicial development of two legal doctrines: (1) the State preemption doctrine and (2) the State concern doctrine. The former represents a fundamental limitation on local government's lawmaking powers; the latter carves out an exception to the constitutional limitations on the State Legislature's authority to enact special laws. The impact of each on the relationship between the State and local governments cannot be overstated. The same can be said for the stresses placed on local governments by unfunded State mandates.

A. The Preemption Doctrine

As noted, the State preemption doctrine is a "fundamental limitation on home rule powers."[61] Although Article IX vests local governments with substantial lawmaking powers by affirmative grant, "the overriding limitation" of the preemption doctrine embodies "the untrammeled primacy of the Legislature to act with respect to matters of State concern."[62]

In general, preemption occurs in one of two ways; first, when a local government adopts a law that directly conflicts with a State statute; and second, when a local government legislates in a field for which the State legislature has assumed full regulatory responsibility.[63] Conflict preemption

[61] *Albany Area Builders Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d. 627, 629 546 N.E.2d 920, 922 (1989).

[62] *Id.*; *see also Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96, 524 N.Y.S.2d 8, 10, 518 N.E.2d 903, 905 (1987) ("although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"); BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 171 ("The sources of home rule authority generally provide that local enactments must not be inconsistent with the Constitution or genera laws. In other words, although a subject may fall within the grant of home rule authority, local action may be preempted by state law.").

[63] *DJL Rest. Corp.*, 96 N.Y.2d at 95, 725 N.Y.S.2d at 625, 749 N.E.2d at 190 (internal quotations omitted).

represents an outright conflict or "head-on collision" between a local law and State statute.[64] A local law is unenforceable if it prohibits what a State statute explicitly allows, or if the State statute prohibits what the local law explicitly allows.[65]

But even in the absence of an outright conflict, a local law is preempted if the State Legislature "has evidenced its intent to occupy the field."[66] Field preemption occurs when "a local law regulating the same subject matter as a state law is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute."[67] "Such local laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns."[68]

Field preemption may be express or implied. Express field preemption occurs when a State statute explicitly provides that it preempts all local laws on the subject.[69] Field preemption is implied when "either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative

[64] *See Lansdown Entertainment Corp. v. N.Y.C. Dep't of Cons. Affairs*, 74 N.Y.2d 761, 764, 545 N.Y.S.2d 82, 83, 543 N.E. 2d 725, 726 (1989).

[65] *Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d 126, 134, 933 N.Y.S.2d 388, 395 (2d Dep't 2011) (internal quotation marks and citations omitted).

[66] *Albany Area Builders Assn.*, 74 N.Y.2d at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

[67] *Id.* (internal quotation marks, alteration, and citations omitted).

[68] *Id.* at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

[69] *See Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 468 N.Y.S.2d 596, 599 456 N.E.2d 487, 490 (1983).

intent to preempt, even in the absence of an express statement of preemption."[70]

Examples of local laws that have been found to be impliedly preempted include the following activities:

- Residency restrictions for sex offenders;[71]
- Minimum wage laws;[72]
- Regulating local taxation for roadway construction;[73]
- Hours of operations of taverns and bars;[74]

[70] Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOKLYN L. REV. 321, 349 (1999) (citations omitted).

[71] *See People v. Diack*, 24 N.Y.3d 674, 681, 3 N.Y.S.3d 296, 26 N.E.3d 1151 (2015) (holding that design and purpose of State laws regulating registered sex offenders evidenced intent to preempt subject of sex offender residency restriction legislation and to "occupy the entire field" so as to prohibit local governments from doing so).

[72] *See Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 A.D.2d 327, 329, 234 N.Y.S.2d 862, 865 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 998, 239 N.Y.S.2d 128, 189 N.E.2d 623 (1963) (invaliding New York City minimum wage law which set a rate higher than that set in the State minimum wage law; "it is entirely clear that the state law indicates a purpose to occupy the entire field").

[73] *Albany Area Builders Assn.*, 74 N.Y.2d at 377-78, 547 N.Y.S.2d at 629, 546 N.E.2d at 922 (invalidating local law regulating taxation for roadway construction, where State's "elaborate budget system" provided for how towns were to budget for roadway improvements and repairs, and the State explicitly regulated at local level amount of taxes collectible for roadway improvements and the expenditure of such funds).

[74] *People v. DeJesus*, 54 N.Y.2d 465, 468-70, 446 N.Y.S.2d 207, 210, 430 N.E.2d 1260, 1263 (1981) (holding that State's Alcohol Beverage Control Act was "exclusive and statewide in scope, thus, no local government could legislate in field of regulation of establishments which sell alcoholic beverages"). *Cf., Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 N.Y.2d 645, 650, 612 N.Y.S.2d 357, 359, 634 N.E.2d 958, 960 (1994) (upholding City of New York's ability to regulate the location of tobacco vending machines, including within taverns).

- Regulating where abortions may be performed;[75] and,
- Power plant siting.[76]

Implied preemption has provided a fertile ground for litigation. By no means are all challenges to local laws based on implied preemption successful.[77] However, because the dispositive inquiry turns on interpreting the State Legislature's intent, it is often difficult to predict whether a given local law will or will not withstand judicial scrutiny. As one commentator has explained:

> The Legislature rarely makes a clear declaration of policy. The courts therefore have no clear standard for determining whether

[75] *See Robin v. Village of Hempstead*, 30 N.Y.2d 347, 350-351 285 N.E.2d 285, 287, 334 N.Y.S.2d 129, 132 (1972) (holding that State law preempted local law regulating where abortions may be perform because of the scope and detail of State medical and hospital regulation).

[76] *See Consolidated Edison Co.*, 60 N.Y.2d at 105, 468 N.Y.S.2d at 599, 456 N.E.2d at 490 (holding that a local zoning ordinance was preempted partially based on State law's establishment of a Siting Board that "is required to determine whether any municipal laws or regulations governing the construction or operation of a proposed generating facility are unreasonably restrictive, and has the power to waive compliance with such municipal regulations").

[77] *See, e.g.*, *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 691-92, 16 N.Y.S.3d 25, 30, 37 N.E.3d 82, 87 (2015) (finding "no express conflict between the broad authority accorded to [New York] courts to regulate attorneys under the [New York] Judiciary Law and the licensing of individuals as attorneys who are engaged in debt collection activity falling outside of the practice of law," and further finding that the "authority to regulate attorney conduct does not evince an intent to preempt the field of regulating non-legal services rendered by attorneys"); *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.2d 1188 (2014) (holding that State Oil and Gas Law did not preempt town zoning ordinances banning hydrofracking); *New York State Club Assn. v. New York*, 69 N.Y.2d 211, 221-22, 513 N.Y.S.2d 349, 354, 505 N.E.2d 915, 920 (1987) (upholding New York City law prohibiting discrimination in private clubs; State's Human Rights Law's failure to define "distinctly private" suggested "an intent to allow local government to act"); *People v. Judiz*, 38 N.Y.2d 529, 531-32, 381 N.Y.S.2d 467, 469, 344 N.E.2d 399, 401 (1976) (upholding a local ordinance prohibiting possession of an "imitation pistol" despite a State statute covering the same subject area).

> the extent and nature of state regulation of an area is "comprehensive," and therefore preemptive, or "piecemeal," and therefore not preemptive. The result is ad hoc judicial decision making and considerable uncertainty as to when state legislation will be considered preemptive of local action.[78]

The implied preemption doctrine has drawn its share of critics. Local government scholars have cautioned that the ever-present, seemingly inchoate possibility that a court may find implied preemption "casts a shadow over local autonomy, often leading local governments to question whether they have the authority to act,"[79] and, therefore, imposing "severe constraints on local policy innovation and choice."[80]

In 2008, the New York State Commission on Local Government Efficiency and Competiveness, chaired by former Lieutenant Governor Stanley N. Lundine, noted that the implied preemption doctrine does not appear in the State Constitution,[81] and has created "confusion and uncertainty" for local governments when exercising their home rule powers.[82] The Lundine Commission called for a constitutional amendment

[78] Briffault, *Intergovernmental Relations, supra* note 26, at 173.

[79] *See* Briffault, *Local Government and the New York State Constitution, supra* note 2, at 90. *See also* Paul Diller, *Intrastate Preemption*, 87 BOSTON UNIV. L. REV. 1113, 1133 (2007) (arguing that field preemption can be a "tool of interest groups," through which particular focused groups "seek relief from the local laws they dislike by turning to the courts, rather than — or in addition to — pursuing other options to further their interests.").

[80] *See* Daniel B. Rodriguez, *Localism and Lawmaking,* 32 RUTGERS L.J. 627, 639-40 (2001).

[81] N.Y. STATE COMM'N ON LOCAL GOVT. EFFICIENCY & COMPETITIVENESS, 21ST CENTURY LOCAL GOVERNMENT 36 (Apr. 2008), *available at* http://www.greaterohio.org/files/policy-research/new-york-final-report.pdf.

[82] *Id.* at 37.

prohibiting the judicial application of implied preemption.[83] Such an amendment, the Lundine Commission explained, "would allow local governments to act except where state law has expressly declared state authority in the area to be exclusive or has specifically limited local governments' ability to act in that area or field."[84]

In a similar vein, one local government scholar has called for the establishment in New York of a judicial presumption against preemption.[85] And, a court of last resort in another state has adopted a default rule that the state legislature has not occupied the field unless it has said so explicitly.[86]

[83] *Id.* at 3, 36-37.

[84] *Id.* at 36. The State of Illinois is an example of a State that has followed this approach. The Home Rule provision in the Illinois State Constitution allows for preemption only when the Legislature expressly so provides in legislation. *See* ILL. CONST. 1970, art. VII, § 6(i) ("Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."). *See also* Alaska CONST. art X, § 11 ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.").

[85] *See* Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 648 (2014) ("Article IX, section 3(c) of the New York Constitution requires that the home rule powers of municipalities be 'liberally construed.' Such liberal construction, this article suggests, requires a qualified presumption against preemption: Unless statutory text manifestly and unambiguously supersedes local law, courts should presume that state law does not preempt local laws. This presumption is not irrebuttable: it can be overcome where local laws encroach on some substantial state interest that local residents are likely to ignore.").

[86] *See Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001) ("In general, for state law to preempt local authority, it is not enough for state law to occupy the field. Rather, if the legislature wishes to preempt an entire field, it must so state.') (internal quotation marks, citation & brackets omitted). *See also, e.g., City of Ocala v. Nye*, 608 So.2d 15, 17 (Fla. 1992) (implying in dicta that Florida does not recognize field preemption); *Cincinnati Bell Tel. Co. v. City of Cincinnati*, 693 N.E.2d 212, 218 (Ohio 1998) ("(T)here is no constitutional basis that supports the continued application of the doctrine of implied preemption.").

Whatever one may think of such proposals, the fact remains that implied preemption is a significant constraint on local authority, even when a local government acts well within the sphere of specific Home Rule powers.[87] It has also generated considerable litigation, with often unpredictable results, creating confusion and uncertainty for local governments.

B. The State Concern Doctrine

Article IX's Home Rule clause carves out a sphere of autonomy for local governments over their "property, affairs or government" by limiting the State Legislature's power to act with respect to such local matters through special legislation. However, the Home Rule clause is subject to a significant limitation — the "State concern" doctrine — derived from the case of *Adler v. Deegan*[88] in 1929.

In *Adler*, the New York Court of Appeals addressed the power of the Legislature to enact the Multiple Dwelling Law,[89] which required housing to comply with minimum standards for fire-prevention, light, air and sanitation.[90] This salutary act applied, in effect, only to New York City, but did not conform to the Home Rule requirements for special legislation.[91] Nevertheless, the Court found the subject matter of the Multiple Dwelling Law addressed a "state concern" and on that ground upheld its enactment as a valid exercise of State legislative power.[92]

[87] *See Jancyn Mfg. Corp.*, 71 N.Y.2d at 97, 524 N.Y.S.2d at 11, 518 N.E.2d at 905.

[88] 251 N.Y. 467, 167 N.E. 705 (1929).

[89] L. 1929, ch. 713, § 3.

[90] *Adler*, 251 N.Y. at 491-92, 167 N.E. at 714 (Lehman, J., dissenting).

[91] *Adler*, 251 N.Y. at 470, 167 N.E. at 706-08 (Pound, J. concurring).

[92] *Id.* at 473-78, 167 N.E. at 706-09.

In a seminal concurring opinion, then-Chief Judge Benjamin Cardozo argued that, if a subject, like slum clearance, "be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality."[93] Thus, even if legislation relates to the property, affairs, or government of a local government, if the legislation is also a matter of substantial state concern, the Home Rule clause is inoperative and the Legislature may act through ordinary legislative processes.[94]

Although *Adler* predated the adoption of Article IX by over 30 years, the Court of Appeals has continuously and expansively interpreted the "state concern" doctrine.[95] Time and again, the Court has upheld legislation

[93] *Id.* at 491, 167 N.E. at 714 (Cardozo, Ch. J., concurring). *See Patrolmen's Benevolent Assn. of City of New York*, 97 N.Y.2d at 386, 740 N.Y.S.2d at 663, 767 N.E.2d at 120 ("A recognized exception to the home rule message requirement exists when a special law serves a substantial State concern.").

[94] Eliot J. Kirshnitz, *Recent Developments: City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes Another Blow Against Constitutional Home Rule*, 74 ST. JOHN'S L. REV. 935, 947 (2000) [hereinafter *Strikes Another Blow*]. *See also Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 970 N.Y.S.2d 724, 726, 992 N.E.2d 1067, 1069 (2013) (holding that "where the Legislature has enacted a law of state-wide impact on a matter of substantial State concern but has not treated all areas of the State alike, the Home Rule section of the State Constitution does not require an examination of the reasonableness of the distinctions the Legislature has made"). *See also Matter of Town of Islip v. Cuomo*, 64 N.Y.2d 50, 52, 484 N.Y.S.2d 528, 529, 473 N.E.2d 756, 757 (1984) (Article's IX limitations on special laws "applies only to a special law which is directly concerned with the property, affairs or government of a local government and unrelated to a matter of proper concern to State government"). *See, e.g., Osborn v. Cohen*, 272 N.Y. 55, 59-60, 4 N.E.2d 289, 290 (1936) (striking down a statute that provided for submission of issue of firemen's hours to referendum in cities of one million or more inhabitants; no "foundation in the record" that the establishment and control of fire departments are matters of state concern).

[95] *See Wambat Realty Corp.*, 41 N.Y.2d at 494, 393 N.Y.S.2d at 952, 362 N.E.2d at 584 (terming *Adler* a "decisively enlightening case"); Cole, *Ghost of Home Rule*, *supra* note 11, at 718 ("In virtually every subsequent judicial decision dealing with these matters, *Adler* has been cited for the proposition that as to matters of state concern, the legislature may act through the ordinary legislative process, unrestricted by the home rule provisions of the constitution."); GALIE, ORDERED LIBERTY, *supra* note 24, at 291 ("In

relating to local property, affairs, or governments, yet which also related to a State concern, despite the failure of those laws to conform to Home Rule requirements.

For example, the Court has found the following local matters to also be matters of state concern sufficient to sustain the Legislature's power to address them by special law, without either a Home Rule or Gubernatorial message or legislative supermajority:

- Waste disposal in Nassau and Suffolk Counties;[96]
- Municipal sewers in Buffalo;[97]
- Protection of the Adirondack Park's resources;[98]
- Salaries of District Attorneys in certain counties;[99]

general, the Court of Appeals has followed decisions made prior to the adoption of the article, giving 'matters of state concern' an expansive reading.") (citation omitted).

[96] *See Matter of Town of Islip*, 64 N.Y.2d at 56-58, 484 N.Y.S.2d at 531-33, 473 N.E.2d at 759-61 (upholding special law regulating waste disposal in Nassau and Suffolk counties; state interest in pollution protection).

[97] *See Robertson v. Zimmerman*, 268 N.Y. 52, 61, 196 N.E. 740, 743 (1935) (upholding special law establishing a sewage authority for the City of Buffalo through an act which imposed restrictions and obligations on one particular municipality; state concern for the life and health of communities taking water supply from Lake Erie, the Niagara River and Lake Ontario).

[98] *See Wambat Realty Corp.,* 41 N.Y.2d at 494-95, 393 N.Y.S.2d at 952-53, 362 N.E.2d at 584-85 (upholding special law, the Adirondack Park Agency Act, in which State set up a zoning and planning program for all public and private lands within the park despite the zoning and planning powers of local government; statute addressed subject of state concern).

[99] *See Matter of Kelley v. McGee*, 57 N.Y.2d 522, 536-39, 457 N.Y.S.2d 434, 439-41, 443 N.E.2d 908 913-15 (1992) (holding that section in Judiciary Law which required district attorneys in counties with a certain population to be paid the same salary as county court judges did not conflict with Home Rule provisions of State Constitution; statutory classification was reasonable and related to an area of state concern).

- Local taxation;[100]
- Housing projects exempt from zoning laws;[101]
- Rent controls;[102]
- Serial bonds issued to cover pension and retirement liabilities;[103]
- Dispute-resolution mechanisms for local public employees;[104]
- Cultural institutions;[105]

[100] *See New York Steam Corp. v. City of New York,* 268 N.Y. 137, 143, 197 N.E. 172, 173 (1935) (upholding statute authorizing cities with a population over one million to pass local tax laws for unemployment relief; state concern given law was designed to combat high unemployment during an unstable time period).

[101] *See Floyd v. New York State Urban Dev. Corp.*, 33 N.Y.2d 1, 7, 347 N.Y.S.2d 161, 164, 300 N.E.2d 704, 706 (1973) (upholding statute under which New York State Urban Development Corporation ("UDC") could acquire land in urban core areas by purchase or condemnation and undertake the development of projects, exempt from local restrictions; State interest in allowing UDC to solve housing problems).

[102] *See City of New York v State of New York,* 31 N.Y.2d 804, 805, 339 N.Y.S.2d 459, 459, 291 N.E.2d 583, 583 (1972) (affirming lower court ruling decision which held that rent control was a matter of State concern and not within New York City's "property, affairs and government" powers).

[103] *See Bugeja v. City of New York,* 24 A.D.2d 151, 152, 266 N.Y.S.2d 80, 81, *aff'd,* 17 N.Y.2d 606, 268 N.Y.S.2d 564, 215 N.E.2d 684 (finding no Home Rule impediment to State Legislature's authorization for the issuance of serial bonds to cover New York City's pension and retirement liabilities; continuance of sound civil service system matter of State concern).

[104] *See Patrolmen's Benevolent Assn. of City of New York v. City of New York,* 97 N.Y.2d at 381-389, 740 N.Y.S.2d at 660-65, 767 N.E.2d at 117-22 (2001) (upholding special law implementing dispute resolution mechanisms for disputes between New York City policemen and New York City; law addressed "substantial State concern").

[105] *See Hotel Dorset Co. v. Trust for Cultural Resources,* 46 N.Y.2d 358, 368-69, 413 N.Y.S.2d 357, 361-62, 383 N.E.2d 1284, 1288 (1978) (upholding statute that had

- Bidding requirements on public contracts;[106]
- Exempting firefighters from local residency requirements.[107]
- Taxes on New York City commuters' incomes;[108] and,
- Regulation of taxicabs in New York City.[109]

The State concern doctrine has narrowed the Home Rule clause's guarantee of a modicum of local legislative autonomy.[110] Today, the line

specifications resulting in it being applied to only one museum, the Museum of Modern Art).

[106] *See Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 318-19, 970 N.Y.S.2d 724, 726, 729-31, 992 N.E.2d 1067, 1069, 1072-73 (2013) (upholding amended Wicks law for public contracting that included differing threshold requirements; statute bears "a reasonable relationship to a substantial statewide concern which concern falls within the State Legislature's purview and must be accorded great deference by this court").

[107] *See Uniformed Firefighters Assn. v. City of New York*, 50 N.Y.2d 85, 90, 428, N.Y.S.2d 197, 198-99, 405 N.E.2d 679, 680 (1980) (upholding State law that eliminated a local requirement that New York City firefighters live in New York City; residency of employees a matter of State concern).

[108] *See City of New York v. State of New York*, 94 N.Y.2d 577, 591–92, 709 N.Y.S.2d 122, 128–29, 730 N.E.2d 920, 926–27 (2000) (upholding special law that repealed New York City's commuter tax; State had a substantial interest in easing burden on non-City residents who work in New York City).

[109] *See Greater N.Y. Taxi Assn.*, 21 N.Y.3d at 302-308, 970 N.Y.S.2d at 914-19, 993 N.E.2d at 400-405 (upholding special law that allowed livery cabs to accept passengers in the outer boroughs of New York City and outside Manhattan's central business district who hail the livery cabs from the street, and also expanded the number of traditional yellow cabs accessible to passengers with disabilities, notwithstanding that it had always been assumed previously that laws regulating New York City taxicabs required a Home Rule message; statute "addresses a matter of substantial state concern" and was "not a purely local issue").

[110] *See Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at 319, 970 N.Y.S.2d at 730, 992 N.E.2d at 1073 ("Home Rule provisions of the Constitution were never intended to apply to legislation" affecting matters of state concern and instead aimed at preventing "unjustifiable state interference in matters of purely local concern").

between matters of State concern and matters of local concern is increasingly indistinct.[111] Few constraints exist on the Legislature's ability to interfere in local affairs by special law.[112] The Court of Appeals said as much in 2013 when it observed:

> there must be an area of overlap, indeed a very sizable one, in which the state legislature acting by special law and local governments have concurrent powers. . . . A great deal of legislation relates *both* to the property, affairs or government of a local government and to [m]atters other than the property, affairs or government of a local government — i.e., to matters of substantial state concern.[113]

See also Gerald Benjamin & Charles Brecher, *Introduction*, *in* THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM 11 (Gerald Benjamin & Charles Brecher eds., 1988) ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

[111] *See* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 ("The line between matters of state concern and matters of local concern remains indistinct[.]"); Cole, *Local Authority to Supersede State Statutes*, *supra* note 21, at 34 ("The areas carved out by Article IX of the State Constitution for control by local governments, free from State interference, except by general law — "property, affairs or government" — has been significantly narrowed and lacks identity.").

[112] *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 171 ("as long as the state is able to make a colorable case that it is acting within respect to a matter of state concern, the Home Rule clause provides little restriction on the legislature's ability to act by special law").

[113] *Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at, 316-17, 970 N.Y.S.2d at 728, 992 N.E.2d at 1070 (internal quotation marks & citations omitted; emphasis in original).

As things now stand, the State Legislature decides whether a home rule message is necessary with respect to a given piece of special legislation. And, this legislative judgment has been treated as "effectively unreviewable."[114]

Proponents of home rule despair over the relative ease with which the State Legislature can overcome constitutional limitations on special legislation.[115] They argue that Article IX's protections of the rights of localities have been "undermined . . . by the many exceptions for 'matters of state concern' with respect to which the Legislature is held free to act without the consent of the local body."[116] "The Legislature is not better suited, and indeed, may be less well-suited," goes the argument, "than the local government to deal with essentially local matters such as providing government services, administering the police department and developing new strategies for providing for the homeless."[117]

On the other hand, advocates for the status quo can point to decades of precedent and a system that, on the whole, has arguably served the State

[114] Report of the Task Force on the New York Constitutional Convention, 52 RECORD OF THE ASSN. OF THE BAR OF THE CITY OF NEW YORK 522, 619 (1997) [hereinafter "CITY BAR 1997 TASK FORCE REPORT"].

[115] *See, e.g.*, Cole, *Ghost of Home Rule*, *supra* note 11, at 749 ("With the extension of the state concern doctrine into areas that logically should be subject to local determination, there is reason only for gloom."); Roberta A. Kaplan, *New York City Taxis and the New York State Legislature: What is Left of the State Constitution's Home Rule Clause After the Court of Appeals Decision in the Hail Act Case*, 77 ALB. L. REV. 113, 118 (2014) (the "highly deferential" approach the Court of Appeals has taken to claims of state concern "cast[s] a long dark shadow on the future of local government autonomy in New York State"), *id.* (the Court's jurisprudence "raises red flags about how much (if any) of the constitution's home rule clause remains in force going forward, making it difficult (if not impossible) for local governments in New York to delineate the appropriate boundaries of autonomous self-rule").

[116] CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 618 (citations omitted).

[117] *Id.* at 619.

well. Home rule is but one of a number of values encompassed by the Constitution, and "the State's commitment to minimal statewide standards of welfare, safety, health, and the like has taken precedence over the goal of local autonomy."[118] No less eminent an authority than Benjamin Cardozo was a staunch guardian of State sovereignty, recognizing, at least in close cases, the need for a dominant State, which represents all, over the power of local governments, which represent only a portion of the State.[119]

C. Unfunded Mandates

Another restriction on Home Rule is State mandates that require local governments to perform certain actions. These can be particularly controversial when unfunded.[120] State mandates cover a wide range of fields, including health care, education and social services. New York imposes more unfunded mandates than any state.[121]

Numerous other states[122] have attempted to resolve the tension between state mandates and Home Rule by adopting constitutional

[118] GALIE, ORDERED LIBERTY, *supra* note 24, at 292-93.

[119] ANDREW L. KAUFMAN, CARDOZO 378-79 (1998).

[120] *See generally*, Robert M. Shaffer, Unfunded State Mandates and Local Governments, 64 U. CINN. L. REV. 1057 (1996).

[121] GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 278.

[122] *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 179-80 ("Prior to and since [the 1967 Constitutional Convention] fourteen states have adopted constitutional provisions limiting or barring some or all unfunded mandates."); CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 620 ("There also is support for a constitutional amendment to restrict unfunded mandates by the legislature on New York's local governments. We view the debate over unfunded mandates as an extension of the home rule question. Again, New York lags behind other states that have considered and resolved this issue."); Deborah F. Buckman, *Construction and Application of State Prohibitions of Unfunded Mandates*, 76 A.L.R.6th 543 (2012) (collecting state court cases that construe and apply state prohibitions of unfunded mandates).

provisions prohibiting or limiting unfunded mandates.[123] Notably, too, in 2011 a "Mandate Relief Redesign Team" established by Governor Cuomo

[123] *See, e.g.*, CAL. CONST. art. 13B, § 6(a) ("Subject to certain exceptions, [w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."); FLA. CONST. art. VII, § 18(a) ("No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure."); HAW. CONST. art. VIII, § 5 ("If any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost."); LA. CONST. art. VI, § 14(a)(1) ("No law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within a political subdivision until approved by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision or until, and only as long as, the legislature appropriates funds for the purpose to the affected political subdivision and only to the extent and amount that such funds are provided, or until a law provides for a local source of revenue within the political subdivision for the purpose and the affected political subdivision is authorized by ordinance or resolution to levy and collect such revenue and only to the extent and amount of such revenue."); MICH. CONST. art. IX, § 29 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs."); MO. CONST. art. X, § 21 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs."); N.H. CONST. pt. I, art. 28-a ("The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision."); N.J. CONST. art. VIII, § 2, ¶ 5 ("[A]ny provision of . . . law, or of . . . rule or regulation issued pursuant to a law, which is determined . . . to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire."); N.M. CONST. art. X, § 8 ("A state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to

recommended the adoption of a constitutional ban in New York on unfunded mandates on local governments.[124]

IV. CONCLUSION

New York's constitutional and statutory provisions regarding home rule are extensive, evincing a clear intent to protect local autonomy.[125] However, the balance between State and local powers has tipped "away from the preservation of local authority toward a presumption of state concern."[126] Some commentators have even observed that Constitutional Home Rule is a "ghost,"[127] "merely a pleasant myth"[128] and "a near total failure."[129]

provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed."); TENN. CONST. art. II, § 24 ("No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.").

[124] *See* NEW YORK STATE MANDATE RELIEF REDESIGN TEAM, MANDATE RELIEF, FINAL REPORT 14 (DEC. 2011), *available at* http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/FInal_Mandate_Relief_Report.pdf (last visited on Mar. 4, 2016).

[125] *See* WARD, THE NEW YORK STATE CONSTITUTION, *supra* note 6, at 545 (New York's constitutional and statutory provisions are more extensive than those in many states.).

[126] Cole, *Ghost of Home Rule*, *supra* note 11, at 715 (1985); *see also* Benjamin & Brecher, *Introduction*, *supra* note 110, at 11 ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

[127] Cole, *Ghost of Home Rule*, *supra* note 11, at 715 (1985).

[128] W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 326 (1954).

[129] Kirshnitz, *Strikes Another Blow*, *supra* note 94, at 943.

Not since the 1967 Constitutional Convention has the body politic engaged in a serious discussion about Constitutional Home Rule.[130] Intense debates were then waged on this subject, resulting in proposals by the Convention that held the promise for greater local government initiative.[131] But those proposals, along with all others made by the 1967 Convention, failed at the polls.[132]

Today, nearly fifty years later, numerous proposals have been made for constitutional reform in this area. To be sure, "[t]here is no ready solution to the problem of state interference in local government actions."[133] Home Rule "doctrine has reflected in its structure the inherently difficult nature" of drawing lines between what is properly the domain of local government and the State Legislature's ability to legislate.[134] That said, many believe "that the home rule provisions of Article IX are clearly in need

[130] GERALD BENJAMIN & CHARLES BRECHER, *The Political Relationship* 118 *in* THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM (Gerald Benjamin & Charles Brecher eds., 1988).

[131] *See* HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION 273 (1997) ("Coupled with repeal of the existing constitutional provision allowing the state to enact legislation related to the 'property, affairs, or government' of local municipalities — a phrase which over the years had been narrowly construed by the courts to limit local flexibility — and its replacement by new language referring to 'matters of local concern and the local aspects of matters of state concern,' the proposed article offered considerable hope for greater local government initiative.").

[132] *Id.* at 339-41.

[133] Briffault, *Local Government and the New York State Constitution*, *supra* note 2, at 99.

[134] Baker & Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, *supra* note 57, at 1342.

of revision, and given the current state of home rule there is little risk of adverse change."[135]

In sum, Constitutional Home Rule is a subject ripe for consideration and debate by all concerned. There is a need to weigh the benefits and costs of amendments to Article IX that would restore local autonomy through greater certainty and clarity. At a minimum, if and when the State establishes a preparatory constitutional commission, Constitutional Home Rule should be a subject to which it devotes significant time and attention.

[135] CITY BAR, 1997 TASK FORCE REPORT, *supra* note 114, at 620; *see also* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 ("Although the recent constitutional and statutory amendments undoubtedly represent great strides forward . . . much work remains to be done.").

NEW YORK STATE BAR ASSOCIATION

ENVIRONMENTAL LAW SECTION

FALL MEETING

October 15, 2016

11:25A.M. – 12:15P.M. Constitutional Convention Panel (1.0 CLE credits)

Implementing New York State Laws Governing The Forest Preserve (Article XIV)

Thomas A. Ulasewicz, Esq.
FitzGerald Morris Baker Firth PC,
Glens Falls, New York

Otesaga Resort
Cooperstown, New York

"*As a man tramps the woods to the lake he knows he will find pines and lilies, blue herons and golden shiners, shadows on the rocks and the glint of light on the wavelets, just as they were in the summer of 1354, as they will be in 2054 and beyond. He can stand on a rock by the shore and be in a past he could not have known, in a future he will never see. He can be a part of time that was and time yet to come."*
from Adirondack Country
by William Chapman White

INTRODUCTION

The Adirondack Park ("Park") was created in 1892 by the State of New York amid concerns for the water and timber resources of the region. Today the Park is the largest publicly protected area in the contiguous United States, greater in size than the Yellowstone, Everglades, Glacier, and Grand Canyon National Parks combined and comparable to the size of the entire state of Vermont. The boundary of the Park encompasses approximately 6 million acres, approximately ½ of that belongs to the people of New York State and is constitutionally protected to remain "forever wild" forest preserve. [1]The remaining 3 million acres are private lands that include settlements, farms, timberlands, businesses, homes and camps.[2]

In 1885, when Article XIV of the NYS Constitution was enacted, New York State owned 681,374 acres in the Adirondacks and 34,000 acres in the Catskills. As of July 2016, the Forest Preserve contains 3 million acres in the Adirondacks and 287,500 acres in the Catskills.[3]

The Adirondack Park Agency ("APA") was created in 1971 by the enactment of the Adirondack Park Agency Act[4] to develop long-range land use plans for both public and private lands within the boundary, commonly referred to as the "Blue Line." The Agency prepared the Adirondack Park State Land Master Plan which was signed into law in 1972.[5] The APA Act further directs that the Master Plan classify all such lands and provide guidelines and criteria for their use and management.

This presentation will focus largely on the Adirondack Park forest preserve because of the enormity of its size, it's very rich and diverse ecological resources, it's serving as the headwaters for 5 major rivers in the Eastern United States and, the fact that nothing that is done to manage these lands is without controversy, emotion and – sometimes – anger. In addition, the creation and implementation of unit management plans in both the Adirondack and Catskill Parks are very similar.

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[1] N.Y. Const. Art. XIV, §1.

[2] *See* N.Y. Zoning & Practice, 4th Ed., Chap. 9A

[3] *See* N.Y. Dept. of Envt;. Conserv., *New York's Forest Preserve*, http://www.dec.ny.gov/lands/4960.html.

[4] Executive Law §§800 et seq.

[5] The Adirondack Park State Land Master Plan is an Executive Document approved by the Governor pursuant to Executive Law §807 (now Executive Law §816). It has been cited as having the "force of law." See Baker v. Department of Environmental Conservation of State of N.Y., 634 F. Supp. 1460. 16 Envtl. L. Rep. 20888 (N.D. N.Y. 1986). *See* N.Y. Dept. of Envtl. Conserv., *Lands and Forest Guidance & Policy Document*, http://www.dec.ny.gov/regulations/2401.html for copies of the Adirondack State Land Master Plan and the Catskill Park State Land Master Plan.

THE STATE LAND MASTER PLAN (SLMP) AND UNIT MANAGEMENT PLANS (UMPS)

The Adirondack Park Agency Act directs that the Department of Environmental Conservation (DEC) develop, in consultation with the Adirondack Park Agency (APA), individual unit management plans for units of State land classified under the Master Plan and that the individual unit management plans conform to the guidelines and criteria set forth in the master plan. Finally, the Adirondack Park Agency Act directs that the master plan and the individual unit management plans shall guide the development and management of State land in the Adirondack Park.

The Adirondack Park State Land Master Plan, developed by the Agency in consultation with the Department of Environmental and approved by the Governor, in addition to classifying all State land and establishing guidelines for their management and use, sets forth requirements for the content of individual unit management plans and procedural requirements for their adoption by the Commissioner of Environmental Conservation. The procedural requirements include that an initial draft Unit Management Plan (UMP) will be submitted to the Agency prior to the preparation of a draft plan for public review. It further provides that an opportunity will be made for review and comment on the draft unit management plans by the public and other interested parties and a public meeting will be convened for that purpose. The Master Plan also provides that the Adirondack Park Agency is responsible for interpreting the Master Plan and will determine whether a proposed unit management plan complies with the guidelines and criteria set forth in the Master Plan.

Finally, the Department of Environmental Conservation and the Adirondack Park Agency have entered into a Memorandum of Understanding (MOU) [6] which establishes procedures for coordination and communication between the Agencies on Master Plan activities, including the preparation of individual unit management plans. With respect to unit planning, this MOU provides: 1) informal consultation with unit management plan teams; 2) Agency review and comment on an "initial draft" plan submitted to the Agency prior to preparation of a draft plan for public review; and 3) formal Agency review of a "final draft" unit management plan as proposed for the approval of the Commissioner of the Department of Environmental Conservation and a determination regarding its compliance with the guidelines and criteria of the Master Plan. The MOU also provides that the Agency will have a minimum of 30 days for review of each draft. The MOU also provides that the Department will advise the Agency in writing of its acceptance or rejection of the Agency's recommendations with respect to any initial draft unit management plan, and that any inconsistencies between a proposed unit management plan and the Master Plan will be resolved prior to the Department providing the

[6] *See* https://fts.dec.state.ny.us/fts/sendfile.php?fid=24841&vercode=e7589fa5 (revised March, 2010; includes 6 Appendices: Policy LF91-2; 1993 Policy on All-Terrain Bicycles; 1992 Policy on Fisheries Management; Standard Snowmobile Trail Bridge Design & Use Of Natural Materials For Design And Construction, APA State Land Master Plan Interpretation and Staff Guidance; Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park; and Inter-Agency Guidelines for Implementing Best Management Practices for the Control of Terrestrial and Aquatic Invasive Species on Forest Preserve Lands in the Adirondack Park.)

Agency with a final draft unit management plan for its review and determinations regarding compliance with the Master Plan.

The APA Act requires the Agency to classify the State lands in the Adirondack Park according to "their characteristics and capacity to withstand use." [7]

A fundamental determinant of land classification is the physical characteristics of the land or water which have a direct bearing upon the capacity of the land to accept human use. Soil, slope, elevation and water are the primary elements of these physical characteristics and they are found in widely varied associations. For example, the fertility, erosiveness and depth of soil, the severity of slopes, the elevational characteristics reflected in microclimates, the temperature, chemistry, volume and turnover rate of streams or lakes, all affect the carrying capacity of the land or water both from the standpoint of the construction of facilities and the amount of human use the land or water itself can absorb. By and large, these factors highlight the essential fragility of significant portions of the State lands within the Adirondack Park. These fragile areas include most lands above 2,500 feet in altitude, particularly the boreal (spruce-fir), sub-alpine and alpine zones, as well as low-lying areas such as swamps, marshes and other wetlands. In addition, rivers, streams, lakes and ponds and their environs often present special physical problems. [8]

Biological considerations also play an important role in the structuring of the classification system. Many of these are associated with the physical limitations just described; for instance many plants of the boreal, subalpine and alpine zones are less able to withstand trampling than species associated with lower elevation life zones. Wetland ecosystems frequently are finely balanced and incapable of absorbing material changes resulting from construction or intensive human use. In addition, wildlife values and wildlife habitats are relevant to the characteristics of the land and sometimes determine whether a particular kind of human use should be encouraged or prohibited, for example the impact of snowmobiles on deer wintering yards, the effect of numbers of hikers or campers near the nesting habitat of rare, threatened or endangered species like the bald eagle or spruce grouse, or the problems associated with motorized access to bodies of water with wild strains of native trout. [9]

In addition, another significant determinant of land classification involves certain intangible considerations that have an inevitable impact on the character of land. Some of these are social or psychological--such as the sense of remoteness and degree of wildness available to users of a particular area, which may result from the size of an area, the type and density of its forest cover, the ruggedness of the terrain or merely the views over other areas of the Park obtainable from some vantage point. [10]

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[7] *See* SLMP, Sec. III – *Basis and Purpose of Classification*, at 13 (October, 2011 edition)

[8] Id. at 13

[9] Id. at 13

[10] Id. at 14

Finally, the classification system takes into account the established facilities on the land, the uses now being made by the public and the policies followed by the various administering agencies. Many of these factors are self-evident: the presence of a highway determines the classification of a travel corridor; the presence of an existing campground or ski area requires the classification of intensive use. The extent of existing facilities and uses which might make it impractical to attempt to recreate a wilderness or wild forest atmosphere is also a consideration. This is not to imply that when present uses or facilities are degrading the resource they should be continued, but their presence cannot be ignored. The unique mixture of public and private land within the Park also requires that account be taken of facilities and uses being made on contiguous or nearby private lands. Thus a large private inholding subject to, or threatened by, some form of intensive use might prevent the designation of an otherwise suitable tract of State land as wilderness. [11]

There are nine basic categories that result from this land classification system: [12]

Wilderness
Primitive
Canoe
Wild Forest
Intensive Use
Historic
State Administrative
Wild, Scenic and Recreational Rivers
Travel Corridors

If there is a unifying theme to this classification system, it is that the protection and preservation of the natural resources of the State lands within the Park must be paramount. Human use and enjoyment of those lands should be permitted and encouraged, so long as the resources in their physical and biological context and their social or psychological aspects are not degraded.

In closing on this section, I have attached to this Paper as **APPENDIX B** a "Memo" authored by Richard S. Booth titled: "State Land Master Plan Classification of Large - Acreage Forest Preserve Acquisitions Where Special Resource Values Exist and Potential Classification of the Boreas Ponds Tract" dated June 29, 2016. Mr. Booth is a Professor with the Department of City and Regional Planning at Cornell University. He was also a Deputy Commissioner at NYSDEC under Commissioner Peter Berle (Governor Hugh Carey's early administration). He served as a member of the APA Board and Chairman of the Agency's State Land Committee through June of this year when he voluntarily resigned. I have not included this document as something whose positions I endorse; but I do agree with a significant majority of what it says. It is worthwhile reading if you are interested, or need to be interested, in this subject matter. It reflects the controversies and emotions that often are associated with State forest preserve unit management

[11] Id. at 14

[12] For the definition of each of these categories, see **APPENDIX A** attached to this Paper.

plans and their associated classifications. It is but one insight into the complexities of implementing the SLMP.

NYS DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF LANDS AND FOREST[13]

The Division of Lands and Forests manages public lands and conservation easements across New York State and provides oversight in forestry and forest management. The Department of Environmental Conservation cares for about 4 million acres of State owned land and nearly 910,000 acres of conservation easement land in New York State. This includes the Forest Preserve in the Adirondack and Catskill Parks, State Forests, Unique Areas and the State Nature and Historical Preserves.

The Division of Lands and Forests is responsible for the management, protection and recreational use of these lands, the care of the people who use these lands and the acquisition of additional lands to conserve unique and significant resources. The Division is made up of five programs: Conservation Easements, Forest Preserve Management, Private Land Services, Real Property and State Land Management.[14]

A. NYSDEC Policies and Guidelines for Forest Preserve Lands (partial)

1. *Recordkeeping and Reporting of Administrative Use of Motor Vehicles and Aircraft in the Forest Preserve (CP-17)* [15]

This policy became effective on March 29, 2000. The purpose of this policy on Recordkeeping of Administrative Use of Motor Vehicles and Aircraft in the Forest Preserve is to recite existing guidelines and provides recordkeeping and reporting requirements for the administrative use of motor vehicles on roads not open to public motor vehicle use and of aircraft on Forest Preserve lands within the Adirondack and Catskill Parks with the intent of minimizing such use.

The Department of Environmental Conservation's Office of Public Protection ("OPP") is exempt from the reporting requirements of this policy. However, OPP remains subject to Article XIV, Section I of the New York State Constitution and all provisions of the Adirondack Park State Land Master Plan and Catskill Park State Land Master Plan including those which govern motor vehicle and aircraft use for administrative purposes. OPP maintains independent records of such activities as part of its law enforcement responsibility.

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[13] http://www.dec.ny.gov/about/650.html

[14] *See* ECL Parts 190 through 199 (*Chapter II – Lands and Forest*).

[15] Id. at footnote 5 – "Lands and Forest Guidance and Policy" under *Administrative Use of Motor Vehicles in the Forest Preserve (CP-17).*

2. ***Forest Preserve Roads (CP-38)*** [16]

This policy establishes procedures and protocols for the maintenance, rehabilitation, relocation, and, when authorized by the State Constitution, widening and new construction of roads and state truck trails under Department of Environmental Conservation jurisdiction in the Forest Preserve which are situated in units classified by the Adirondack Park State Land Master Plan ("APSLMP") as Wild Forest, Primitive or Canoe Area or classified by the Catskill Park State Land Master Plan ("CPSLMP") as Wild Forest. This policy pertains to all such roads and state truck trails on Forest Preserve lands whether or not they are open for public motor vehicle use, except it does not pertain to roads or state truck trails in Intensive Use Areas and Administrative Areas. Further, this policy establishes that generally Forest Preserve roads are low maintenance seasonal roads which are narrow, surfaced with gravel, suitable for low speeds, lightly traveled by the public, and partially or fully shaded by tree canopy. Such roads are further constructed and maintained to the minimum standard necessary to provide passage by appropriate motor vehicles in a manner which protects the environment.

This policy does not include standards for determining if a road has become legally abandoned. Determinations of road abandonment will be made on a case by case basis in consultation with the Division of Legal Affairs.

3. ***Snowmobile Trails – Catskill Forest Preserve (ONR-2)*** [17]

When "ONR-2 Snowmobile Trails - Forest Preserve" was issued on September 2, 1998, it applied to Forest Preserve lands in both the Adirondack and Catskill Parks. On December 21, 2009, then DEC Commissioner Alexander B. Grannis rescinded ONR-2 as it applied to the Adirondack Forest Preserve and replaced it with "Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park " (infra.). ONR-2 still applies to Forest Preserve lands in the Catskill Park.

The purpose of this policy is to establish a procedure by which snowmobile trails are to be planned, located, constructed, used and maintained on Forest Preserve lands. Further, it is to outline the types of trails that are permissible and specify standards to be followed.

Over the years, municipalities and private organizations have developed networks of snowmobile trails that benefit the locality. Through interconnecting trails crossing the Forest Preserve, extended travel enhances the snowmobile experience.

In the Forest Preserve, snowmobile trails are permitted only in those areas classified as Wild Forest and Intensive Use.

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[16] Id at footnote 5 – "Lands and Forest Guidance and Policy".

[17] Id.

Where a Wilderness, Primitive or Canoe Area boundary abuts a public highway, snowmobile trails are expected to be located within 500 feet of the highway right - of - way on a site - specific basis in limited instances in conformity with a duly adopted unit management plan.

These general guidelines and policies are derived from the recommendations of the Temporary Study Commission on the Future of the Adirondacks as stated in its report dated December 15, 1970.

4. *Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park*[18]

The October 2006, Snowmobile Plan for the Adirondack Park/Final Generic Environmental Impact Statement (2006 Snowmobile Plan) presents a conceptual snowmobile plan with the goal of creating a system of snowmobile trails between communities in the Adirondack Park. The 2006 Snowmobile Plan outlines the concept of reconfiguring the existing snowmobile trail network across the Forest Preserve through the UMP process. Implementation is supported by a Management Guidance approach establishing a new DEC snowmobile trail classification system with new standards and guidelines for snowmobile trail siting, construction and maintenance.

The designation of a new class of snowmobile trail to establish and improve community connections (Class II trails) is complemented by the designation of another new class of trail (Class I trails) intended to preserve a more traditional type of Adirondack snowmobiling experience. Some existing snowmobile trails (most likely within the interior of Wild Forest areas or adjacent to private inholdings) will be redesignated for non-motorized use or abandoned as trails altogether. These actions will serve to ensure available, wintertime recreational opportunities in Wild Forest areas are not dominated by snowmobile use to the exclusion or near exclusion of passive recreational uses. All snowmobile trails, regardless of class, are to be carefully sited, constructed and maintained to preserve the most essential characteristics of foot trails and to serve, where appropriate, hiking, mountain biking and other non-motorized recreational pursuits in spring, summer and fall. Additionally, this guidance helps ensure protection of sensitive natural resources on public lands and the minimization of snowmobiling safety hazards.

Implementing the broad recommendations of the 2006 Snowmobile Plan is intended to result in the establishment of important new routes on private lands through the acquisition of easements or other access rights from willing sellers. This Guidance does not address the management of those trails, but instead provides standards and guidelines solely for the management of DEC snowmobile trails on Forest Preserve lands throughout the Adirondack Park.

[18] Id.

In many locations, designated snowmobile routes of varying lengths exist on Forest Preserve roads, rather than on trails. DEC's management of all such roads for motor vehicle use, including snowmobiles, is guided by DEC's "CP-38 Forest Preserve Roads" policy and not by this Guidance.

Under the sub-heading "Snowmobile Route Design, Construction and Maintenance Standards," standards are set for alignment and grading, trail width, tree cutting, rock removal, side slope management, drainage and involvement of wetlands.

5. ***Temporary Revocable Permits (TRPs) for State Lands and Conservation Easements (ONR-3)***[19]

This is quite possibly the most delicate program to be administered by DEC. It is recognized by just about everyone as being "a necessary evil;" it clearly flirts with legality when it comes to Article XIV constitutional issues.

ONR-3 sets forth the procedure for issuing Temporary Revocable Permits for the use of State lands and conservation easement lands pursuant to 6NYCRR Parts 190 and 196 and Environmental Conservation Law (ECL) Articles 3, 9, 11 and 51.

The Department issues TRPs in its sole discretion, for the temporary use of State lands and conservation easement lands only for activities that are in compliance with all constitutional, statutory and regulatory requirements; the Adirondack and Catskill Park State Land Master Plans; adopted Unit Management Plans and Recreation Management Plans; and that have negligible or no permanent impact on the environment. This policy applies to State lands and conservation easement lands managed by the New York State Department of Environmental Conservation Division's of Fish, Wildlife and Marine Resources, Lands and Forests, and Operations. These areas include, but are not limited to, Wildlife Management Areas, State Reforestation Areas, Forest Preserve, campgrounds, boat launches/waterway access sites, tidal wetlands, and conservation easements. TRPs are subject to all other applicable State and Federal requirements and subject to any required Federal, State or local permit requirements.

This policy establishes four types of TRPs (Expedited TRPs, Routine TRPs, Non-Routine TRPs, and Research TRPs) and establishes procedures for their issuance by the Department.

Any TRP issued by the Department remains valid only if all necessary permits and/or licenses are obtained and kept current for the full duration of the TRP. TRPs may be revoked or suspended at any time in the sole discretion of the Department. TRPs are issued for a term not to exceed one (1) year, including TRP renewals and extensions. TRPs for Motorized Access Program for People with Disabilities (CP-3) are issued for a term not to exceed five (5) years.

[19] Id.

6. ***Hazardous Tree Guidance (LF 91-2)***

There are two parts to this Guidance document: an Appendix and a Memorandum.

(a). **Appendix** – The information in this appendix applies to NYSDOT staff in the Main Office, Regional offices, Regional Crews and Residencies. While much of the coordination and permitting work in this Appendix is likely to be performed by managers or coordinators, front-line staff in Residencies or tree crews are essential to the success of this guidance document.

Trees on Forest Preserve Lands: In a non-emergency, NYSDOT staff must obtain a Temporary Revocable Permit from a NYSDEC Regional Land Manager before removing trees. An emergency is a sudden, actual and ongoing event or incident, requiring the protection or preservation of human life or the intrinsic value of Forest Preserve resources.

NYSDEC Commissioner Approval for Mechanized Equipment in Wilderness, Primitive and Canoe Areas: If Forest Preserve land next to a highway is designated Wilderness, NYSDOT staff may not use mechanized equipment on it unless the Commissioner of Environmental Conservation first approves such use in writing. Such use shall be confined to off-peak seasons and normally will not be undertaken at less than 3-5 year intervals, absent extraordinary conditions.

Emergencies: In a sudden, actual and ongoing event or incident, requiring protection or preservation of human life or the intrinsic value of Forest Preserve resources, NYSDOT may perform any and all reasonable tree work without obtaining a TRP. However, after the incident or event is over, NYSDOT must provide a report to NYSDEC and APA with the information normally required for a TRP.

(b). **Memorandum** - The purpose of this memorandum is to establish administrative procedures for the implementation of "Organization and Delegation Memorandum #84-06" relating to the construction of new facilities, the expansion or modification of existing facilities and routine maintenance projects on lands of the Forest Preserve. In areas classified wilderness, such projects shall be undertaken only for purposes of protecting either user safety or natural resource values.

Such Organization and Delegation Memorandum states, in part: "Section 9-0105 of the Environmental Conservation Law provides that the Division of Lands and Forests has responsibility for the 'care, custody and control' of the Adirondack and the Catskill Forest Preserve. In accordance with this responsibility, all construction of new facilities, expansion or modification of existing facilities and maintenance of facilities, that will result in cutting, removal or destruction of trees and endangered, threatened or rare plants as defined in 6NYCRR subdivision 193.3(b), (c) and (e), on any of the lands constituting the Forest Preserve shall require approval of the Director of the Division of Lands and

Forests …". In order to carry out this direction and policy, the memorandum goes on to identify procedures to be followed by regional and non-regionalized personnel in requesting approval for such projects on lands of the Forest Preserve that involve the cutting, removal and/or destruction of trees and endangered, threatened or rare plants. According to DEC, in all cases, the provisions and constraints of this Organization and Delegation Memorandum are to be recognized and complied with.

ASSESSMENT AND TAXATION OF CERTAIN STATE LANDS

Section 532 of N.Y.'s Real Property Tax law titled "Certain State lands subject to taxation for all purposes" states, in pertinent part:

> "The following state lands shall be subject to taxation for all purposes:
> (a) All wild or forest lands owned by the State within the forest preserve; …".

Section 530.2 of N.Y.'s Real Property Tax law titled "Construction of Terms" defines "Lands" and "State lands" to include:

> "… conservation easements created pursuant to title three of article forty-nine of the environmental conservation law within the Adirondack or Catskill parks, as those areas are defined in such law and common law easements on land within the Adirondack or Catskill parks created for conservation purposes … "Lands" and "state lands" shall in no event include lands used by the state for highway or parkway purposes or lands acquired for such purposes though not in actual use therefor if construction of a highway or parkway thereon is in good faith contemplated.

There are 103 Towns and villages within the Blue Line where approximately 3 million acres of their lands are owned by New York State as forest preserve;[20] approximately 778,000 acres under conservation easements to the State. [21] The economics of those rural communities would become tumultuous if not for this taxation provision. As it is, the vast majority of communities do not look favorably on its lands going into the forest preserve. Legislation has been attempted over the years to limit the amount of lands the State could acquire within the Blue Line.

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[20] *See* SLMP (last revised Feb. 2014), Id. at footnote 5 under "Area Descriptions and Delineations," pages 51-119 for precise statistics on UMPs and other state lands including acreage.

[21] *See* "The Adirondack Park – *Seeking Balance*" – Adirondack Park Regional Assessment 2014 (contact Brad Dake ariettaplanning@wildblue.net).

CONCLUSION

Thus, these are the laws, policies and practices that could be effectuated by any changes to New York's Conservation Article in the State Constitution (Art. XIV, sec. 1). I cannot say things are not broken … but I can say that I believe they can be fixed and, in my opinion, will be fixed. The question is: "Do we need changes to these programs to be expressed at a Constitutional Convention?" In my mind, and clearly only one opinion, what needs to be fixed needs more time and more deliberation by our judicial and executive branches of government, not the Legislature… not yet, in any event.

APPENDIX A

These definitions of the various classifications of units of forest preserve lands come from the Adirondack Park State Land Master Plan, Section II – "Classification System and Guidelines " at pages 19 through 48. "Guidelines for Management' and far more descriptive text can be found throughout these pages for each classification.

I. WILDERNESS

Definition

A wilderness area, in contrast with those areas where man and his own works dominate the landscape, is an area where the earth and its community of life are untrammeled by man--where man himself is a visitor who does not remain. A wilderness area is further defined to mean an area of state land or water having a primeval character, without significant improvement or permanent human habitation, which is protected and managed so as to preserve, enhance and restore, where necessary, its natural conditions, and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least ten thousand acres of contiguous land and water or is of sufficient size and character as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological or other features of scientific, educational, scenic or historical value.

II. PRIMITIVE

Definition

A primitive area is an area of land or water that is either:

1. Essentially wilderness in character but, (a) contains structures, improvements, or uses that are inconsistent with wilderness, as defined, and whose removal, though a long term objective, cannot be provided for by a fixed deadline, and/or, (b) contains, or is contiguous to, private lands that are of a size and influence to prevent wilderness designation; or,

2. Of a size and character not meeting wilderness standards, but where the fragility of the resource or other factors require wilderness management.

III. CANOE

Definition

A canoe area is an area where the watercourses or the number and proximity of lakes and ponds make possible a remote and unconfined type of water-oriented recreation in an essentially wilderness setting.

IV. WILD FOREST

Definition

A wild forest area is an area where the resources permit a somewhat higher degree of human use than in wilderness, primitive or canoe areas, while retaining an essentially wild character. A wild forest area is further defined as an area that frequently lacks the sense of remoteness of wilderness, primitive or canoe areas and that permits a wide variety of outdoor recreation.

V. INTENSIVE USE

Definition

An intensive use area is an area where the state provides facilities for intensive forms of outdoor recreation by the public. Two types of intensive use areas are defined by this plan: campground and day use areas.

VI. HISTORIC

Definition

Historic areas are locations of buildings, structures or sites owned by the state (other than the Adirondack Forest Preserve itself) that are significant in the history, architecture, archeology or culture of the Adirondack Park, the state or the nation; that fall into one of the following categories;

- -- state historic sites;
- -- properties listed on the National Register of Historic Places;
- -- properties recommended for nomination by the Committee on Registers of the New York State Board For Historic Preservation; and that are of a scale, character and location appropriate for designation as an historic area under this master plan.

VII. STATE ADMINISTRATIVE AREAS

Definition

State administrative areas are areas where the state provides facilities for a variety of specific state purposes that are not primarily designed to accommodate visitors to the Park. [*This category, like the travel corridor category with which it is closely associated, contains a wide variety of developed uses related directly to the activities of many state agencies. It includes the administrative offices of the Department of Environmental Conservation, Division of State Police and the Adirondack Park Agency itself as well as the Department of Environmental Conservation fish hatcheries, Department of Transportation offices and maintenance and storage sites, the Atmospheric Sciences Research Center at Whiteface Mountain, the Sunmount Developmental Center, the Adirondack Correctional Facility, the Dannemora Correctional*

Facility, and several sewage treatment plants operated by the Environmental Facilities Corporation. All of these facilities are in close proximity to public highways and are generally in developed areas of the Park.]

VIII. WILD, SCENIC AND RECREATIONAL RIVERS

Definitions

A wild river is a river or section of river that is free of diversions and impoundments, inaccessible to the general public except by water, foot or horse trail, and with a river area primitive in nature and free of any man-made development except foot bridges.

A scenic river is a river or section of river that is free of diversions or impoundments except for log dams, with limited road access and with a river area largely primitive and undeveloped, or that is partially or predominantly used for agriculture, forest management and other dispersed human activities that do not substantially interfere with public use and enjoyment of the river and its shore.

A recreational river is a river or section of river that is readily accessible by road or railroad, that may have development in the river area and that may have undergone some diversion or impoundment in the past.

IX. TRAVEL CORRIDORS

Definition

A travel corridor is that strip of land constituting the roadbed and right-of-way for state and interstate highways in the Adirondack Park, the Remsen to Lake Placid railroad right-of-way, and those state lands immediately adjacent to and visible from these facilities.

This document is intended for public distribution.

MEMO

Subject: State Land Master Plan Classifications Of Large-Acreage Forest Preserve Acquisitions Where Special Resource Values Exist and Potential Classification of The Boreas Ponds Tract

To: NYS Adirondack Park Agency Members, Adirondack Park Agency Staff, And Other Interested Parties

From: Richard S. Booth, member of the Agency and chair of its State Land Committee

Date: June 29, 2016

This memo addresses what the Adirondack Park State Land Master Plan (hereafter the SLMP or the Master Plan) requires regarding NYS Adirondack Park Agency (hereafter Agency) decisions to classify large tracts of land added to the Forest Preserve in cases where those lands contain special resource values. It also addresses the Agency's eventual decision regarding classification pursuant to the SLMP of the 20,000 acres plus Boreas Ponds Tract recently added to the Forest Preserve.

I. PRELIMINARY POINTS

1. All specific references made to the SLMP in this document are tied to the SLMP's various sections, and all page references reflect the Agency's February 2014 hard copy publication of the Master Plan.

2. I generally intend the term **"land(s)"** to include both "lands" and "waters."

3. This memo uses the term **"large-acreage Forest Preserve**

acquisition(s)." While there is not an absolute minimum figure for this type of acquisition, in my opinion a 5,000 acre threshold is appropriate. In terms of the logic of using this figure, certainly any Forest Preserve acquisition of 5,000 acres or more is significant; 5,000 acres is 50% of the SLMP's general minimum for the establishment of a Wilderness Area; and the federal Wilderness Act uses the 5,000 acre figure as its general minimum for the designation of federal Wilderness Areas (although a number of those federal areas contain smaller numbers of acres). I recommend that the Agency use the 5,000 acre figure as a guideline and not as a definite standard.

This memo also uses the term **"special resource values."** All pieces of the Forest Preserve contain important resource values. Resource values include natural resources values and social values. (All references in this memo to "social values" encompass the SLMP's focus on "**intangible considerations,**" including those that are **"social or psychological**.") (SLMP, Section II, pages 13-14 and Section I, page 1; underlining and emphasis added) By using the term **"special resource values,"** I intend to convey the idea that a large tract of Forest Preserve land contains particularly significant natural resource values and social resource values when considered in light of the values that exist within the Park's Forest Preserve lands.

4. Given what item #3 above says re a 5,000 acre threshold, it is important to note that I understand, support, and foresee the possibility/desirability of creating new acquired Primitive Areas that are less than 5,000 acres. Nothing in this memo suggests anything to the contrary.

5. This memo's central argument regarding what the SLMP requires when the Agency is classifying large-acreage Forest Preserve acquisitions on which special resource values exist reflects in significant part the argument I made to Agency members in the fall of 2013 regarding the eventual classification of what are now the Essex Chain Lakes and Pine Lake Primitive Areas (plus some additional lands). In its fullest form I made that argument in an October 2013 memo that I gave Agency members. The Agency refused to release that document to the public pursuant to one or more New York State Freedom of Information Law (FOIL) requests, a decision with which I strongly disagreed.

6. This memo focuses on the SLMP's Wilderness, Primitive, Canoe, and Wild Forest classifications because they make up the vast majority of

the Forest Preserve. It does not address the remaining types of classifications created by the Master Plan: i.e., Intensive Use; Historic; State Administrative; Wild, Scenic and Recreational Rivers; and Travel Corridors.

7. Given the provisions of the SLMP and the NYS Adirondack Park Agency Act, clearly the Agency may at any point choose to reconsider the SLMP's existing land area classifications. I want to be absolutely clear that in writing this memo I am not in any way urging that a reclassification analysis be undertaken re any existing classification.

8. This memo makes several references to the Agency's 1979 Final Programmatic Environmental Impact Statement (hereafter FPEIS) that dealt with guidelines for amending the SLMP. The FPEIS is one of the most important documents the Agency has every created regarding the SLMP. Significantly, that document strongly supports the conclusions I state here.

9. An important caveat merits attention. In recent decisions the Agency has decided (not unanimously) to permit the public's use of bicycles on miles of bicycle trails in the Essex Chain Lakes Primitive Area and the Pine Lake Primitive Area **and** to permit the NYS Department of Environmental Conservation (hereafter DEC) to maintain those trails with motor vehicles. **Those decisions reflect the Agency's willingness (as well as willingness on the part of the DEC and the Governor) to ignore what the SLMP requires --- and in particular, to ignore the Master Plan's existing language that defines Primitive Areas as "essentially wilderness in character" and its very clear intention that Primitive Areas should be managed as closely as possible to the ways in which Wilderness Areas are required to be managed.** (SLMP, Section II, pages 25-28) At a minimum those decisions cast doubt on how two very important Primitive Areas will be managed in the future. They also cast doubt on how all areas of the Forest Preserve classified pursuant to the SLMP will be managed because those decisions flow from choices consciously made by state officials to ignore the Master Plan's purposes and mandates. **In writing this memo, I have assumed that those recent Agency decisions were clearly in error and that at some time in the future those errors may be corrected.**

10. This memo reflects my thoughts/conclusions as one member of the Adirondack Park Agency. It does not state any positions on behalf

of the Agency. My tenure on the Agency will end June 30, 2016. I am sending this memo (in both electronic and hard copy form) while I am still a member of the Agency. (In addition, I am likely to send additional copies of this memo after June 30.)

II. THE SLMP's MANDATES APPLICABLE TO CLASSIFICATION OF LARGE, NEWLY ACQUIRED FOREST PRESERVE TRACTS WITH SPECIAL RESOURCE VALUES

1. Primary Conclusions

The SLMP creates a very strong presumption in favor of a Wilderness, Primitive, or Canoe classification for any new, large-acreage Forest Preserve acquisition that contains special resource values. That presumption is especially strong for large newly acquired tracts that contain significant water resources. In other words, when the Agency is classifying any major new Forest Preserve acquisition that exhibits very important natural resource values and social values, the SLMP's various mandates considerably narrow the range of choices the Agency may properly make. **Furthermore, in such a case the Agency should not permit this presumption to be overturned unless there is a very clear showing that designating that particular tract as Wilderness, Primitive, or Canoe would be inconsistent with the purposes of the Master Plan (as more fully discussed below).**

2. The SLMP's Stated Purpose

While not a statute, the SLMP is binding as a matter of state law, and its central mandate is clear: "If there is a **unifying theme to the master plan**, it is that the protection and preservation of the natural resources of the state lands within the Park must be paramount. Human use and enjoyment of those lands should be permitted and encouraged, **so long as the resources in their physical and biological context as well as their social or psychological aspects are not degraded**. This theme is drawn not only from the Adirondack Park Agency Act … and its legislative history, but also from a century of the public's demonstrated attitude toward the forest preserve and the Adirondack Park." (SLMP, Section I, page 1; underlining and emphasis added).

Any and all decisions under the SLMP, including in particular classification decisions, must be measured against their compliance with this

central mandate. In that regard it is critical to note that this mandate emphasizes protection of physical and biological resources and protection of the social/psychological benefits that can be derived from state lands left in as natural a state as possible.

3. The SLMP's Land Classification Mandate

As noted by the SLMP, the Adirondack Park Agency Act (APA Act) establishes a clear and specific mandate regarding the Agency's state land classification decisions: "The Act requires the Agency to classify the state lands in the Park according to **'their characteristics and capacity to withstand use.'**" (SLMP, Section II, page 13; underlining and emphasis added; see also Section 807 of the APA Act as initially adopted in 1971, language from which was incorporated into the SLMP in 1972 when it was initially adopted.)

4. The SLMP's Classification Determinants

The SLMP identifies **four determinants** for classifying state lands (including newly acquired state lands) and provides some guidance regarding the application of these determinants. They are as follows:

A) "A fundamental determinant of land classification is the **physical characteristics** of the land or water which have a direct bearing upon the capacity of the land to accept human use. Soil, slope, elevation and water are the primary elements of these physical characteristics and they are found in widely varied associations. For example, the fertility, erosiveness and depth of soil, the severity of slopes, the elevational characteristics reflected in microclimates, the temperature, chemistry, volume and turnover rate of streams or lakes, all affect the carrying capacity of the land or water both from the standpoint of the construction of facilities and the amount of human use the land or water itself can absorb. **By and large, these factors highlight the essential fragility of significant portions of the state lands within the Park. These fragile areas include most lands above 2,500 feet in altitude, particularly the boreal (spruce-fir), sub-alpine and alpine zones, as well as low lying areas such as swamps, marshes and other wetlands. In addition, rivers, streams, lakes and ponds and their environs often present special physical problems.**" (SLMP, Section II, page 13; underlining and emphasis added)

B) "**Biological considerations** also play an important role in the structuring of the classification system. Many of these are associated with

the physical limitations just described; for instance many plants of the boreal, subalpine and alpine zones are less able to withstand trampling than species associated with lower elevation life zones. **Wetland ecosystems frequently are finely balanced and incapable of absorbing material changes resulting from construction or intensive human use. In addition, wildlife values and wildlife habitats are relevant to the characteristics of the land and sometimes determine whether a particular kind of human use should be encouraged or prohibited,** for example the impact of snowmobiles on deer wintering yards, the effect of numbers of hikers or campers near the nesting habitat of rare, threatened or endangered species like the bald eagle or spruce grouse, or the problems associated with motorized access to bodies of water with wild strains of native trout." (SLMP, Section II, page 13; underlining and emphasis added)

C) "In addition, another significant determinant of land classification involves **certain intangible considerations** that have an inevitable impact on the character of land. Some of these are **social or psychological** -- such as **the sense of remoteness and degree of wildness available to users of a particular area, which may result from the size of an area, the type and density of its forest cover, the ruggedness of the terrain or merely the views over other areas of the Park obtainable from some vantage point.** Without these elements an area should not be classified as wilderness, even though the physical and biological factors would dictate that the limitations of wilderness management are essential.

In such cases, as will be seen, a primitive designation would be required. Other classification determinants are more concrete, for example **the suitability of a given system of lakes and ponds for canoeing or guideboating,** the ability of larger bodies of water to provide for adequately distributed motorboat use, or the accessibility of a tract of land to a public highway, and its attractiveness, permitting the development of a campground or other intensive use facility."

(SLMP, Section II, pages 13-14; underlining and emphasis added)

D) "Finally, the classification system takes into account the **established facilities on the land, the uses now being made by the public and the policies followed by the various administering agencies.** Many of these factors are self- evident: the presence of a highway determines the classification of a travel corridor; the presence of an existing campground or

ski area requires the classification of intensive use. The extent of existing facilities and uses which might make it impractical to attempt to recreate a wilderness or wild forest atmosphere is also a consideration, ..." (SLMP, Section II, page 14; underlining and emphasis added)

Applying these four determinants is admittedly not precise, and in doing so, the Agency must make a number of judgment calls. In recognition of this point, the SLMP states: **"The above described factors are obviously complex and their application is, in certain instances, subjective, since the value of resource quality or character cannot be precisely evaluated or measured. Nonetheless, the Agency believes that the classification system described below reflects the character and capacity to withstand use of all state lands within the Adirondack Park in conformity with the provisions of the Act. ... Insofar as forest preserve lands are concerned, no structures, improvements or uses not now established on the forest preserve are permitted by these guidelines and in many cases more restrictive management is provided for."** (SLMP, Section II, page 14; underlining and emphasis added)

5. The SLMP's Classification Hierarchy

A) Designed to protect the resources of the Park's Forest Preserve lands, the SLMP creates a three-part hierarchy for nearly all of those lands. **Specifically, it places Wilderness Areas at the top of that hierarchy, and it places Primitive Areas and Canoe Areas on a very close second rung. The third rung of this hierarchy is Wild Forest Areas.** The primary differences between the first and second rungs of the hierarchy on the one hand and the third rung on the other are two-fold, and they are central to the purpose and meaning of the SLMP's land area classification system: **first**, in general lands in Wilderness, Primitive, and Canoe Areas have resource values that require greater degrees of protection than lands in Wild Forest Areas; and **second**, in large part because of these differences in resource values, mechanized uses (e.g., bicycles), motorized uses (including but not limited to use of motors for recreation purposes), and motorized access within an area are severely limited in Wilderness, Primitive, and Canoe Areas compared to what is permissible in Wild Forest Areas.

B) The centrality of this three-part hierarchy to the SLMP's overall purpose and structure is made clear by a substantial number of statements in the Master Plan. For example, the SLMP's basic guidelines for managing Primitive Areas and Canoe Areas make clear that those areas

are to be managed in a condition as close as possible to wilderness. (SLMP, Section II, **Primitive**, page 25 – **"Essentially wilderness ... require wilderness management."** (underlining and emphasis added); and Section II, **Canoe**, page 28 – **"in an essentially wilderness setting"** (underlining and emphasis added)) Moreover, in a number of places the SLMP specifies permissible structures/improvements/uses in Primitive Areas, Canoe Areas, and Wild Forest Areas by first stating that what is permissible in Wilderness Areas is permissible in the other classifications. (SLMP, Section II, **Primitive** at pages 25-28; Section II, **Canoe** at pages 28-31; and Section II **Wild Forest** at pages 31-36)

In addition, the SLMP's policy recommendations regarding state land acquisitions make clear that ~~protection of~~ Wilderness, Primitive, and Canoe Area protection is given greater priority than protection of Wild Forest Areas: i.e., **"4. Highest priority** should be given to acquiring fee title to, fee title subject to a term of life tenancy, or conservation easements providing public use or value or rights of first refusal over, (i) key parcels of private land, the use or development of which could adversely affect the integrity of vital tracts of state land, **particularly wilderness, primitive and canoe areas** and (ii) key parcels which would **permit the upgrading of primitive areas to wilderness areas.**" (SLMP, Section I, page 7; underlining and emphasis added)

C) The existence and importance of the SLMP's classification hierarchy are clearly and very strongly underscored by Section 810 of the Adirondack Park Agency Act. That section defines the scope of the Agency's regional project review authority. With regard to all of the Park's Moderate Intensity Use Areas, Low Intensity Use Areas, Rural Use Areas, and Resource Management Areas, Section 810 designates as **"critical environmental areas"** (among others) all lands **"within one-eighth mile"** of any Forest Preserve lands that the SLMP classifies **"now or hereafter"** as Wilderness, Primitive or Canoe. By way of explanation, the Adirondack Park Agency Act, among other things, establishes Moderate Intensity Use ... Resource Management land use designations, and they cover the vast majority of all non-state lands in the Adirondack Park. The Act grants the Agency substantially greater regional project review authority in areas designated as **"critical environmental areas"** than it does in areas not so designated. Significantly, the statute does not designate as **"critical environmental areas"** lands that lie within one-eighth of a mile of Wild Forest Areas. (Section 810, Adirondack Park Agency Act, NYS Executive

Law, underlining and emphasis added)

D) The existence and importance of the SLMP's classification hierarchy are also clearly and strongly underscored by a number of statements in the 1979 FPEIS previously mentioned. See the FPEIS, for example, at:

" Particularly remote or fragile tracts of land that require Wilderness management but do not meet the 10,000 acre size criterion for Wilderness designation and do not lie adjacent to existing Wilderness should be classified as Primitive. Also, lands which otherwise would receive a Wilderness classification but contain significant non-conforming uses, the removal of which cannot be scheduled, or lands which contain or lie contiguous to private lands that are of a size and influence to prevent Wilderness designation, will be classified as Primitive." (FPEIS, Reclassification Guidelines, page 25; underlining and emphasis added)

AND again at: "4. **Only in exceptional circumstances should lands presently classified as Wilderness, Primitive or Canoe be reclassified to Wild Forest.** This should occur only after it has been demonstrated that a highly unusual condition exists, such as the identification of a mapping error, or the existence of a previously unrecognized non-conforming use of a permanent nature.

5. **Wilderness should be reclassified to Primitive only under the most exceptional circumstances** such as the identification of a mapping error or the existence of a previously unrecognized non-conforming use of a permanent nature."

(FPEIS, Reclassification Guidelines, page 26; underlining and emphasis added)

AND again at: "8. **The reclassification from Wild Forest to Wilderness, Primitive or Canoe would result in added protection of natural resources.** This reclassification could also result in the elimination of existing motorized access or aircraft landings on lakes. **Wild Forest areas which lie adjacent to existing Wilderness, Primitive or Canoe should be reclassified to the above land classifications: a) if substantial management problems are created by the Wild Forest classification;** b) if only limited facilities such as open roads or snowmobile trails exist within

the Wild Forest area; c) if the level of use of existing facilities is unusually slight; d) **if the Wild Forest area has unusual natural resource or open space characteristics which require the protection offered by the Wilderness, Primitive or Canoe classification**; or e) the reclassification from Wild Forest is required **to protect the resources or character of existing, adjacent or nearby designated Wilderness, Primitive or Canoe areas.**" (FPEIS, Reclassification Guidelines, pages 27-28; underlining provided in FPEIS; emphasis added)

AND again at: **"The classification of land by the State Land Master Plan as Wilderness, Primitive or Canoe** prohibits motorized access and, except in cases of actual and ongoing emergencies such as fire, flood, search and rescue or large scale contamination of streams, **provides large acreages of habitat undisturbed by man essential to the reintroduction of certain extirpated species. This opportunity is unavailable elsewhere in New York State and would be protected by the proposed guidelines."** (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 34; underlining and emphasis added)

AND again at: **"Wilderness is vital to the survival of many species of wildlife with highly specialized habitat needs**, and it provides both a natural laboratory and basic standards for the assessment of main effects on non-wilderness ecosystems. The proposed guidelines **should protect existing Wilderness and enable the creation of additional Wilderness areas**." (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 34; underlining and emphasis added)

AND again at: **"The Wilderness, Primitive and Canoe classifications generally prohibit the use of motor vehicles, motorized equipment and aircraft. Any amendment to the Plan which would sanction such uses in these areas would severely diminish the Primitive character of those lands and should not be proposed. Noise intrusion is only one component of an area's character. The mere knowledge that motorized access is permissible diminishes an area's sense of remoteness."** (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 35; underlining and emphasis added)

AND again at: **"Amendments to the Master Plan which diminish the size or deteriorate the character of areas designated as Wilderness, Primitive or Canoe are extremely significant and should not be**

proposed." (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 36; underlining and emphasis added)

AND again at: **"Any amendment to the State Land Master Plan which would diminish the area or resource quality of lands classified as Wilderness, Primitive or Canoe would significantly diminish the educational and research opportunities which those areas now offer. These effects would be particularly acute due to the scarcity of designated wilderness in the northeastern United States."** (FPEIS, Impact of Proposed Guidelines on Area Character and Landscape Quality; page 38; underlining and emphasis added)

E) The SLMP does not state explicitly how this three-part hierarchy is to be used regarding the classification of newly acquired state lands. Nevertheless, the general purposes of the Master Plan, its specific mandates regarding the different land classifications, the clear meaning of its terminology, and the Plan's overall organization suggest strongly what the Agency should generally do when large acreages of newly acquired Forest Preserve lands are classified: **i.e., wherever possible those lands with special resources values should be classified as Wilderness; AND when that is not possible, those lands should be classified as Primitive or Canoe; AND only when that is clearly shown not to be possible, should those lands be classified as Wild Forest.**

F) An additional note regarding the SLMP's classification hierarchy is critically important. Stating that Wild Forest lands are on the third rung of this hierarchy in no way suggests that protection of the resources on those lands is unimportant. Indeed, **"Substantially all ..."** of the lands administered by the DEC in the Park, which obviously include very large acreages of Wild Forest lands, "are protected by the **"forever wild clause"** of Article XIV, Section 1 of the State Constitution." (SLMP, Section I, page 2; emphasis and underlining added) The history of the Park, SLMP's initial adoption in 1972, and the Master Plan's implementation over the past four plus decades make clear that it is the underlying **"forever wild"** protection of the vast majority of the Park's state lands (including Wild Forest Areas) that makes the Master Plan's land classification system both possible and important. The SLMP was designed to insure that large portions of the Park's Forest Preserve would be managed in ways that were significantly more resource protective than the base line of Article XIV protection DEC had determined over many years applies to all Forest Preserve lands.

6. History And Interpretation Of The SLMP

The history of Forest Preserve management in the Park before 1972 led directly to the SLMP's creation/adoption and the establishment of its three-part hierarchy, as discussed above in item #5. While this point often goes unstated due to the sensitivity of relations between the Agency and the DEC, any reasonable review of the Park's Forest Preserve history makes clear that this hierarchy came into existence because in 1971 the state's leaders decided it was necessary to alter, substantially and fundamentally, the manner in which much of the Forest Preserve had been managed up to that point.

In 1971 the State Legislature created the Adirondack Park Agency and required it (among other things) to prepare what is now the SLMP. By that time the state's leaders had become dissatisfied with the overall character of Forest Preserve management by the long existing NYS Conservation Department and (its successor) the very young NYS Department of Environmental Conservation (both agencies referred to collectively as CON/DEC hereafter in this item #6): i.e., they were unhappy that over many years CON/DEC officials had chosen to allow much of the Forest Preserve to become less and less wild. Most critically, those officials had made numerous choices to permit ever increasing amounts of infrastructure to be constructed/installed on the Park's Forest Preserve lands, ever increasing amounts of motorized recreation on those lands, and ever increasing amounts of motorized access within those lands.

The primary motivation of the state's leaders in requiring the SLMP's creation and then approving its classification system flowed directly from their determination that large parts of the Forest Preserve should be managed so that they would be significantly wilder than what the CON/DEC had determined was permissible under the State Constitution's Article XIV "Forever Wild" mandate. As a result, the concept of strongly protecting wilderness values in areas classified as Wilderness and in almost-wilderness areas classified as Primitive and Canoe became the SLMP's central focus. This focus was very consistent with, and in large part inspired by, the approach taken in the federal Wilderness Act adopted by Congress and signed by the President just eight years before the SLMP was created. It is no coincidence, but rather a matter of specific and meaningful intention, that the Master Plan's definition of **"wilderness"** so closely parallels the definition of the same term in the federal statute.

(SLMP at Section II, definition of "**Wilderness**" at page 19; and see 16 U.S.C. sections 1131-1136, at section 1131(c)).

In summary, review of the Park's Forest Preserve history illuminates the purpose and significance of the three-part classification hierarchy contained in the SLMP. What the Master Plan now permits in Wild Forest Areas in large part reflects what the CON/DEC had allowed on much of the Park's Forest Preserve prior to 1972. The SLMP's Wilderness, Primitive, and Canoe Area classifications were designed to protect wilderness values in very large areas of the Forest Preserve far more completely than what had been permitted before the SLMP came into existence.

7. A Presumption

Therefore, the SLMP's various mandates regarding classification of newly acquired Forest Preserve lands, when considered together as an integrated whole, **create a very strong presumption in favor of Wilderness, Primitive, or Canoe classifications where special resource values exist on new large land acquisitions, and that presumption should be set aside only where there is a clear showing that such a classification in a particular case would be contrary to the purposes of the Master Plan:**

A) For any large-acreage land acquisition where special resource values exist, that presumption suggests a Wilderness classification. The presumption is especially strong where the newly acquired lands contain significant acreage covered by lakes or ponds.

B) Notwithstanding this presumption in favor of Wilderness classifications, there are some circumstances in which it is proper under the SLMP, and sometimes necessary, for the Agency not to adopt a Wilderness classification regarding a large land acquisition where special resource values exist: i.e.,

---- **where** the area acquired is less than 10,000 acres (the SLMP's general minimum threshold for Wilderness Areas) and does not adjoin an existing Wilderness Area or Primitive Area; or **where** there is some significant, existing infrastructure on the acquired land that it is important to maintain, which infrastructure prevents a Wilderness classification (e.g., two large dams and an access road at Lows Lake, which are included in the Eastern Five Ponds Access Primitive Area); or **where** there are special

circumstances on newly acquired land that currently prevent a Wilderness classification (e.g., the anticipated long-term presence of float plane use in the vicinity of the Essex Chain Lakes constituted circumstances that properly prevented the Agency from classifying as Wilderness the now-existing Essex Chain Lakes and Pine Lake Primitive Areas); **in these several circumstances that presumption strongly suggests a Primitive classification;** and

---- **where** a large newly acquired tract involves an exceptional abundance of interconnecting lakes, ponds, and/or streams, **that presumption strongly favors a Canoe classification.**

III. THE AGENCY'S EVENTUAL CLASSIFICATION OF THE BOREAS PONDS TRACT

1. Preliminary Points

A) As of this date Agency members have not received from the Agency's staff any summary re the resource values inherent in the Boreas Ponds Tract (hereafter TRACT). However, I have received and reviewed various pieces of information regarding the TRACT. This section of this memo reflects what I have derived from that information.

B) My comments here focus on the broad question of what should be the appropriate classification for the largest portion(s) of the TRACT pursuant to the SLMP. Nothing in this memo addresses where any classification line should be drawn on the TRACT between different state land classifications.

C) Because my term on the Agency expires on June 30, as previously noted, I will not still be on the Agency when it eventually acts to classify the TRACT pursuant to the SLMP.

2. Primary Conclusions

As the previous discussion explains, the SLMP's various mandates create a very strong presumption in favor of a Wilderness classification that covers the great majority of the Boreas Ponds Tract. This conclusion pertains most critically to the TRACT's ponds and considerable amounts of lands around those water bodies. Furthermore,

this presumption should be set aside only if there is a very clear showing that a Wilderness designation for most of the TRACT would be inconsistent with the purposes of the Master Plan.

3. <u>A Large Forest Preserve Acquisition That Contains Exceptional Resource Values</u>

A) By any reasonable definition the TRACT constitutes a major addition to the Forest Preserve. Containing more than 20,000 acres, it is larger than several of the Park's existing Wilderness Areas: **Hurricane Mountain** (13,948 acres), **Jay Mountain** (7,896 acres), **Little Moose** (12,258 acres), **Round Lake** (10,356 acres), and **William C. Whitney** (13,678 acres). In addition, it is nearly as large as several other Wilderness Areas in the Park: **Ha-De-Ron-Dah** (25,272 acres), **Hudson Gorge** (23,494 acres), **Pepperbox** (23,816 acres), and **Sentinel Range** (24,017 acres).

B) While my assessment of the TRACT's resources is admittedly preliminary, it is abundantly clear that any detailed and balanced analysis of those resources must conclude that in the context of the Park's Forest Preserve (and the Park more generally) the natural resources values and social resource values present on the TRACT are of exceptionally high order. The materials I have reviewed to date make clear that these special resource values include (but are by no means limited to):

---- fragile soils over considerable areas, including extensive areas with soils with severe potential for erosion;

---- significant areas over 2500 feet elevation;

---- an extensive network of streams, including a significant river segment;

---- extensive areas covered by ponds;

---- extensive wetland habitat, including more than 1,000 acres of peatlands;

---- an abundance of plant and animal species, including a number of boreal species, and a number of rare, threatened or endangered species;

---- **stunning vistas from the TRACT into lands already classified as Wilderness;**

----- **superior location re the protection of wilderness values** (the TRACT adjoins the High Peaks Wilderness Area; if the TRACT is eventually classified as Wilderness and added to the High Peaks Wilderness Area, it will constitute a remarkable addition to the Park's largest and most famous Wilderness Area);

---- **its remoteness and its capacity to provide extensive opportunities for solitude** (These characteristics of the TRACT merit special emphasis. By any reasonable definition, large portions of the TRACT are remote, and the TRACT provides multiple opportunities for people to find solitude, to experience nature's wildness over a large landscape containing widely varying resources, and to traverse this landscape in as non-intrusive ways as possible. The importance of these qualities will be greatly enhanced if the TRACT is added to the High Peaks Wilderness Area.)

4. <u>The TRACT's Prior Use By The Forest Products Industry</u>

The forested lands in the TRACT have been the subject of intensive timber management practices over an extended period (involving among other things the development of an extensive road network to permit truck transportation of logs). Due to that fact, some are arguing that the TRACT's resource values do not justify a Wilderness classification under the SLMP. That argument should be rejected.

If permitted to do so, nature can and will over time renew lands very heavily impacted by human activities. The previous existence of significant logging operations and the road networks built as part of those operations do not prevent regeneration of forested lands and reestablishment of those lands as truly wild lands. This reality is clearly demonstrated in a number of the Park's Wilderness Areas where substantial timber harvesting once occurred (e.g., **Blue Ridge**, **Ha-De-Ron-Dah**, **McKenzie Mountain**, **Round Lake**, **Siamese Ponds**, and **William C. Whitney**). The Park's existing inventory of wilderness would be far less substantial than it now is had the Agency in previous years allowed evidence of past logging activities to prevent designation of qualifying lands as Wilderness Areas. Similarly, pursuant to the federal Wilderness Act, Congress has designated numerous Wilderness Areas since 1964 that had previously been substantially affected by human

activity; this has been particularly true regarding federal Wilderness Area designations in the eastern United States. Nothing relating to past forest management activities on the TRACT in any way prevents its being classified as Wilderness under the SLMP.

5. Application Of The SLMP's Fourth Classification Determinant To The TRACT

As discussed previously, the SLMP's fourth classification determinant requires consideration of "**... established facilities on the land, the uses now being made by the public and the policies followed by the various administering agencies. ....**" (SLMP, Section II, p. 14) This determinant lends no weight to any potential suggestion that the great majority of the TRACT should be classified as something other than Wilderness. Because the TRACT has been in private hands until very recently, there are no established facilities used by the public that could arguably prevent the great bulk of these lands from being classified as Wilderness. In determining how the TRACT should be treated under the SLMP, the Agency will be "writing on an essentially clean slate" with respect to this fourth determinant.

6. Other Potential Classifications For Large Portions Of The TRACT

A) I know of no circumstances that indicate any large portion of the TRACT should be classified as Primitive. However, it is possible that a small portion(s) of the TRACT could properly be classified as Primitive.

B) While the TRACT contains an abundance of stream and pond resources, **I do not think the degree of the water-based recreation opportunities it offers would merit its being classified as a Canoe Area.**

C) I know of no circumstances that suggest that anything approaching a majority of the TRACT acreage should be classified as Wild Forest. Reasonable assessment and application of the SLMP's land classification determinants would prevent such a classification in this case. The TRACT's resources place this acquisition in the high echelons of any reasonable listing of valuable resource areas existing anywhere within the Forest Preserve. While careful review may result in an appropriate determination that some portion of the TRACT should be classified as Wild Forest, that classification cannot be reasonably assigned to the great majority of the TRACT's lands.

D) The SLMP cannot be accurately or logically read to permit a Wild Forest classification of the TRACT with an overlay treating it (or large portions of it) as a Special Management Area. The essential purpose of the Special Management Area concept in the SLMP is to allow special treatment (i.e., more restrictive management) of relatively small areas inside of a larger land area. Nothing in the Master Plan contemplates the notion that the Agency may properly reduce the level of classification for a large area to a lesser level of protection than should be assigned given the resource values of that area and then use the Special Management Area mechanism to modify the impacts that would be generated by utilizing that lesser level of protection. In other words, the SLMP does not permit designating as Wild Forest an area whose resources merit a Wilderness Area classification (or a Primitive Area or Canoe Area classification) and then using Special Management Area guidelines to offset the negative impacts that will be caused by classifying the area as Wild Forest. (SLMP, Section II, pp. 49-50)

(NOTE: the potential Special Management Area treatment of all (or most) of what are now the Essex Chain Lakes Primitive Area and the Pine Lakes Primitive Area was suggested by DEC in 2013. Fortunately the Agency rejected that approach then, and it should similarly reject any suggestion favoring this approach with regard to the TRACT.)

IV. CLOSING THOUGHTS

The present mixture of Wilderness, Primitive, and Canoe Areas in the Adirondack Park is a remarkable reality in the second decade of the 21st Century. That reality exists because in establishing the SLMP in 1972 the Adirondack Park Agency looked past short-term considerations and decided that the broadest interests of the people of New York State (including those who live in the Park) will be best served by very strong protection of those state lands that contain wilderness resource values. As a result, the SLMP requires that the wildest parts of the Park's Forest Preserve be protected as Wilderness, Primitive, and Canoe Areas. Many decisions by the Agency since 1972 have reflected these central, critical mandates of the Master Plan.

This memo has urged close attention to the letter of the SLMP. **In closing, I urge that the Adirondack Park Agency pay very careful attention to its spirit as well.** The Master Plan forcefully favors the

protection of large, wild, remote, high resource value tracts of the Adirondack Park's Forest Preserve lands from intensive human use, including motorized uses and motorized access. The SLMP does so because it is vitally important that people have meaningful and extensive opportunities to experience nature in its unbridled form without many of the intrusions of the modern world. Protecting those opportunities today is increasingly important and difficult because the world in 2016 is so much more crowded and busier a place than it was in 1972. Protecting and enhancing those opportunities will become ever more significant and ever more challenging as the decades proceed, as new generations arrive, and as technology wears away at more and more of the world's natural fabric. **The members of the Agency, now and far into the future, bear and will bear the responsibility --- and must bear the responsibility --- of making certain that the Master Plan's spirit lives and thrives.**

This memo is long. Indeed!!! I appreciate the time you have devoted to reading it, and I hope you find it useful. Thank you.

Hiking boom too much for ADK staff

September 10, 2016

By PETER CROWLEY - Managing Editor (pcrowley@adirondackdailyenterprise.com) , Adirondack Daily Enterprise

Save

Adirondack Mountain Club staff say they were overwhelmed by unusually large crowds of hikers this Labor Day weekend - the most they've ever seen, some staff said.

The club's land near Lake Placid, tucked in the heart of the High Peaks Wilderness Area, has long been New York's most popular trailhead, and Labor Day weekend has long been one of its busiest times of year. But the holiday traffic is now too much to handle, Executive Director Neil Woodworth said Friday.

Among the problems the crowds bring, club officials say, are trampling of fragile vegetation on summits, erosion of trails and a proliferation of human fecal waste, left unburied.

Article Photos

A Summit Steward chats with Doug Haney of Saranac Lake atop Algonquin Peak in 2010.
(Enterprise photo — Chris Knight)

ADK, as the club is known, does much of the job of informing hikers in the busy Eastern High Peaks Wilderness. The state Department of Environmental Conservation has fewer forest rangers and assistant rangers there than it used to, just one or two of each, due to budget cuts. Also, there are so many rescues now, in the age of cellphones when it's easy for lost or injured hikers to call for help, that forest rangers often don't go into the woods at all on busy weekends so they're ready to respond wherever needed. It's common now for hikers to never encounter a ranger unless there's an emergency.

"We are the first uniformed presence many of these people encounter," said Summit Steward Coordinator Julia Goren, head of a crew that's posted atop the most popular peaks. It's a partnership program between ADK, the DEC and the Adirondack Chapter of The Nature Conservancy. Goren said the stewards often have to give novice hikers basic advice like "It's a good idea to bring a map."

Gov. Andrew Cuomo has invested millions of state dollars and much attention into promoting tourism, including the Adirondacks, through the I Love NY program. Woodworth and Goren say they think that's a factor in increasing the crowds. Now, they say, the state needs to increase funding for DEC staff and trail maintenance, help spread tourists throughout the Park and promote responsible backcountry practices with some of the same vigor it uses to bring people here.

Article Links

ADK opinion: Summits overrun over Labor Day
Justin Levine: Stinky experience on the trail

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Summit crunch

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ADK officials wrote an opinion piece on the subject of alpine vegetation, published in today's Enterprise. While Summit Stewards share all kinds of information, their primary job is to tell hikers to avoid the fragile plants that live only on a few dozen acres of the state's highest mountaintops.

But those peaks are getting "bombarded" with hikers, Woodworth said.

Goren was out of town to attend a wedding this past weekend, but she said the stewards told her the traffic was "crazy beyond anything they've ever seen before.

"And it's a pretty seasoned group," she added. "All of them who have been stewarding with us have been doing it for a least a couple years."

The numbers bear that out. Goren said six Summit Stewards were on duty this weekend, three paid and three volunteer, posted in shifts atop Mount Marcy, Algonquin Peak, Wright Peak and Cascade Mountain. They counted talking to more than 3,000 people, with about 1,500 on Cascade alone.

"When it's a slow day, you can have a 45-minute conversation with someone and talk about the vegetation and talk about the trail conditions and the peaks," she said. With crowds of this weekend's magnitude, "it's definitely possible that we missed a few people, but we're pretty diligent."

The only time two stewards worked together was on Cascade Saturday, when they talked to 665 people. A solo steward talked about to the same number Sunday, plus another 200-plus on Labor Day.

The high a year ago was 540 on the Sunday before Labor Day, according to the Adirondack Explorer magazine.

When the summits are crowded, people tend to spread out, each seeking their own corner. There just isn't enough room sometimes without them stepping on fragile vegetation, Goren said. Stewards told her they saw people walking through alpine meadows but have not specifically reported any damaged patches.

DEC statistics cited recently in the Explorer show Cascade trailhead registrations more than doubled over the past decade, from 16,091 in 2006 to 33,149 in 2015 - and mostly in the last five years. The increase at the Van Hoevenberg trailhead, which leads to Marcy, Algonquin and other peaks, was 62 percent from 2005 to 2015's total of 53,423.

As stretched as the Summit Stewards are, they can't add more. They're trying to hold the line after a trust, which Goren declined to identify, recently redirected its donations.

"It was about a third of the program's funding that vanished for us," she said. ADK has stepped up with more money and fundraising, but "it puts us in a position where every year we're trying to fill a $24,000 gap."

Waste woes

The problem of people defecating all over the place - including on or near trails - and not burying their feces seems to have gotten worse in the last two or three years, Goren said, even though the DEC has added outhouses and ADK put together a public-service video on the topic.

"Indian Falls is just one big toilet, despite our best efforts," Woodworth said.

In June, he said, as he and his wife helped install a new privy at the Algonquin-Wright trail junction, hikers were asking to use it while the work was underway. Despite it being bug season, he saw "a steady stream of people" going by.

Education needs

When Woodworth first started going into the mountains, he said, more of the people who did had been involved in scouting or gone to summer camps, which gave them some experience with backcountry ethics. Not so much now.

"We're seeing so many people who just don't know what's going on, and it's frightening," he said.

Goren said she doesn't have hard data on whether the percentage of novice hikers had increased, although it seems so to her, but the sheer number of novices in the woods goes up as overall hiker numbers do.

In addition to novices, ADK officials say they're concerned about the increasing popularity of extreme hikers who want to bag the peaks more frequently or ultralight packers who, for the sake of speed, leave behind important gear - like a shovel with which to bury their feces.

There are also people unaware of special rules for the popular Eastern High Peaks, such as a 15-person group limit. The weekend before Labor Day, the DEC ticketed group leaders from Quebec who took a busload of 67 people up Algonquin and were reported by a Summit Steward.

Both Goren and Woodworth said they wish the state would put money toward a public service campaign about outdoor ethics and etiquette. ADK trains people on "Leave No Trace" practices, but they can't do enough.

"It's like a trickle against a flood," Woodworth said.

"We're not the ad execs," Goren said.

Spreading people out

Goren and Woodworth would like to see hotel and other hospitality staff members in the Lake Placid direct visitors to places other than the most popular ones like Cascade.

"We don't want to stop people from coming to the Adirondacks," Goren said. "Certainly the first thing that sets people onto the path to caring for an area is firsthand experience of that area. We just don't want them to keep being directed to the same place on the same day."

Also, Cascade isn't for everyone, she added. She'll never forget seeing one woman trying to hike it in wedge heels, clutching a purse.

Mt. Baker too busy?

Parking crunch at trailhead sparks concerns, but no easy solutions

September 14, 2016
By CHRIS KNIGHT - Senior Staff Writer (cknight@adirondackdailyenterprise.com) , Adirondack Daily Enterprise

Save |

SARANAC LAKE - The town of St. Armand is taking a hard look at parking and congestion problems at the trailhead to Baker Mountain, but Supervisor Charlie Whitson says it will take more than just his town's efforts to get anything done.

The village of Saranac Lake, the town of North Elba and the state Department of Environmental Conservation all have a stake in trying to solve the problems, along with nearby residents and the hikers who use the trail, Whitson said.

Whether those stakeholders will come together, however, remains to be seen.

Article Photos

A long line of cars and trucks is parked around the edge of Moody Pond, near the trailhead to Baker Mountain, in Saranac Lake on July 4.
(Enterprise photo — Lou Reuter)

"It's not something that's going to have a remedy to it overnight," Whitson acknowledged this week.

The Baker trailhead is located on Forest Hill Avenue. There's space for a dozen or so vehicles on the shoulder of the road next to Moody Pond, but the trail gets so much use on summer weekends that vehicles are often parked part way around the pond, sometimes on private property.

"It's been pretty hectic," said Jerry Bough, who lives three houses away from the trailhead. "There's no place to park. There's 'No Parking' signs, and people park right underneath them. People park on a blind corner in front of Dilzer's. The troopers have been here, but they don't write parking tickets. People are having picnics on our properties. Nobody will do anything."

Article Map

Bough noted that many people walk and bike around Moody Pond, which exacerbates the problem.

Whitson said the village's Saranac Lake 6er program is to blame for the trailhead congestion. Modeled after the Adirondack 46er program, it encourages hikers to climb six mountains in the Saranac Lake area: Baker, St. Regis, Ampersand, Haystack, McKenzie and Scarface. Since it started in 2013, more than 1,600 people have completed the challenge.

"That's when the intensity and the use and the hard feelings over there on the parking started to come into play, and it's only increased since then," Whitson said. "I do feel as though Saranac Lake can be partially at fault because the conditions were not taken into consideration as to what it was going to do the area, and the problems that were going to arise."

Article Links

EDITORIAL: Time to revive ads about outdoor ethics
46ers unveil new correspondent system

"The village is promoting all this being a bicycle path and a walking path, but it's a residential road," Bough said.

It's not just the impact on parking, Whitson noted. The trail itself is in rough shape, he said, comparing it to what he remembers from his childhood. Whitson grew up in a house next to the Baker trailhead and hiked the mountain regularly with his brother and their friends.

"We'd take our backpacks, go up and spend the weekend up there, and come down Sunday afternoon," he said. "That trail now, you could almost drive a truck up through it, it's so worn. It's unbelievable the amount of use that trail gets now."

The municipal boundaries in the area make a solution complicated. The only public land is the sliver of state-owned land where the Baker trail begins. It's bordered on each side by private property. The trailhead area is outside the village in St. Armand, but it's very close to the town of North Elba.

Building a parking lot would be an ideal solution, but there's nowhere to do it, Whitson said.

"The town, we're confined because of the pond on one side, which is literally right up to the edge of the road, and the other side is a swamp, at the early part of it, and the other side is private-owned property," he said. "There's a small section owned by the state. DEC has to take a look at it to see if there is anything that can be done. Many of the other trailheads have parking (lots) there at the beginning, but not over there on Mount Baker."

DEC spokesman David Winchell said the department has seen an increase in trail use across the Adirondacks, including at Baker Mountain.

"Although the trail register numbers have not yet been compiled, observations by DEC staff and the public indicate a significant increase in the number of people using the trail," Winchell wrote in a prepared statement.

"DEC is aware of the issues regarding parking at the trailhead and the condition of the trail. While the construction of a parking area is a challenge because of the area's terrain, DEC is soliciting suggestions from any interested parties for addressing the parking issue."

As for the condition of the trail, Winchell said the state has evaluated re-routing it to the summit from its current trailhead, but no final determination has been made.

Saranac Lake Mayor Clyde Rabideau said the village is prohibited from doing anything outside its boundaries.

"So if the whole neighborhood wanted to annex into the village, then our potential for a role would expand," he said. "Do I see that happening? Not likely. However, Charlie Whitson and his board are very talented and very committed, and they're studying the issue right now, and I'm sure they will come up with some viable solutions."

Rabideau said the 6er program "may have added some hikers (to Baker), but I've noticed a trend among area residents to climb that mountain on a daily basis for a daily workout because it's just the right length.

"I went out on Labor Day weekend and counted 36 cars, which is the most I've ever counted there," Rabideau said. "They were parked there but not illegally and not in front of anybody's driveways. I think the town of St. Armand can manage this."

A group of Moody Pond area residents recently approached North Elba officials to see if the town could get involved, but Supervisor Roby Politi said Tuesday that there isn't an easy solution.

"We've had numerous, numerous discussions about that," he said. "Unfortunately, my understanding is the state police are not interested in enforcing the 'No Parking' signs. DEC doesn't seem to know of a solution. The town of North Elba cannot make the road any bigger. There's no property there for expansion of a parking lot, so I don't know what the answer is. I think we're all kind of chasing our tails."

Politi compared it to similar summertime trailhead congestion issues at Cascade Mountain on Route 73 and the Adirondack Loj Road.

One possible solution would be to relocate the Baker trailhead. Both Bough and Politi said the village has been approached about putting the trailhead on its sewer plant property, on the north side of the mountain, but village officials weren't receptive to it.

Whitson said he's reached out to state Sen. Betty Little and Assemblyman Dan Stec for their help. He said the town will continue working on the issue.

"Over the winter we'll try to push a little heavier to get some action moving forward," he said. "We can't wait until next summer, when the problems start up again, before we start discussing things."

DEC will turn hikers away from Adirondak Loj

September 16, 2016
By staff , Adirondack Daily Enterprise

Save

LAKE PLACID - The state Department of Environmental Conservation announced yesterday that when the parking lot at Adirondak Loj fills up over the Columbus Day weekend, forest rangers will turn hikers away from the area.

Rangers will be posted on Adirondak Loj Road at South Meadow Road.

The DEC has come up with a list of 12 other nearby hikes that hikers can do instead of entering the High Peaks, including Rocky Peak, Whiteface and Poke-O-Moonshine mountains.

Article Photos

Rocky Peak, right, is one of the mountains DEC staff will direct hikers to if Adirondak Loj becomes too busy over the Columbus Day weekend.

(Photo provided by Justin Levine)

For more information, visit www.dec.ny.gov/outdoor/9163.html

Ethics - Lawyers Who Made Headlines

PRESENTED BY:
Randall C. Young, Esq.

I. Introduction 2.5 min.

A. Brief speaker biography
B. Sources for stories
C. Disclaimer

II. The appetizer menu (audience choice) 12.5 min.

A. Settlement offer or extortion?
B. The DUI Sting
C. Lawyer in Led Zeppelin Case "Ushered" Out
D. Hokey Hockey case (and other dubious suits)
E. Can bad writing get you disbarred?

III. The Big Case (choice) 12.5 min.

A. Fall of F. Lee Bailey
   1. Background
      a) Bailey - legal superstar
      b) The DuBoc Case
      c) Plea Bargain
      d) Called to account
   2. The disbarment proceeding
   3. Application for readmission
B. Nixon Can't Resign
   1. Background
      a) Watergate
      b) The Code and its value
      c) Attempted resignation
   2. Disbarment and dissent
   3. Fallout
      a) Confidentiality and conflict
      b) Model Rules
      c) NY Exception
      d) Required disclosure

IV. Conclusion 2.5 min

A. Mac Truong and Zealous Representation

Supreme Court of Florida

No. SC96767

THE FLORIDA BAR,
Complainant,

vs.

F. LEE BAILEY,
Respondent.

[November 21, 2001]

PER CURIAM.

F. Lee Bailey seeks review of a referee's report finding numerous, serious violations of the Rules Regulating the Florida Bar and recommending permanent disbarment. We have jurisdiction. See art. V, § 15, Fla. Const. For the reasons that follow, we approve the referee's findings of guilt and order that F. Lee Bailey be disbarred.

FACTS

The Florida Bar filed a complaint against Bailey alleging seven

counts of misconduct in violation of various Rules Regulating the Florida Bar in the course of Bailey's representation of his client, Claude Duboc.[1] After a final hearing was held over a number of days in which witnesses testified and exhibits were introduced into evidence, the referee issued a detailed twenty-four page report containing her findings of fact and conclusions of law. The referee began the report with an overview of the factual setting that provided the framework for further findings as to all counts of charged misconduct:

In 1994, Bailey represented Duboc in a criminal case filed against Duboc by the United States alleging violations of Title 21 of the United States Code, which prohibits drug smuggling. The indictment also included forfeiture claims under Title 18 of the United States Code. Bailey worked out a deal with the United States Attorneys ("U.S. Attorneys") covering Duboc's plea, repatriation of assets, and payment of attorneys' fees. Under the agreement, Duboc would plead guilty and forfeit all of his assets to the United States Government. All of Duboc's cash accounts from around the world would be

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1. Count number six of the Bar's complaint was dismissed and is therefore not discussed further.

transferred to an account identified by the U.S. Attorney's Office. To deal with the forfeiture of Duboc's real and personal property, 602,000 shares of Biochem Pharma ("Biochem") stock, valued at $5,891,352.00, would be transferred into Bailey's Swiss account. Bailey would use these funds to market, maintain and liquidate Duboc's French properties and all other assets. In order to put this unusual arrangement in context, we set forth the specific factual findings surrounding this plea agreement and Bailey's role in it:

> The ultimate strategy employed by Respondent [Bailey] was that Duboc would plead guilty and forfeit all assets to the United States Government in the hopes of a reduction of sentence based on what [Bailey] described as "extraordinary cooperation." First, Duboc would identify and transfer all cash accounts from around the world into an account identified by the United States Attorney's Office.
>
> The forfeiture of the real and personal properties held in foreign countries presented some nettlesome problems. Duboc owned two large estates in France and valuable car collections, boats, furnishings and art works. Most of these properties were physically located in France. The two estates required substantial infusions of cash for maintenance.
>
> The idea proposed by [Bailey] was to segregate an asset, a particular asset, one that would appreciate in value over time, so that when it came time for Duboc to be sentenced following entry of a plea of guilty, the United States Government would not argue in opposition to a defense claim that part of the appreciation in value was not forfeitable to the United States. Ultimately, the object was to sequester a fund which would not be entirely subject to forfeiture.
>
> The identified asset was 602,000 shares of Biochem Pharma Stock. This would serve as a fund from which [Bailey] could serve as

> trustee and guardian of Duboc's French properties. Duboc's primary interest was to maximize the amount of forfeitures that would be turned over to the United States. This stock would provide a sufficient fund from which to market, maintain and liquidate the French properties and all other assets. [Bailey] explained that it would be prudent to hold the Biochem stock because the company was conducting promising research on a cure for AIDS, and the loss the government would suffer if large blocks of stock were dumped on the market.
>
> Money was transferred immediately into a covert account identified by the United States Attorney's Office. Duboc provided written instructions to the various financial institutions and the orders were then faxed. On April 26, 1994, the Biochem stock certificates were transferred to [Bailey's] Swiss account at his direction. The Respondent provided the account number.

On May 17, 1994, United States District Court Judge Maurice Paul held a pre-plea conference in his chambers. At the conference, the following arrangement as to attorneys' fees, including those for Bailey, was reached: "[T]he remainder value of the stock which was being segregated out would be returned to the court at the end of the day, and from that asset the Judge would be – a motion would be filed for a reasonable attorney's fee for Mr. Bailey." Later in the day on May 17, Duboc pled guilty to two counts in open court and professed his complete cooperation with the U.S. Attorney's Office.

Having outlined these predicate findings of fact, the referee then made the following factual findings and recommendations as to guilt

in the context of each count of misconduct as alleged by the Bar in its complaint.

Count I of the Bar's complaint charged Bailey with commingling. Bailey was entrusted with liquidating stock that belonged to Duboc, referred to as "the Japanese Stock." Upon liquidation, Bailey was then to transmit the proceeds to the United States. Bailey sold the Japanese stock and deposited approximately $730,000 into his Credit Suisse account on or about July 6, 1994. Bailey then transferred the money into his Barnett Bank Money Market Account. The money was paid to the United States Marshal on or about August 15, 1994. The referee found that Bailey admitted that his money market account was not a lawyer's trust account, nor did Bailey create or maintain it as a separate account for the sole purpose of maintaining the stock proceeds. In concluding that Bailey had engaged in commingling, the referee rejected Bailey's claims that there were no personal funds in the Barnett Bank account at the time Bailey transferred the funds from the Japanese Stock into this account, and that Bailey's deposit of the proceeds into a non-trust account was "inadvertent error." The referee concluded that Bailey

violated Rule Regulating the Florida Bar 4-1.15(a) by failing to set up a separate account for these funds and also by commingling client funds with his personal funds.

Count II of the Bar's complaint charged Bailey with misappropriating trust funds and commingling. On or about May 9, 1994, the 602,000 shares of Biochem stock were transferred into Bailey's Credit Suisse Investment Account. Bailey sold shares of stock and borrowed against the stock, deriving over $4 million from these activities. Bailey then transferred $3,514,945 of Biochem proceeds from the Credit Suisse account into his Barnett Bank Money Market Account. Bailey had transferred all but $350,000 of these proceeds into his personal checking account by December 1995. From this account, Bailey wrote checks to his private business enterprises totaling $2,297,696 and another $1,277,433 for other personal expenses or purchases. Bailey further paid $138,946 out of his money market account toward the purchase of a residence.

The referee rejected Bailey's two defenses to the Bar's charge of misappropriation: (1) he never held the stock in trust for Duboc or the United States; rather, it was transferred to him in fee simple absolute;

and (2) this stock was not subject to forfeiture. The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3-4.3 (lawyer shall not commit any act that is contrary to honesty and justice), 4-1.15(a) (commingling funds), 4-8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 4-8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and 5-1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a specific purpose).

Count III charged Bailey with continuing to expend Biochem funds in contravention of two federal court orders. In January 1996, Judge Paul issued two orders regarding the Duboc criminal case; one on the 12th and the other on the 25th. The January 12 order relieved Bailey as Duboc's counsel, substituting the Coudert Brothers law firm. The order further required Bailey to give within 10 days "a full accounting of the monies and properties held in trust by him for the United States of America." The order froze all of the assets received by Bailey from Duboc and further prohibited their disbursement. The

January 25 order directed Bailey to bring to a February 1, 1996, hearing all of the shares of Biochem stock that Duboc had turned over to Bailey. The referee found that Bailey continued to use the Biochem proceeds that he held in trust after service and knowledge of the January 12 and January 25, 1996, orders. The referee rejected Bailey's argument that the January 25 order did not restrain him from utilizing the funds to meet his prior financial obligations, finding that "the order

. . . require[d] Respondent to bring with him the Biochem Pharma stock or any replacement asset . . . . Clearly there were judicial restraints in place when the money was disbursed."

The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3-4.3 (lawyer shall not commit an act that is contrary to honesty and justice), rule 4-8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), rule 4-8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and rule 5-1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a

specific purpose). The referee further found that by knowingly expending trust account funds from the money market account after entry of the January 12 order, Bailey violated Rules Regulating the Florida Bar 3-4.3, 4-3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal), 4-8.4(a) (lawyer shall not violate the Rules of Professional Conduct), and 4-8.4(d) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Count IV of the Bar's complaint charged Bailey with giving false testimony. The referee found that Bailey testified falsely before Judge Paul and the U.S. Attorneys that he did not see the January 12 or January 25 orders until the morning of a civil contempt hearing held on February 2, 1996. The referee further found that Bailey was not being truthful when: (1) in his answer to the Bar's complaint, Bailey denied that he had received the orders and that he had testified falsely before Judge Paul; and (2) Bailey testified before the referee at the final hearing.

Specifically, the referee found numerous reasons why this testimony was false. First, Bailey had a conversation with the

Assistant U.S. Attorney about the terms of the January 12 order following its entry. Indeed, on January 19, when Bailey met with the Assistant U.S. Attorneys, he accused them of obtaining the order from the judge ex parte. In addition, when Bailey returned to his Palm Beach office on January 18, he marshaled documents in support of the accounting that the January 12 order required him to provide. In the letter to Judge Paul dated January 21, 1996, Bailey "plainly concedes that he knew of the terms of the order as early as January 16, 1996." In that letter, he referred to the manner, mode and method by which Judge Paul entered the order. He complained in the letter that "Your Honor was persuaded to act on representations which are at a minimum subject to sharp challenge." As the referee notes, "these assertions could not have been made unless [Bailey] had seen the January 12 order." Further, as to the January 25, 1996, order, it was served upon Bailey by "fax transmission, United States mail, and personally by the U.S. Marshal's Service pursuant to the very terms of the order." Based on these factual findings, the referee found Bailey guilty of violating Rules Regulating the Florida Bar 3-4.3, 4-8.4(b), 4-8.4(c), and 4-3.3(a)(1) (lawyer shall not knowingly make a

false statement of material fact or law to a tribunal).

Count V of the Bar's complaint charged Bailey with self-dealing in the course of his representation of Duboc. The referee found that Bailey's claim that he owned the stock in fee simple created a financial conflict of interest between Bailey and Duboc. "The more [Bailey] received, the less his client would produce in his column at the time of sentencing." This finding refers to the fact that under the plea agreement, it was in Duboc's interest to maximize the amount of assets he forfeited to the United States Government in hopes of receiving a reduced sentence, and that for Bailey to claim entitlement to the appreciation of the stock would be directly contrary to the interests of his client. The referee concluded that Bailey's claim of entitlement to the stock was in no way consistent with the premise that ultimate approval and payment of fees rested with Judge Paul.

The referee further found that Bailey used information relating to his representation of Duboc to the disadvantage of his client. The referee found that Bailey managed one of the French properties to his own personal benefit by procrastinating in his efforts to sell the property. The referee ultimately concluded that Bailey had engaged

in self-dealing, and therefore violated Rules Regulating the Florida Bar 4-1.7(b) (lawyer shall not represent a client if lawyer's exercise of independent professional judgment may be materially limited by the lawyer's own interest), 4-1.8(a) (lawyer shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client), and 4-1.8(b) (lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation).

Count VII of the Bar's complaint charged Bailey with ex parte communications, self-dealing, and disclosure of confidential information. In connection with this count, the referee found that on May 17, 1994, Duboc appeared before Judge Paul and entered a plea and cooperation agreement. Duboc pled guilty to counts II and III of the indictment. The referee found that the only way Duboc would get a reduced sentence was if Judge Paul was convinced that Duboc had completely and totally cooperated and had forfeited all of his assets to the United States. On January 4, 1996, Bailey wrote a letter to Judge Paul stating, "I have sent no copies of this letter to anyone, since I believe its distribution is within Your Honor's sound

discretion." (Emphasis added.) This letter contains an express admission that it was ex parte. In this ex parte letter to Judge Paul, Bailey stated that: (1) Duboc pled guilty because he had no defense due to the strength of the case, (2) Duboc chose this course because it was his only option, not in a spirit of remorse or cooperation, (3) Duboc was a "multimillionaire druggie," (4) by consulting with other counsel, Duboc was no longer acting in the spirit of cooperation, and (5) Duboc's new defense team had interests contrary to those of his client and the court. Bailey sent a second letter to Judge Paul on January 21, 1996, a copy of which was sent to the U.S. Attorney's Office, threatening to seek an order to invade the attorney-client privilege in an attempt to defeat Duboc's position that the stock was held in trust.

The referee found that both of Bailey's letters were sent to compromise Duboc before the sentencing judge and to protect Bailey's interest and control of Duboc's and the U.S. Government's money. The referee recommended that Bailey be found guilty of violating Rules Regulating the Florida Bar 4-1.6(a) (lawyer shall not reveal information relating to representation of a client), 4-1.8(a), 4-

1.8(b), 4-3.5(a) (lawyer shall not seek to influence a judge), 4-3.5(b) (in an adversary proceeding, lawyer shall not communicate as to the merits of the cause with a judge).

Having made the above findings of fact and recommendations as to guilt, the referee considered the appropriate discipline for Bailey's misconduct:

Preliminarily, the referee noted that Bailey was 67 years old at the time of the report. He has been a member of The Florida Bar since 1989, and was admitted to the Massachusetts Bar in 1960. The referee further states "[a]ccording to the Respondent, he is a member of The Supreme Court of the United States, every circuit in the United States, the Tax Court, the Federal Court of Claims, and as of the time of the hearing was admitted in North Carolina and California pro hac vice on two cases."

Prior to considering any aggravating or mitigating factors, the referee stated that "any of the violations of the rules regulating the Florida Bar which have been proven by the Bar as set forth above, would singularly warrant the recommended discipline [of disbarment]. Collectively, the numerous violations, all of which are serious and egregious, plainly warrant permanent disbarment." The

referee then listed the following aggravating factors: dishonest or selfish motive, a pattern of misconduct, multiple offenses, submission of false statements, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law. Further, the referee considered that a federal judge recently found Bailey to be in civil contempt in another case. The referee noted that Bailey has two prior disciplinary actions; a censure in Massachusetts in 1970 and a suspension for one year of the privilege of applying for permission to appear pro hac vice in New Jersey in 1971; however, these incidents were too remote in time to be considered in aggravation. The referee did not find any mitigation. Finally, the referee recommended that the Bar be awarded all reasonable costs. Bailey petitioned this Court for review, challenging multiple aspects of the referee's report.

ANALYSIS

In our system of discipline regulating the conduct of lawyers, our referees, who are circuit court judges, serve as the finders of fact. They hear the testimony of witnesses, judge their credibility, and receive evidence, as would be done in any trial in a court of law. As with any other fact finder, this Court will uphold a

referee's findings of fact when they are supported by competent substantial evidence in the record below. See Florida Bar v. Jordan, 705 So. 2d 1387, 1390 (Fla.1998). As we have explained, where the findings of fact are supported by competent substantial evidence, this Court will not reweigh the evidence and substitute our judgment as to the findings of fact of the referee. See Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996). Nevertheless, in any Bar disciplinary case, and in particular a case where the recommendation is disbarment, the most severe penalty we can administer to an attorney, we engage in a careful and thorough review of the record. Having reviewed the extensive record before us, we conclude that there is competent substantial evidence to support the referee's findings of fact and conclusions of guilt as to each count of misconduct. Although each of the rule violations is extremely serious, ranging from trust account violations to misappropriation of funds, lying to a federal judge, self-dealing and compromising the position of a client, we focus on Bailey's actions regarding the Biochem stock (count II) because the gist of his defense in this case was that the Bar never established the stock was to be held by Bailey in trust. In connection with this, we also review whether, regardless of Bailey's claim that the stock had been transferred to him in "fee simple," this claimed right to the stock would permit him to act in disregard of the judge's orders (count III).

The Biochem Pharma Stock (Count II)--The most contested issue in this case is whether a trust was created with the transfer of the Biochem stock from Duboc to Bailey. The Bar argued that the plea agreement with the U.S. Government provided that Bailey was to hold the stock in trust for the benefit of the U.S. Government. Bailey would use the stock to maintain and liquidate Duboc's properties. After this was accomplished, the stock or its replacement assets would be forfeited to the United States in order to maximize any benefit to Bailey's client for his cooperation. However, Bailey argued that the stock was transferred to him in fee simple. He agreed that he was required to utilize the Biochem stock to derive the funds necessary to maintain and liquidate the French properties. However, Bailey asserted that after the properties were sold, he was only accountable to the United States for the value of the stock on the date that Duboc transferred it to Bailey's Swiss account (which was approximately $6 million), and not for any appreciation--which, as of January 1996, amounted to over $10 million. In other words, Bailey claims that he was entitled to all of the Biochem stock and proceeds from the sale of the stock, minus the approximate $6 million for which he was accountable to the U.S. Government. As he wrote Judge Paul in his letter of January 21, 1996:

I viewed [the value of the stock of $5,891,352.00 on May 9, 1994] as

> an account in which the United States had an interest to this extent: after the payment of costs associated with the case and fees approved by Your Honor, any balance of the $5,891,352.00 remaining would revert to the United States. Because of this view, I did not declare the funds to be income to myself.

(Emphasis omitted.)

We conclude that regardless of the manner in which he was to hold the stock, Bailey is guilty of the most serious and basic trust account violations. The stock, by his own admission, was given to Bailey by his client neither as a gift, nor as an earned fee. Rather, the stock was given to Bailey to be used for the benefit of Duboc, and ultimately the U.S. Government. Bailey was required to use the stock to maximize Duboc's forfeitures to the U.S. Government in the hope that Duboc would receive a reduction of sentence for his cooperation. In his January 21, 1996, letter to Judge Paul, even Bailey recognized that the U.S. Government had an interest in the transfer value of the Biochem stock. Nevertheless, from the day it was transferred to him, Bailey treated the money as his own.

Rule Regulating the Florida Bar 3-4.1[2] charges every member of the Bar with knowledge of the standard of ethical and professional conduct prescribed by this

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2. Rule 3-4.1 provides, "Every member of the Florida Bar . . . is within the jurisdiction of this court . . . and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court."

Court, and with notice of rule 3-4.1. Rule 4-1.15 provides:

> A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the lawyer receives written permission from the client to do so and provided that such written permission is received prior to maintaining the funds other than in a separate bank account. In no event may the lawyer commingle the client's funds with those of the lawyer or those of the lawyer's law firm. Other property shall be identified as such and appropriately safeguarded.

(Emphasis added.) Bailey admits that he was accountable to the United States for the approximate $6 million value of the Biochem stock on the day of transfer. Nevertheless, when the stock was transferred, Bailey made absolutely no effort to segregate or safeguard this money. Rather, he commingled the money with the funds in his Credit Suisse account, sold shares of the stock, and obtained a line of credit on the stock, deriving over $4,000,000 from these activities. As noted by the Bar at oral argument, if on January 1, 1996, the value of Biochem stock fell to zero, Bailey would have already taken $3.5 million out of the Biochem stock fund and transferred it to his personal money market account. Bailey transferred all but $350,000 of these proceeds into his personal checking account and used some or all of this money to pay for various business and

personal expenses.

Further and importantly, Bailey admits that Judge Paul would approve the amount of Bailey's fee for representing Duboc, and that his fee would be taken from the approximate $6 million value of the Biochem proceeds. Therefore, even if some of the initial $6 million corpus was to be used for payment of an attorneys' fee, Bailey was not entitled to the fee until it was approved by Judge Paul--a fact that Bailey admits in his January 21 letter to Judge Paul, and that he admits in this case. Indeed, in a letter written to his own client, Duboc, before a falling out occurred, Bailey explained that:

> You do not face the dilemma since I will be paid with Chief Judge Paul's approval - only that amount which is commensurate with the result achieved in your case, and the amount of work that went into it. Our interests are therefore in perfect alignment.

Rule 5-1.1(a) provides: "Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose." When the approximate $6 million transfer value of the Biochem stock was given to Bailey, it was given to him for specific purposes: to maintain the property of his client and then to return the remainder to the U.S. Government. Therefore, under Rule Regulating the Florida Bar 5-1.1, Bailey had a duty to safekeep this property and use it only for the

aforementioned purposes. The transfer value of this stock or its proceeds could neither be commingled nor could it be withdrawn. The fact that a portion of this fund was to be used for payment of any attorneys' fees only serves to highlight this fact--that the monies were to be held in trust for a specific purpose.

If Bailey's fee had been earned, then it could have and should have been withdrawn from a trust account; the failure to do so would have been a violation of trust account rules. See Florida Bar v. Tillman, 682 So. 2d 542 (1996) (holding that rule 4-1.15(c) requires fees to be withdrawn when they become due and the failure to do so constitutes a trust account violation). However, if money is given to a client to be applied to fees when they become earned, much like a retainer, these monies cannot be withdrawn from a trust account and spent until they are earned. See In re Sather, 3 P.3d 403, 410 (Colo. 2000) ("[U]nearned portion[s] of . . . advance fees must be kept in trust and cannot be treated as the attorney's property until earned."). In this case, by express agreement, Bailey was not entitled to any fees until determined and approved by Judge Paul. Thus, he was expressly prohibited from withdrawing and spending any portion of the stock for his own personal benefit until approved by Judge Paul. See generally Spann, 682 So. 2d at 1070-71.

In light of the foregoing, we conclude that regardless of the manner in which

the stock was transferred to Bailey and the exact words used, Bailey violated rule 4-1.15 and rule 5-1.1(a) as to approximately $6 million (i.e., the value of the stock at the time it was transferred to Bailey).[3]

We further note that even if there was no precise agreement with the U.S. Government regarding the necessity to segregate and safeguard the stock and its proceeds, Bailey's obligations as to his client's property or the property of a third party flow from the Rules Regulating the Florida Bar, rules that are imposed as a condition of all attorneys' membership in The Florida Bar. Indeed, one of the most solemn obligations that separate lawyers from any other professionals relates to the safeguarding and segregation of a client's property.

The January 12 and January 25 orders (Count III)--Judge Paul's January 12, 1996, order provides that "[a]ll monies, real and personal property and other assets received by Bailey from or on behalf of Duboc, including the aforementioned Biochem Pharma stock shall be frozen as of the date of this order and no further disbursement of any of these funds shall be made unless authorized by this Court." The January 25 order required Bailey to "bring with him all shares of stock of Biochem Pharma, Inc. held by him, or by others, which represent the stock turned

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3. We approve the referee's other findings regarding rule violations under this count without further discussion.

over to him by the Defendant, Claude Duboc, or Duboc's representatives. If the Biochem Pharma, Inc. stock has been replaced by any other form of asset while in the possession of Mr. Bailey, then the replacement stock will be brought to this Court at the time of the above hearing."

As mentioned earlier, Bailey took no action to segregate or safeguard the value of the Biochem proceeds for which he admits he was accountable to the United States. Because Bailey held approximately $6 million in trust for the Government, and Bailey commingled money from the Biochem proceeds with his personal assets, we conclude that Judge Paul's orders covered that portion of the Biochem proceeds that Bailey was holding in his money market account or his personal checking account.

Even if Bailey felt that he was entitled to the stock proceeds in his personal account, this does not permit him to act in contravention of two federal court orders. In Florida Bar v. Gersten, 707 So. 2d 711, 713 (Fla. 1998), this Court found that an attorney who failed to comply with a court order violated rule 4-3.4(c). The Court stated that "[a]n attorney is not permitted to ignore and refuse to follow a court order based upon his personal belief in the invalidity of that order. To countenance that course is to court pandemonium and a breakdown of the judicial system." Id. (quoting Florida Bar v. Rubin, 549 So. 2d 1000, 1003 (Fla.

1989)). Similarly, in Florida Bar v. Canto, 668 So. 2d 583 (Fla. 1996), this Court found that an attorney who continued to litigate a case despite being disqualified from the case had violated rules 3-4.3, 4-3.4(c), 4-8.4(a), and 4-8.4(d), in addition to other rules. We found that "Canto's repeated refusal to accept the directives of the court are of a most serious order. The record contains unrefuted evidence of the injury he has caused his former clients, third parties, and the courts. Such disdain for the legal system simply can not be tolerated." Id. at 585. Bailey's disregard of the January 12 and January 25 orders requiring him not to utilize or expend Biochem proceeds similarly demonstrates disdain for the federal court that issued those orders. Therefore, we conclude that Bailey violated rules 3-4.3, 4-3.4(c), 4-8.4(a) and 4-8.4(d) by acting in contravention of Judge Paul's orders.

DISCIPLINE

Bailey has committed multiple counts of egregious misconduct, including offering false testimony, engaging in ex parte communications, violating a client's confidences, violating two federal court orders, and trust account violations, including commingling and misappropriation. Disbarment is the presumed discipline for many of these acts of misconduct. For example, as to Bailey's mishandling of the Biochem stock, Standard 4.11 of the Florida Standards for Imposing Lawyer Sanctions provides: "Disbarment is appropriate when a lawyer

intentionally or knowingly converts client property regardless of injury or potential injury." As to Bailey's violation of the January 12 and 25 orders, Standard 6.21 provides that "[d]isbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes . . . potentially serious interference with a legal proceeding." Regarding Bailey's ex parte communication with Judge Paul, Standard 6.31 provides that "[d]isbarment is appropriate when a lawyer: . . . (b) makes an unauthorized ex parte communication with a judge or juror with intent to affect the outcome of the proceeding."

Case law also supports disbarment for the types of misconduct committed by Bailey. See Florida Bar v. Rightmyer, 616 So. 2d 953, 955 (Fla. 1993) (holding that "[n]o breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process"); Florida Bar v. Leon, 510 So. 2d 873 (Fla. 1987) (attorney disbarred for engaging in ex parte communication with judge to achieve alteration of sentences and then lying under oath to Judicial Qualifications Commission). Further,"[t]his Court deals more severely with cumulative misconduct than with isolated misconduct." Florida Bar v. Greenspahn, 386 So. 2d 523, 525 (Fla. 1980); see also Spann, 682 So. 2d at 1074.

Bailey has committed some of the most egregious rules violations possible, evidencing a complete disregard for the rules governing attorneys. "[M]isuse of client funds is one of the most serious offenses a lawyer can commit. Upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment." Tillman, 682 So. 2d at 543. Bailey's false testimony and disregard of Judge Paul's orders demonstrate a disturbing lack of respect for the justice system and how it operates. Bailey's self-dealing and willingness to compromise client confidences are especially disturbing. Not only did Bailey use assets that his client intended to forfeit to the U.S. Government for Bailey's own purposes, but Bailey also attempted to further his own interests by disparaging his client in an ex parte letter to the judge who would sentence his client. Bailey's self-dealing constitutes a complete abdication of his duty of loyalty to his client. His willingness to compromise his client for personal gain shows an open disregard for the relationship that must be maintained between attorney and client: one of trust, and one where both individuals work in the client's best interest. Such misconduct strikes at the very center of the professional ethic of an attorney and cannot be tolerated. As we have repeatedly stated, discipline must serve three purposes:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as

> a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Florida Bar v. Brake, 767 So. 2d 1163, 1169 (Fla. 2000) (quoting Florida Bar v. Cibula, 725 So. 2d 360, 363 (Fla. 1998)).

In light of Bailey's egregious and cumulative misconduct, and the absence of any mitigating factors, we conclude that disbarment is not only appropriate in this case, but necessary to fulfill the threefold purpose of attorney discipline. By this disbarment, Bailey's status as a member of The Florida Bar shall be terminated and he may not reapply for readmission for a period of five years, and then he may "only be admitted again upon full compliance with the rules and regulations governing admission to the bar." R. Regulating Fla. Bar 3-5.1(f). This includes retaking the Florida bar examination, complying with the rigorous background and character examination, and demonstrating knowledge of the rules of professional conduct required of all new admittees.[4]

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4. Although we regard these rule violations as extremely serious and warranting disbarment, we do not accept the referee's recommendation of permanent disbarment. Under the rules, the minimum period of disbarment is for five years (and thereafter until the attorney is readmitted to the practice of law). See R. Regulating Fla. Bar 3-5.1(f). In 1998, the Court amended the Rules Regulating the Florida Bar to specifically provide for permanent disbarment. See In re

CONCLUSION

Accordingly, F. Lee Bailey is hereby disbarred from the practice of law in the State of Florida. The disbarment will be effective thirty days from the filing of this opinion so that Bailey can close out his practice and protect the interests of existing clients. If Bailey notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the disbarment effective immediately. Bailey shall accept no new business from the date this opinion is filed until he is readmitted to the practice of law in Florida. Judgment is entered for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for recovery of costs from F. Lee Bailey in the amount of $24,418.60, for which sum let execution issue.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS, and QUINCE, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARMENT.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Staff

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Amendments to Rules Regulating The Florida Bar, 718 So. 2d 1179, 1181 (Fla. 1998) (amending rule 3-5.1(f) "to authorize permanent disbarment as a disciplinary sanction").

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for Respondent

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for the Northern District of Florida, Amicus Curiae

90 A.3d 1137
Supreme Judicial Court of Maine.

F. Lee BAILEY
v.
BOARD OF BAR EXAMINERS.

Docket No. Cum–13–291.
|
Argued: Jan. 14, 2014.
|
Decided: April 10, 2014.

Synopsis

Background: Attorney disbarred in other state and federal jurisdictions petitioned for admission to practice of law in state. On reconsideration, a single justice of the Supreme Judicial Court, Alexander, J., recommended admission. Board of Bar Examiners appealed.

Holdings: The Supreme Judicial Court, Levy, J., held that:

[1] fact that attorney was not fully repentant and did not unambiguously admit to all misconduct for which he was disbarred in other jurisdiction, without more, did not preclude finding that he satisfied requirement that he recognize wrongfulness and seriousness of prior misconduct, and

[2] attorney failed to establish by clear and convincing evidence that he recognized wrongfulness and seriousness of his conduct.

Vacated and remanded.

Saufley, C.J., and Clifford, J., dissented with opinion.

Attorneys and Law Firms

***1140** Thomas A. Knowlton, Asst. Atty. Gen. (orally), Office of the Attorney General, Augusta, on the briefs, for appellant Board Of Bar Examiners.

Peter J. DeTroy, Esq. (orally), and Devin W. Deane, Esq., Norman, Hanson & DeTroy, LLC, Portland, on the briefs, for appellee F. Lee Bailey.

Panel: SAUFLEY, C.J., and LEVY, MEAD, GORMAN, JABAR and CLIFFORD, JJ.
Majority: LEVY, MEAD, GORMAN, and JABAR, JJ.
Dissent: SAUFLEY, C.J., and CLIFFORD, J.

Opinion

***1141** LEVY, J.

[¶ 1] The Board of Bar Examiners appeals from the judgment of a single justice of the Supreme Judicial Court (*Alexander, J.*) concluding that applicant F. Lee Bailey presently possesses the requisite good character and fitness required by M. Bar R. 7.3(j)(5) to be admitted to practice law in Maine.

[¶ 2] The Board advances several reasons in support of its position that the single justice erred in authorizing Bailey's admission to the Maine bar. [1] Because we conclude that the single justice erred with respect to the Board's principal assertion—that Bailey failed to prove by clear and convincing evidence that he recognizes the wrongfulness and seriousness of the misconduct that resulted in his disbarment—we vacate the judgment on that basis and do not reach the Board's other contentions.

I. BACKGROUND

A. Bailey's Representation of Claude Duboc

[¶ 3] In 1994, Bailey, who had practiced primarily as a criminal-defense attorney for many years, began defending Claude Duboc against charges of drug smuggling and money laundering and related claims for asset forfeiture in the United States District Court for the Northern District of Florida. Bailey was disbarred in Florida in 2001 due to misconduct in connection with his representation of Duboc, and was reciprocally disbarred in the state and federal courts of Massachusetts in 2003 and 2006, respectively. The Florida Supreme Court, in its decision ordering Bailey's disbarment, set out the following factual background based upon the findings of Circuit Judge Cynthia Ellis, who acted as the referee in the disbarment proceedings:

> In 1994, Bailey represented Duboc in a criminal case filed against Duboc by the United States alleging violations of Title 21 of the United States Code, which prohibits drug smuggling. The indictment also included

forfeiture claims under Title 18 of the United States Code. Bailey worked out a deal with the United States Attorneys ("U.S. Attorneys") covering Duboc's plea, repatriation of assets, and payment of attorneys' fees. Under the agreement, Duboc would plead guilty and forfeit all of his assets to the United States Government. All of Duboc's cash accounts from around the world would be transferred to an account identified by the U.S. Attorney's Office. To deal with the forfeiture of Duboc's real and personal property, 602,000 shares of Biochem Pharma ("Biochem") stock, valued at $5,891,352.00, would be transferred into Bailey's Swiss account. Bailey would use these funds to market, maintain and liquidate Duboc's French properties and all other assets....

The ultimate strategy employed by [Bailey] was that Duboc would plead ***1142** guilty and forfeit all assets to the United States Government in the hopes of a reduction of sentence based on what Bailey described as "extraordinary cooperation." First, Duboc would identify and transfer all cash accounts from around the world into an account identified by the United States Attorney's Office.

The forfeiture of the real and personal properties held in foreign countries presented some nettlesome problems. Duboc owned two large estates in France and valuable car collections, boats, furnishings and art works. Most of these properties were physically located in France. The two estates required substantial infusions of cash for maintenance.

The idea proposed by Bailey was to segregate an asset, a particular asset, one that would appreciate in value over time, so that when it came time for Duboc to be sentenced following entry of a plea of guilty, the United States Government would not argue in opposition to a defense claim that part of the appreciation in value was not forfeitable to the United States. Ultimately, the object was to sequester a fund which would not be entirely subject to forfeiture.

The identified asset was 602,000 shares of Biochem Pharma Stock. This would serve as a fund from which Bailey could serve as trustee and guardian of Duboc's French properties. Duboc's primary interest was to maximize the amount of forfeitures that would be turned over to the United States. This stock would provide a sufficient fund from which to market, maintain and liquidate the French properties and all other assets. Bailey explained that it would be prudent to hold the Biochem stock because the company was conducting promising research on a cure for AIDS, and the loss the government would suffer if large blocks of stock were dumped on the market.

Money was transferred immediately into a covert account identified by the United States Attorney's Office. Duboc provided written instructions to the various financial institutions and the orders were then faxed. On April 26, 1994, the Biochem stock certificates were transferred to Bailey's Swiss account at his direction. [Bailey] provided the account number.

On May 17, 1994, United States District Court Judge Maurice Paul held a pre-plea conference in his chambers. At the conference, the following arrangement as to attorneys' fees, including those for Bailey, was reached: "The remainder value of the stock which was being segregated out would be returned to the court at the end of the day, and from that asset ... a motion would be filed for a reasonable attorney's fee for Mr. Bailey." Later in the day on May 17, Duboc pled guilty to two counts in open court and professed his complete cooperation with the U.S. Attorney's Office.

Florida Bar v. Bailey, 803 So.2d 683, 685–86 (Fla.2001) (per curiam) (quotation marks omitted) (alterations omitted).

[¶ 4] During the course of Bailey's management of Duboc's assets, the market value of the Biochem stock [2] increased significantly. After the stock was transferred to Bailey's Credit Suisse account in Switzerland, Bailey sold some shares and borrowed against the remaining shares, deriving over $4 million in proceeds. He then ***1143** transferred over $3.5 million of the Biochem proceeds from the Credit Suisse account to his personal money market account, and by December 1995 he had transferred all but $350,000 of that amount to his personal checking account. From this personal account, Bailey wrote checks totaling over $2 million to his private businesses and nearly $1.3 million for personal expenses and purchases. Bailey also paid $138,946 from his money market account towards the purchase of a personal residence. Bailey used a substantial portion of the remaining funds to pay the expenses of maintaining and liquidating Duboc's French holdings.

[¶ 5] By late 1995, Duboc had become dissatisfied with Bailey's representation and filed a motion to substitute new counsel for Bailey. Five days before the scheduled hearing, Bailey sent a letter to Judge Paul without copying the prosecutors, Duboc, or Duboc's new attorneys. Bailey's letter referred to Duboc, in quotes, as a "multimillionaire druggie" and alleged, among other things, that Duboc's new attorneys had a conflict of interest and were giving Duboc harmful advice. At the end of the letter, Bailey acknowledged its ex parte nature: "I have sent no copies of this letter to anyone, since I believe its distribution is within Your Honor's sound discretion."

[¶ 6] Following a hearing, Judge Paul entered an order on January 12, 1996, removing Bailey as Duboc's counsel. The order also froze all of Duboc's assets held by Bailey and required Bailey to submit a complete accounting of Duboc's money and property that he held in trust. Despite his knowledge of the January 12 order, Bailey thereafter spent over $300,000 of the Biochem proceeds for his own purposes. Judge Paul issued a second order on January 25, 1996, mandating that Bailey surrender all of the shares of the Biochem stock or any replacement assets, and prepare a full accounting of the assets he received from Duboc, including any disbursements he made from those assets. Bailey then notified the Swiss government that the Biochem shares and proceeds in his Swiss bank account were the fruits of drug trafficking, which resulted in the Swiss authorities freezing the account. As a result, Bailey did not surrender the stock or proceeds as he was required to do. Judge Paul subsequently scheduled a hearing to determine if Bailey should be held in contempt.

[¶ 7] At the contempt hearing held on February 2, 1996, Bailey testified under oath that he did not physically see the January 12 and January 25 orders until that very morning. Judge Paul held Bailey in contempt for violation of the orders, and ordered his incarceration until he could purge himself of contempt by producing the requested accountings and the stock, and repaying to the court the amount he had withdrawn. When Judge Paul determined that he had substantially complied with the court's contempt order, Bailey was released from incarceration after forty-four days.

[¶ 8] Ultimately, Judge Paul approved $1.2 million of the approximately $1.6 million in expenditures Bailey claimed to have made to manage Duboc's assets. Because Bailey had already spent more than the approved expenses, he was ordered to pay an additional $423,737 to the court. The court also ordered Bailey to return the sum that he had withdrawn from the Swiss account and spent for personal purposes. On appeal, the United States Court of Appeals for the Eleventh Circuit rejected Bailey's contention that Judge Paul was biased against him and should have been recused, and affirmed the court's allowance of expenses with one minor exception. ***1144** *United States v. Bailey,* 175 F.3d 966, 968–70 (11th Cir.1999) (per curiam).

B. Bailey's Disbarment

[¶ 9] In July 2000, after a five-day hearing on the Florida Bar's petition for Bailey's disbarment, Judge Ellis found that Bailey had committed various ethical violations, including misappropriation of client assets and commingling them with personal assets, ex parte communication, self-dealing, conflict of interest, and false testimony under oath. Judge Ellis rejected Bailey's argument that because the Biochem stock was transferred to him in "fee simple absolute," he was entitled to treat the stock and its appreciation as his own. In arriving at a proposed sanction, Judge Ellis noted that Bailey was sixty-seven years old at the time of the misconduct and had been practicing law for many years. She applied the aggravating factors of substantial experience in the practice of law, selfish motive, pattern of misconduct, multiple offenses, and refusal to acknowledge the wrongful nature of his misconduct. Emphasizing the egregiousness of Bailey's ethical violations and the aggravating factors, Judge Ellis recommended that Bailey be permanently disbarred.

[¶ 10] On appeal, the Florida Supreme Court upheld all of Judge Ellis's findings and conclusions regarding the six counts of ethical violations, noting that Bailey had "committed some of the most egregious rules violations possible." *Florida Bar,* 803 So.2d at 690, 694. The court ordered Bailey disbarred with eligibility to apply for readmission after a period of five years. *Id.* at 695. Bailey appealed to the United States Supreme Court, which denied certiorari. *Bailey v. Florida Bar,* 535 U.S. 1056, 122 S.Ct. 1916, 152 L.Ed.2d 825 (2002). Subsequently, Bailey was reciprocally disbarred in both the state and federal courts of Massachusetts. [3]

[¶ 11] After Bailey's disbarment in Florida, the Biochem stock continued to be a subject of dispute. In 2002, the United States Court of Federal Claims rejected a claim

Bailey brought against the United States in which he contended that the government had breached an implied-in-fact contract to transfer the stock to him in fee simple absolute. *Bailey v. United States,* 54 Fed.Cl. 459, 485–87 (2002), *aff'd, Bailey v. United States,* 94 Fed.Appx. 828 (Fed.Cir.2004). In January 2013, the United States Tax Court determined that Bailey owed taxes and penalties in the amount of $1.9 million, not including statutory interest, resulting in part from his failure to report as income a portion of the Biochem proceeds that he had treated as his own. *Bailey v. Comm'r,* No. 3080–08 (T.C. Jan. 11, 2013); *Bailey v. Comm'r,* No. 3081–08 (T.C. Jan. 11, 2013); *Bailey v. Comm'r,* 103 T.C.M. (CCH) 1499, 2012 WL 1082928, at *22 (T.C. Apr. 2, 2012). In July 2013, the Internal Revenue Service (IRS) filed tax liens against Bailey in the approximate sum of $4.5 million, which included statutory ***1145** interest on Bailey's tax liability.[4] Bailey appealed the Tax Court's decision, and the United States Court of Appeals for the First Circuit affirmed. *Bailey v. Internal Revenue Serv.,* No. 13–1455, 2014 WL 1422580 (1st Cir. Mar. 14, 2014).

C. Bailey's Application to the Maine Bar

[¶ 12] In February 2012, ten years after his disbarment in Florida, Bailey applied for admission to practice law in Maine and passed the Maine bar exam. In November 2012, following a testimonial hearing, the Board of Bar Examiners concluded in a five-to-four decision that Bailey had failed to meet his burden of proving, by clear and convincing evidence, that he presently possesses the requisite good character and fitness for admission to the Maine bar. *See* M. Bar R. 7.3(j)(5). The Board found, among other things, that Bailey did not recognize the wrongfulness and seriousness of his prior misconduct that led to his disbarment, that he continued to dispute the Florida Supreme Court's findings regarding his misconduct, and that he continued to challenge the legitimacy of the judicial process that resulted in his disbarment.

[¶ 13] Bailey appealed the Board's decision pursuant to M. Bar Admission R. 9(d)(6), and the single justice held a de novo hearing on March 6 and 7, 2013. In April 2013, the single justice entered a judgment concluding that Bailey had met his burden of proving the requisite good character and fitness in all but one respect—his large outstanding tax obligation. The single justice specifically found that Bailey recognizes the wrongfulness and seriousness of the misconduct that led to his disbarment but denied Bailey's petition for a certificate of good character and fitness based on the tax liability alone. The single justice invited the parties to submit motions for reconsideration to address this issue, explaining:

> [T]he existence of large debts can compromise professional judgment and client relations in ways that must be recognized in considering admission applications. The issue of an outstanding, though not final, judgment ordering payment of nearly $2 million must be addressed in consideration of a bar admission. This issue remaining unaddressed is the only bar to this Court's granting Bailey a certificate of good character and fitness to be admitted to the practice of law.
>
> Bailey has the burden to prove, by clear and convincing evidence, good character and fitness to practice law. With the tax debt issue unresolved, and not seriously addressed at hearing or in the written closing arguments, the Court cannot find present fitness to practice proven by clear and convincing evidence. Accordingly, the Court must deny the petition to grant an unconditional admission and issue a certificate of good character and fitness to practice law. For the present, this denial will be without prejudice to a timely request for reconsideration addressing how, if at all, the Court should treat the obligations indicated in the January 11, 2013, Tax Court orders in reaching its decision on good character and fitness.

[¶ 14] Bailey subsequently filed a motion for reconsideration. In June 2013, after a hearing, the single justice issued a judgment finding that Bailey, by actively litigating and seeking to resolve the tax debt, "is making a genuine effort to meet ***1146** his responsibilities" and had therefore met his burden of proof on this last issue bearing on his character and fitness. The single justice remanded the case to the Board with instructions to issue Bailey a certificate of qualification.

[¶ 15] The Board filed a motion for further findings and for reconsideration, arguing that the single justice failed to consider evidence bearing negatively on Bailey's character and fitness. The single justice denied the Board's motion, and this appeal followed.

II. DISCUSSION

[1] [¶ 16] Maine Bar Rule 7.3(j) governs the admission of attorneys who have been disbarred. Pursuant to Maine Bar Rule 7.3(j)(5), Bailey bore the burden of presenting "clear and convincing evidence demonstrating the moral qualifications, competency, and learning in law required for admission to practice law" in Maine, as well as evidence establishing that "it is likely that [his admission] will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest." *See also In re Williams,* 2010 ME 121, ¶ 6, 8 A.3d 666 (citing M. Bar R. 7.3(j)(5)); *In re Hughes,* 594 A.2d 1098, 1100–01 (Me.1991). [5] To determine whether Bailey met this burden, the single justice was required to evaluate whether Bailey demonstrated, among other requirements, that he "recognizes the wrongfulness and seriousness of the misconduct" leading to his disbarment. M. Bar R. 7.3(j)(5)(C). [6] This requirement presents a mixed question of law and fact. *See Bd. of Overseers of the Bar v. Warren,* 2011 ME 124, ¶ 25, 34 A.3d 1103 ("We interpret the meaning of the [bar] rules de novo as a matter of law, and review for clear error the findings of fact that determine the applicability of the rule." (citations omitted)).

[2] **[3]** [¶ 17] The Board asserts that the evidentiary record shows that the single justice's finding that Bailey recognizes the wrongfulness and seriousness of his misconduct is clearly erroneous, and that, as a matter of law, Bailey failed to prove this factor because he only admitted to some, but not all, of the misconduct found by the Florida Supreme Court. We interpret the meaning of Rule 7.3(j)(5) de novo as a matter of law and review for clear error the single justice's findings of fact. *Warren,* 2011 ME 124, ¶ 25, 34 A.3d 1103. When reviewing on appeal findings of fact that must be proved by clear and convincing evidence, we determine "whether the factfinder could reasonably have been persuaded that the required factual finding ***1147** was or was not proved to be highly probable." *Taylor v. Comm'r of Mental Health & Mental Retardation,* 481 A.2d 139, 153 (Me.1984).

A. Maine Bar Rule 7.3(j)(5)(C)'s Standard for Recognition of the Wrongfulness and Seriousness of Prior Misconduct

[¶ 18] We begin by examining the meaning of the phrase "recognizes the wrongfulness and seriousness of the misconduct" as used in Rule 7.3(j)(5)(C), considering (1) the meaning of the term "recognize" as employed in the Rule, and (2) whether, as the Board contends, the Rule required Bailey to demonstrate that he is fully repentant and unambiguously accepts the wrongfulness and seriousness of all of his misconduct.

1. The Meaning of the Term "Recognize" as Employed in Rule 7.3(j)(5)(C)

[4] **[5]** [¶ 19] The underlying purpose of Rule 7.3(j)(5)(C)'s requirement that a previously disbarred applicant "recognizes the wrongfulness and seriousness of the misconduct" is to ensure that the applicant's readmission "will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest." M. Bar R. 7.3(j)(5). Because the purpose of the Rule centers on the protection of the public, its standard is directed at whether the disbarred applicant has been sufficiently rehabilitated to be trusted with the responsibilities of an attorney. *See In re Wigoda,* 77 Ill.2d 154, 32 Ill.Dec. 341, 395 N.E.2d 571, 574 (1979) ("Rehabilitation, the most important consideration in reinstatement proceedings, is a matter of one's return to a beneficial, constructive and trustworthy role." (quotation marks omitted)). Consistent with Rule 7.3(j)(5)'s purpose of protecting the public, we construe the term "recognize" to mean that the applicant must demonstrate that he or she (1) sincerely believes that the prior misconduct, as ultimately determined by the tribunal that imposed the discipline, was wrong and serious, and (2) is capable of identifying similar conduct as wrongful in the future if he or she were to engage in the active practice of law.

2. Whether M. Bar R. 7.3(j)(5)(C) Required Bailey to Prove That He Unambiguously Accepts the Wrongfulness and Seriousness of His Misconduct

[¶ 20] Having construed the term "recognize," we turn to the Board's argument that Rule 7.3(j)(5)(C) requires proof of nothing less than Bailey's unambiguous acceptance of all findings of misconduct that the Florida Supreme Court found. We find this contention unpersuasive.

[6] [¶ 21] Neither the language of the rule nor its purpose requires that an applicant demonstrate his complete and unambiguous acceptance of all of the findings of wrongdoing in order to establish his good character and fitness. *See* M.Bar R. 7.3(j)(5); *see also In re Williams,* 2010 ME 121, ¶ 10, 8 A.3d 666 (finding that an applicant failed to recognize the wrongfulness and seriousness of his misconduct because he "ignore[d] or minimize[d] the actual misconduct that led to his disbarment"). An

applicant's good faith and reasoned dispute with one or more of a tribunal's findings that formed the basis of his disbarment does not preclude the possibility that the applicant sincerely believes that the misconduct, as ultimately determined by the tribunal, was wrong and serious. An applicant could, in good faith, dispute one or more of a tribunal's findings while nonetheless demonstrating respect for the process that was employed and acceptance of the tribunal's conclusions.

***1148** [¶ 22] Other courts have recognized that an applicant's failure to be fully repentant does not preclude a determination that the applicant has been rehabilitated. *See, e.g., In re Sabo,* 49 A.3d 1219, 1228 (D.C.2012) ("[A] confession of guilt is not required for a petitioner seeking reinstatement to show that he recognizes the seriousness of his misconduct...." (quotation marks omitted) (alteration omitted)); *In re Mitchell,* 249 Ga. 280, 290 S.E.2d 426, 427 (1982) ("[C]ontinued assertion of innocence following conviction is not conclusive proof of lack of rehabilitation."); *In re Wigoda,* 32 Ill.Dec. 341, 395 N.E.2d at 573–74 (distinguishing repentance from rehabilitation); *In re Hiss,* 333 N.E.2d at 437 ("[W]e refuse to disqualify a petitioner for reinstatement solely because he continues to protest his innocence of the crime of which he was convicted."); *In re Page,* 94 P.3d 80, 83 (Okla.2004) ("[A]n applicant's assertion of innocence, standing alone, is not a bar to reinstatement...."); *In re Walgren,* 104 Wash.2d 557, 708 P.2d 380, 384 (1985) (en banc) ("The continued assertion by [the applicant] of his innocence does not reflect negatively on our assessment of his rehabilitation.").

[7] [¶ 23] Accordingly, that Bailey does not unambiguously accept all of the findings and conclusions of the Florida Supreme Court is not conclusive as to whether he sincerely believes that his misconduct was wrong and serious and whether he is capable of identifying similar conduct as such in the future as a practicing attorney. Common sense dictates, however, that the nature and extent of his failure to be fully repentant should be carefully considered when determining his fitness to practice law. *See, e.g., In re Walgren,* 708 P.2d at 384–85 (contrasting an applicant who maintained that he was wrongly convicted but who nonetheless "accepts the verdict as the law" and "accepts and respects the system which found him guilty of his acts" with one who blamed his misconduct on "bad judgment"). An applicant's attempt to minimize the wrongfulness and seriousness of his or her misconduct, as found by the presiding tribunal, casts doubt on whether the applicant believes the misconduct was wrong or serious. *See In re Williams,* 2010 ME 121, ¶ 10, 8 A.3d 666 (finding that an applicant failed to recognize the wrongfulness and seriousness of his misconduct because he "ignore[d] or minimize[d] the actual misconduct that led to his disbarment"); *see also In re Sabo,* 49 A.3d at 1225 ("If a petitioner does not acknowledge the seriousness of his or her misconduct, it is difficult to be confident that similar misconduct will not occur in the future." (quotation marks omitted)); *In re Silva,* 29 A.3d 924, 943 (D.C.2011) (finding that the applicant's acceptance of the seriousness of his misconduct "rings hollow" in part because "that acknowledgement is tempered by efforts to minimize the harm"); *In re Holker,* 765 N.W.2d 633, 638 (Minn.2009) (finding that an attorney did not demonstrate sufficient moral change when he "minimized several aspects of his misconduct, emphasizing that this was only one case out of thousands").

[8] [¶ 24] We conclude, contrary to the Board's position, that the fact that Bailey is not fully repentant and does not unambiguously admit to all of the misconduct for which he was disbarred does not, standing alone, preclude a finding that he has satisfied Rule 7.3(j)(5)(C)'s requirement.

B. Whether the Finding that Bailey Recognizes the Wrongfulness and Seriousness of His Misconduct is Supported by Clear and Convincing Evidence

[¶ 25] To determine whether an applicant recognizes the wrongfulness and seriousness ***1149** of his misconduct, a court must necessarily examine the specific misconduct the applicant committed. The Florida Supreme Court, in adopting Judge Ellis's findings regarding the six counts of ethical violations, found that Bailey had "committed some of the most egregious rules violations possible, evidencing a complete disregard for the rules governing attorneys":

> Misuse of client funds is one of the most serious offenses a lawyer can commit.... Bailey's false testimony and disregard of Judge Paul's orders demonstrate a disturbing lack of respect for the justice system and how it operates. Bailey's self-dealing and willingness to compromise client confidences are especially

> disturbing. Not only did Bailey use assets that his client intended to forfeit to the U.S. Government for Bailey's own purposes, but Bailey also attempted to further his own interests by disparaging his client in an ex parte letter to the judge who would sentence his client. Bailey's self-dealing constitutes a complete abdication of his duty of loyalty to his client. His willingness to compromise his client for personal gain shows an open disregard for the relationship that must be maintained between attorney and client: one of trust, and one where both individuals work in the client's best interest. Such misconduct strikes at the very center of the professional ethic of an attorney and cannot be tolerated.

Florida Bar, 803 So.2d at 694 (quotation marks omitted) (alteration omitted).

[9] **[10]** [¶ 26] The single justice concluded that Bailey had established that he recognizes the wrongfulness and seriousness of the above misconduct, finding:

> [Bailey] testified to this [recognition] at several points, perhaps more unequivocally than in his similar testimony before the Board of Bar Examiners. Particularly, the Court finds that Bailey recognizes that his ex-parte contacts with Judge Paul were wrong, as was his poor recordkeeping, comingling of client and personal funds, and failure to have an explicit written agreement with the Department of Justice lawyers regarding the uses of the Biochem stock and its proceeds that were transferred to him in trust.

In reviewing this determination, we defer to the single justice's credibility determinations. *See Dyer v. Superintendent of Ins.,* 2013 ME 61, ¶ 12, 69 A.3d 416 ("No principle of appellate review is better established than the principle that credibility determinations are left to the sound judgment of the trier of fact." (quotation marks omitted)). We further infer that the single justice would have found all additional facts necessary to support the judgment if those inferred findings are supported by the evidence in the record.[7] *See Pelletier v. Pelletier,* 2012 ME 15, ¶ 20, 36 A.3d 903. We therefore consider whether competent evidence supports the court's explicit and inferred findings, to the standard of clear and convincing evidence, in relation to the specific acts of misconduct for which Bailey was disbarred.

1. Counts I and II: Commingling Related to Duboc's "Japanese Stock"; Misappropriating Trust Funds and Commingling Related to Duboc's Biochem Stock Proceeds

[11] [¶ 27] We consider together the first two counts of ethical violations relating to Bailey's commingling of client assets ***1150** with his own and his misappropriation of the Biochem proceeds. Regarding Count I, the Florida Supreme Court adopted Judge Ellis's finding that Bailey, entrusted with the liquidation of Duboc's so-called "Japanese stock," commingled $730,000 of the stock's sale proceeds with his own funds for six weeks before turning the money over to the government.[8] *Florida Bar,* 803 So.2d at 686–87, 690. The Florida Supreme Court rejected Bailey's contention that he did not have any personal funds in his account and had inadvertently deposited the stock proceeds into this account. *Id.*

[¶ 28] Regarding Count II, the Florida Supreme Court adopted Judge Ellis's finding that Bailey commingled and misappropriated over $3 million of the proceeds from Duboc's Biochem shares, and rejected Bailey's arguments that the stock was transferred to him in fee simple absolute and that he properly treated it as his own property.[9] *Id.* at 687, 690–94. The court emphasized that, because the stock was given to Bailey for the benefit of Duboc and, ultimately, the federal government, regardless of the manner in which Bailey held the stock, he was "guilty of the most serious and basic trust account violations" ***1151** by commingling and treating the stock and its appreciation as his own property. *Id.* at 691. We address Bailey's commingling and misappropriation of proceeds separately.

a. Commingling

[¶ 29] Bailey admitted to commingling "on one occasion" when he was questioned before the Board about the Biochem stock. [10] Bailey did not testify or introduce other evidence regarding the commingling of the Japanese stock proceeds either before the Board or the single justice.

[¶ 30] With regard to the Japanese stock, because Bailey had the burden of production on this issue and there is no evidence in the record from which the court could have found that Bailey recognizes the wrongfulness and seriousness of having commingled the proceeds from Duboc's Japanese stock, we will not infer that the court found that Bailey recognizes the wrongfulness and seriousness of that transgression.

[¶ 31] Likewise, the evidence in the record does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of having commingled the proceeds from Duboc's Biochem stock, as required by the clear and convincing evidence burden of proof. As the Florida Supreme Court noted, "one of the most solemn obligations that separate lawyers from any other professionals relates to the safeguarding and segregation of a client's property." *Florida Bar,* 803 So.2d at 693. By commingling client assets, Bailey was "guilty of the most serious and basic trust account violations." *Id.* at 691. While Bailey's testimony before the Board that he "did on one occasion commingle" acknowledged the fact that he committed the misconduct, he offered no other testimony that sheds light on whether he believes that this "most serious and basic trust account violation" was indeed seriously wrong. On this record, we conclude that the fact-finder could not reasonably have been persuaded that the required factual finding—that Bailey recognizes the wrongfulness and seriousness of having commingled the proceeds from Duboc's Biochem stock—was proved to be highly probable, as required by the clear and convincing evidence standard. *See Taylor,* 481 A.2d at 153.

b. Misappropriation of the Biochem proceeds

[12] [¶ 32] At the hearing before the single justice, Bailey admitted to spending approximately $3 million of the Biochem proceeds for his own use, and testified that if the appreciation in the value of the Biochem stock ever belonged to him, as he claimed, "I lost it through my own negligence and perhaps substandard conduct." Bailey minimized the seriousness of this misconduct, however, by explaining that he spent no more than the appreciated value of the stock, which had risen from $5.9 million at the time of the original transfer to over $10 million by January 1996. [11] Bailey further testified before the single ***1152** justice that he believed that Judge Paul may have implicitly approved some of his personal use of the Biochem proceeds. [12] Bailey adheres to the view that it was reasonable to believe that he was entitled to use the stock to pay himself the attorney fees he believed he was owed, and to treat the appreciated value of the Biochem stock as his own, because the parties had agreed to transfer the stock to him in "fee simple and without restriction." [13] Bailey's view contradicts what was determined in the Florida disbarment proceeding. *See Florida Bar,* 803 So.2d at 690–91 (rejecting Bailey's assertion that he never held the stock in trust for Duboc or the United States because it was transferred to him in fee simple absolute, and concluding that, "regardless of the manner in which he was to hold the stock, Bailey is guilty of the most serious and basic trust account violations.").

[¶ 33] Consistent with his continued claim that the stock belonged to him in fee ***1153** simple, Bailey repeated before the single justice his position that he had not "misappropriated" the Biochem funds, [14] which was one of the specific ethical violations that the Florida Supreme Court found that Bailey committed. *See Florida Bar,* 803 So.2d at 687, 690. Bailey then explained that a portion of the withdrawn Biochem funds was for his attorney fees and that, even though he never applied to Judge Paul for approval of his fees, the judge had implicitly approved this arrangement. [15] This argument was also rejected in the Florida Bar proceeding. *Id.* at 692 (stating that even if some of the corpus of the initial Biochem stock was to be used for payment of attorney fees, "Bailey was not entitled to the fee until it was approved by Judge Paul—a fact that Bailey admits in his January 21 letter to Judge Paul, and that he admits in this case.").

[¶ 34] Lastly, when asked about the mistakes he made, Bailey stated that his mistake was his failure to recognize that the handling of the stock was "riddled with conflicts" and that "the United States Attorney didn't have the authority to make that deal as was ultimately ruled in the Court of Claims." [16] Bailey's professed understanding of these mistakes minimizes ***1154** the wrongfulness and seriousness of the actual misconduct for which he was disbarred: misappropriating his client's property.

[¶ 35] In short, Bailey continues to dispute that he misappropriated over $3 million of his client's property and the key predicate facts supporting that finding. The evidence in the record does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of his misappropriation of the Biochem stock proceeds, as required by the clear and convincing evidence burden of proof.

2. Count III: Violations of Two Federal Court Orders

[¶ 36] The Florida Supreme Court adopted Judge Ellis's finding that Bailey willfully violated Judge Paul's two orders issued in January 1996: first, by spending over $300,000 from the Biochem proceeds he held in trust despite Judge Paul's January 12 order freezing the funds; and second, by failing to surrender the Biochem shares and stock proceeds to the court despite the January 25 order requiring him to do so. [17] *Florida Bar,* 803 So.2d at 687–88, 690, 693–94.

[13] [¶ 37] At the hearing before the single justice, Bailey admitted to spending an additional $300,000 for personal purposes after the January 12 order was issued. However, he maintained that his violation of the order was unintentional because he mistakenly assumed that the January 25 order superseded the January 12 order. [18] There is simply no language, ***1155** however, in either order that would justify a reasonable attorney —particularly an attorney who claims not to have personally read either order prior to February 2, 1996 —in assuming that the January 25 order superseded the provision in the January 12 order freezing Duboc's assets in Bailey's possession. Although Bailey recognized that his decision to treat the January 25 order as superseding the January 12 order was "not good lawyering" and "a selfish position to take," he further testified that he did not violate the January 12 order "[u]nless you view [the January 12 and 25 orders] as running in parallel." This justification was squarely rejected in the Florida disbarment proceeding and minimizes the wrongfulness and seriousness of Bailey's misconduct in, among other things, "knowingly disobey[ing] an obligation under the rules of a tribunal." *Florida Bar,* 803 So.2d at 687–88.

[¶ 38] In addition, although Bailey admitted to the single justice that he violated the January 25 order, he continued to disavow responsibility for having arranged for the notice to the Swiss government that caused it to freeze Bailey's account. [19]

***1156** [¶ 39] Based on Bailey's testimony, it is not possible to conclude that it is highly probable that he recognizes the wrongfulness and seriousness of his violation of Judge Paul's orders, as required by the clear and convincing evidence burden of proof.

3. Count IV: False Testimony

[¶ 40] The Florida Supreme Court adopted Judge Ellis's finding that Bailey testified falsely before Judge Paul, and again in the Florida bar hearing, that he did not see either the January 12 or the January 25 order until the morning of the civil contempt hearing held on February 2, 1996. [20] *Florida Bar,* 803 So.2d at 688, 690.

[14] [¶ 41] In his testimony before the single justice, Bailey again asserted that he did not see or read the January 12 and January 25 orders until the morning of the contempt hearing. [21] Bailey also testified, ***1157** however, that he was to some degree aware of the contents of the orders because his associate had read them to him over the phone. Relying on this distinction, Bailey maintained that his testimony before Judge Paul that he had not physically seen the orders at the time he violated them was not false. [22]

[¶ 42] In sum, Bailey continued to dispute that he testified falsely before Judge Paul and Judge Ellis as the Florida Supreme Court had found. Based on Bailey's testimony, it is not possible to conclude that it is highly probable that Bailey recognizes the wrongfulness and seriousness of his false testimony, as required by the clear and convincing evidence burden of proof.

4. Count V: Self–Dealing in the Representation of Duboc

[¶ 43] The Florida Supreme Court adopted Judge Ellis's finding that Bailey engaged in two instances of self-dealing in his representation of Duboc. [23] *Florida Bar,* 803 So.2d at 688–689, 690. First, Bailey claimed ownership of the Biochem stock that belonged to Duboc and which Duboc planned to forfeit to the federal government in order to receive favorable treatment at sentencing. *Id.* at 688. Second, Bailey procrastinated in selling Duboc's estates in France. *Id.* at 688–89.

[15] [¶ 44] On the first point, as noted above, although Bailey explained to the single justice that he failed to recognize that his acceptance of the Biochem ***1158** stock was "riddled with conflicts," [24] he did not acknowledge the detriment that his treatment of the stock had to his client's interests. Rather, Bailey only expressed regret for not clarifying who would be entitled to the stock's appreciation, and for not accepting his fees in cash and selling the stock quickly. [25]

[¶ 45] On the second point, Bailey contended before the single justice that Judge Ellis had erred in finding that he had procrastinated in selling Duboc's estates to prolong his personal use of the properties; rather, he explained that he delayed selling the properties in order to garner a better price for them. [26]

[¶ 46] Bailey's present view of his actions minimizes the wrongfulness and seriousness of his self-dealing as determined in the Florida Bar proceeding. Based on Bailey's testimony, it is not possible to conclude that it is highly probable that he recognizes the wrongfulness and seriousness of this misconduct, as required by the clear and convincing evidence burden of proof.

5. Count VII: Ex Parte Communications, Self–Dealing, and Disclosure of Confidential Information

[¶ 47] The Florida Supreme Court adopted Judge Ellis's finding that Bailey sent an ex parte letter to Judge Paul in which he stated that Duboc had pleaded guilty because he had no defense due to the strength of the case, referred to Duboc as a "multimillionaire druggie," alleged that Duboc, by consulting with other attorneys, was no longer acting in a spirit of cooperation, and disparaged Duboc's new counsel. *Florida Bar,* 803 So.2d at 689, 690. [27] Judge Ellis also found that Bailey ***1159** then sent a second letter to Judge Paul, this time copying the U.S. Attorney's Office, threatening to seek an order waiving attorney-client privilege, thereby compromising Duboc's interests in order to protect his own. *Id.* at 689.

[¶ 48] At the hearing before the single justice, Bailey admitted to sending the ex parte letter to Judge Paul. He admitted that his ex parte communication constituted "unethical conduct" and a "knee-jerk reaction," and expressed regret in writing the letter without having consulted another attorney. [28] He, however, minimized the seriousness of the violation by contending that he sent the letter in an attempt to "alert [Judge Paul] to a serious condition which [Bailey] planned to tell him might involve an attempt to bribe him" for $1 million. [29] Although the ex parte letter to ***1160** Judge Paul did not mention that Duboc or his new attorneys might attempt to bribe the judge, Bailey maintained that his use of the words "seclusion" and "clear watershed" would suggest to Judge Paul—had he read the letter—that "something improper is in the wind." [30]

[¶ 49] Before the single justice, Bailey also denied having disparaged Duboc in his letter to Judge Paul, testifying that he had put the phrase "multimillionaire druggie" in quotes to denote that he only repeated what other attorneys had called Duboc. [31] Bailey further denied that the letter revealed to Judge Paul that Duboc had violated the plea agreement or that it breached confidentiality and attorney-client privilege, [32] explaining that the government knew and had disclosed to Bailey the information alleged in the letter. [33] ***1161** These explanations minimize the wrongfulness and seriousness of the misconduct of self-dealing and disclosure of confidential client information.

[16] [¶ 50] Although different conclusions may be drawn from Bailey's testimony regarding the letter, the single justice's finding that Bailey recognized the wrongfulness and seriousness of having sent an ex parte letter to Judge Paul is supported by competent evidence in the record. The evidence, however, does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of his self-dealing and disclosure of confidential client information, as required by the clear and convincing evidence burden of proof.

6. Additional Testimony by Bailey Regarding the Wrongfulness and Seriousness of His Misconduct

[¶ 51] Bailey testified that although he believed, in retrospect, that the Florida Supreme Court had "some grounds ... that warranted disbarment," he believed that his disbarment was "kind of harsh." [34] He also testified before the Board and the single justice to his continued belief that the bias and animus of others contributed to his disbarment and related setbacks. He testified that the Department of Justice engaged in "obstructive

efforts" to "engineer[ ]" his disbarment; that Judge Ellis was "hostile" toward him; that Judge Paul had developed "distaste" for him; that the Department of Justice obstructed the renomination of Judge Horn to the U.S. Court of Federal Claims "in the hope that she would get the message" to rule against him in the civil complaint he had brought against the federal government in the U.S. Court of Federal Claims; and that the tax agent who investigated Bailey's failure to report income associated with the Biochem proceeds improperly altered his investigative records. Bailey also acknowledged that he filed a pleading with the Tax Court in which he alleged that the Florida Bar, the Department of ***1162** Justice, and the IRS had conspired to violate his constitutional rights. [35] Accordingly, in his testimony, Bailey questioned the integrity of almost all of the legal proceedings related to his misappropriation of Duboc's Biochem stock. This lack of respect for the judicial process casts further doubt on whether he believes his misconduct was wrong or serious. [36] *See Bd. of Overseers of the Bar v. Campbell,* 663 A.2d 11, 13 (Me.1995) ("The efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court, opposing counsel or the jury.... Turbulent, intemperate or irresponsible behavior is a proper basis for the denial of admission to the bar." (quoting *In re Feingold,* 296 A.2d 492, 500 (Me.1972))).

7. Testimony By Other Witnesses Bearing on Whether Bailey Recognizes the Wrongfulness and Seriousness of the Misconduct

[¶ 52] Before the single justice, multiple witnesses testified to Bailey's love of the law, the devastating effect that disbarment has had on him, and his regret and reformation since disbarment. For example, witnesses testified that Bailey "had lost something he deeply loved and was going through a lot of pain"; that the Duboc case was Bailey's "one regret" and he was "very sorry for what had happened"; that since his disbarment Bailey has become "a new man," "far more humble," and "much more measured"; that Bailey is actively involved in business and community activities in Maine and elsewhere; and that it was clear that Bailey has recognized his mistakes in the Duboc matter and those mistakes would not be repeated. In particular, Judge Kenneth Fishman of the Superior Court of Massachusetts testified that Bailey's conduct in his representation of Duboc was an "aberration":

> I think Lee recognizes this as well—that he made some serious mistakes with regard to that case and have lapses of judgment, good judgment in that regard.
>
> But as I've described it before, when you compare what happened in that case with a long distinguished career as a criminal defense attorney, I feel that *DuBoc* was an aberration. It was not indicative of the kind of man or attorney that he is.

[¶ 53] Witnesses further testified as to the personal difficulty that Bailey faced during the period leading to his disbarment—Bailey was handling too many high-profile cases at once and was constantly traveling; his wife had fallen ill in 1998 and passed away in 1999; and her death caused him great personal suffering. [37]

***1163** **[17]** **[18]** [¶ 54] Bailey's character witnesses testified to their strong beliefs that Bailey regrets the mistakes he made in defending Duboc and that he has suffered profoundly negative personal and professional consequences as a result of his disbarment. Their testimony also demonstrates the high regard in which Bailey is held by many of his professional peers, friends, and business associates, and underscores his advanced skills as a legal advocate. As the California Supreme Court recently recognized, however, "the testimony of character witnesses will not suffice by itself to establish [an applicant's] rehabilitation." *In re Glass,* 58 Cal.4th 500, 525, 167 Cal.Rptr.3d 87, 316 P.3d 1199 (Cal.2014). Here, the character witnesses' testimony does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of his misconduct to the extent that Bailey's testimony suggests otherwise. [38]

***1164** C. Conclusion

[¶ 55] The clear and convincing standard is applied where "a higher than ordinary degree of certitude" is required to achieve the applicable public policy. *Taylor v. Comm'r of Mental Health & Mental Retardation,* 481 A.2d 139, 149 (Me.1984). We apply this heightened burden of proof in deciding whether to readmit previously disbarred applicants because "we are required specifically to determine that [such] reinstatement will not be detrimental to the public interest." *In re Hughes,* 594 A.2d 1098, 1101 (Me.1991). Further, "the policies that motivated the imposition of the clear and convincing evidence standard apply with equal force at both the

factfinding and appellate stages." *Taylor,* 481 A.2d at 153 (quotation marks omitted).

[¶ 56] Viewing Bailey's actions as identified in the six counts of misconduct, we conclude that Bailey met his burden of proof by clear and convincing evidence only with respect to the question of whether he recognizes the wrongfulness and seriousness of having sent an ex parte communication to Judge Paul (Count VII). As to the remaining misconduct, the evidence in the record does not support the conclusion that it is highly probable that Bailey recognizes the wrongfulness and seriousness of commingling the Japanese stock (Count I), commingling and misappropriating the Biochem stock (Count II), violating two federal court orders (Count III), false testimony (Count IV), self-dealing in his treatment of the Biochem stock (Count V), and self-dealing and disclosure of confidential client information (Count VII). By continuing to question many of the findings and conclusions reached by the Florida Supreme Court, and by suggesting that Judge Ellis and the other judges who presided in his cases were biased and that the Florida proceedings were the product of a conspiracy to deprive him of his constitutional rights, Bailey minimizes the wrongfulness and seriousness of the misconduct for which he was disbarred.

[¶ 57] As previously discussed, an applicant is not required to demonstrate that he or she completely and unambiguously accepts all of the findings of misconduct to satisfy the requirement of M. Bar R. 7.3(j)(5)(C). Here, however, Bailey failed to demonstrate that he is sufficiently rehabilitated by proving that it is highly probable that he recognizes the wrongfulness and seriousness of most of the misconduct he committed. Considered as a whole, the record evidence was insufficient to prove, by clear and convincing evidence, that Bailey recognizes the wrongfulness and seriousness of his misconduct. Accordingly, the single justice erred by reaching the opposite conclusion and, consequently, by ultimately concluding that Bailey's "reinstatement will not be detrimental to the integrity and standing of the Bar, the administration of justice, or the public interest." *See* M. Bar R. 7.3(j)(5).

The entry is:

Judgment vacated. Remanded for entry of a judgment affirming the order of the Board of Bar Examiners.

SAUFLEY, C.J., and CLIFFORD, J., dissenting.

[¶ 58] Because the Court has acted outside its appellate function in vacating the ***1165** factual findings of the single justice who heard the evidence in this matter, and because we would instead remand this matter on the single issue of F. Lee Bailey's plan for avoiding violations of the Maine Bar Rules while responsible for a significant federal tax obligation, we respectfully dissent.

I. LEGAL FRAMEWORK

[¶ 59] We have no quarrel with the Court's well-crafted analysis of the applicant's burden of proof and the Court's standard of review on appeal. As the Court properly observed, it was Bailey's "burden to present 'clear and convincing evidence demonstrating the moral qualifications, competency, and learning in law required for admission to practice law in this State,' " and to establish that " 'reinstatement will not be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest.' " *In re Williams,* 2010 ME 121, ¶ 6, 8 A.3d 666 (quoting M. Bar R. 7.3(j)(5)). [39] On appeal, we review the factual findings of the single justice reached by clear and convincing evidence for clear error to determine whether the justice, based on the evidence and any reasonable inferences that may be drawn from that evidence, [40] "could reasonably have been persuaded that the required findings were proved to be highly probable." *Me. Eye Care Assocs. P.A. v. Gorman,* 2008 ME 36, ¶ 12, 942 A.2d 707 (quotation marks omitted); *see In re Hughes,* 608 A.2d 1220, 1220 (Me.1992) (reviewing whether a single justice erred in finding that an applicant for admission to the Bar had proved her good moral character "to a high degree of probability").

[¶ 60] The Court also properly analyzed the law and determined that complete and unambiguous acceptance of previous wrongdoing is not a prerequisite for a finding of good character and fitness pursuant to Maine Bar Rule 7.3(j)(5). Court's Opinion ¶ 21. We agree with the Court that common sense requires an analysis of "the nature and extent of [an applicant's] failure to be fully repentant." Court's Opinion ¶ 23.

II. FACTUAL FINDINGS

[¶ 61] Despite the Court's recognition of the standards applicable to its appellate review, however, it fails to apply those standards, instead making credibility determinations of its own and choosing to give weight to different evidence than was credited by the single justice. The Court goes astray from its own pronouncements when it decides which facts it believes from among many facts presented at a full hearing.

[¶ 62] Specifically, the Court today concludes that the evidence presented could ***1166** not reasonably have persuaded the single justice that it was highly probable that Bailey "recognizes the wrongfulness and seriousness of the misconduct" that led to his disbarment in another jurisdiction. M. Bar R. 7.3(j)(5)(C). In doing so, the Court reviews the testimony that Bailey provided before the single justice and determines from his uninflected words on the transcript pages that the single justice could not have been persuaded that Bailey recognized the wrongfulness and seriousness of each act that formed a basis for his disbarment. Despite evidence that supports the single justice's findings, the Court amasses other evidence to justify its decision to vacate those findings. As this gathering of evidence suggests, the Court is, in function, making credibility determinations.

[¶ 63] Credibility determinations are not, however, properly undertaken by an appellate court. "[T]he fact finder who hears and sees the witnesses, who observes their hesitations, inflections and emphases, is in a more favorable position to judge their credibility than the appellate court which only reads the printed testimony." *Michaud v. Charles R. Steeves & Sons, Inc.,* 286 A.2d 336, 341 (Me.1972) (quotation marks omitted). A witness's credibility is "for the presiding justice to weigh." *Bd. of Overseers of the Bar v. Dineen,* 481 A.2d 499, 502 (Me.1984). "Fact-finders are not required to believe or disbelieve witnesses and are called upon to determine the significance of the evidence and decide what inferences, if any, to draw from that evidence." *Huber v. Williams,* 2005 ME 40, ¶ 15, 869 A.2d 737. Furthermore, "the fact-finder may believe some, all, or none of a witness's testimony," *In re Cyr,* 2005 ME 61, ¶ 16, 873 A.2d 355, and "has the prerogative to selectively accept or reject testimony and to combine such testimony in any way," *Jenkins, Inc. v. Walsh Bros., Inc.,* 2001 ME 98, ¶ 22, 776 A.2d 1229 (quotation marks omitted).

[¶ 64] Given the testimony of Bailey and other witnesses about Bailey's awareness and acknowledgement of his wrongdoing, we would conclude that the evidence, and any reasonable inferences that may be drawn from that evidence, could reasonably have persuaded the single justice that it was highly probable that Bailey "recognize[d] the wrongfulness and seriousness of the misconduct" that led to his disbarment. M. Bar R. 7.3(j)(5)(C).

[¶ 65] Specifically, as the Court recognizes in its opinion, Bailey conceded in his testimony that there were some grounds for disbarment because he did engage in some improper conduct. He testified that he made a mistake in accepting stocks instead of an agreed $3 million fee in the Duboc case: "[T]he acceptance of the stock was riddled with conflicts I really didn't see at the outset." *See* Court's Opinion ¶ 34 & n. 16. He also testified that, when he sent the ex parte letter to Judge Paul concerning Duboc, he acted improperly: "I would certainly agree now that it was unethical conduct, improper, unwise, and a knee-jerk reaction at a time when I was totally focused on a different case. And I make no excuses for having that transgression." *See* Court's Opinion ¶ 48 & n. 28.

[¶ 66] He took responsibility for having failed to read the Florida court's January 12, 1996, order prohibiting any sale of stock as soon as the order arrived at his office: "I must hasten to add that certainly was substandard performance on my part. I should have made it my business to read the letter and not assume anything, to read the order. And I just didn't do that." *See* Court's Opinion ¶ 41 n. 21. He also accepted responsibility for selling stock after receiving a second order on January 25 without getting clarification about whether ***1167** the January 25 order supervened the January 12 order: "That was a presumption I never should have made. I should have found out whether the government thought it supervened the original order or whether the judge did, and so those transfers where made improperly." *See* Court's Opinion ¶ 37 n. 18 (quoting, additionally, Bailey's admission before the single justice that, after January 25, he "improperly" spent additional stock proceeds on his personal and business obligations and, "[i]n retrospect, [he] would say [he] did" violate the January 25 order).

[¶ 67] Bailey's colleagues also testified about their observations of his acknowledgment of the seriousness and wrongfulness of his misconduct since the disbarment. Bailey's former law partner, now a Superior Court Justice in Massachusetts, described Bailey as having been arrogant before his disbarment but more "humble" and "careful" since. He testified that Bailey realizes that he had lapses in judgment and made serious mistakes that he would never repeat. A Maine attorney who has befriended Bailey in Maine since the disbarment also testified that he is "humble." Another Maine lawyer testified that Bailey had expressed to him that he regretted and was sorry for what happened in the Duboc case. A lawyer and former Massachusetts State Senator who has known Bailey since before the disbarment testified that Bailey had "without a doubt" learned from the disbarment. A private investigator and former probation officer who worked with Bailey extensively before the disbarment and remains a friend of his testified that Bailey is remorseful and accepts his responsibility for what has happened.

[¶ 68] Although, given Bailey's testimony explaining or rationalizing his past behavior, the Justices in the majority might not have found as the single justice did if any of them had sat as the trial justice, the function of an appellate court is not to re-weigh the evidence and substitute its findings for those of the fact-finder. Rather, as an appellate court reviewing the findings in this matter, the Court must determine on appeal whether there is evidence in the record from which the single justice could reasonably have found that it was highly probable that Bailey "recognize[d] the wrongfulness and seriousness of [his] misconduct." M. Bar R. 7.3(j)(5)(C). The evidence presented here can support a finding that Bailey recognized the wrongfulness and seriousness of his conduct. We would therefore affirm the single justice's finding that Bailey demonstrated his recognition of the wrongfulness and seriousness of his misconduct.

III. REVIEW OF OTHER FINDINGS

[¶ 69] Because we would affirm the finding on the recognition of wrongfulness, it would be necessary to review the single justice's other findings of fact.

A. Maine Bar Rule 7.3(j)(5)(A), (B), (D), (E), and (F)

[¶ 70] There is ample evidence in the record to demonstrate that Bailey has complied with the terms of all prior disciplinary orders.[41] *See* M. Bar R. 7.3(j)(5)(A). He has "neither engaged nor attempted to engage in the unauthorized practice of law," M. Bar R. 7.3(j)(5)(B); has not engaged in any additional misconduct since being disbarred, *see* M. Bar R. 7.3(j)(5)(D); and does not have continuing legal education obligations in Maine because ***1168** he has never been admitted here before, *see* M. Bar R. 7.3(j)(5)(F). There is also evidence that can support a finding of the requisite honesty and integrity to practice law. *See* M. Bar R. 7.3(j)(5)(E). The remaining question is whether there are any other circumstances that the single justice was required to consider in determining whether Bailey's admission would "be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest." M. Bar R. 7.3(j)(5).

B. Detriment to the Integrity and Standing of the Bar, the Administration of Justice, or the Public Interest

[¶ 71] The only remaining factual issue that is relevant here but not addressed by the factors set forth in the rule is whether Bailey's substantial tax debt creates an unacceptable risk that Bailey's admission would "be detrimental to the integrity and standing of the Bar, the administration of justice, or to the public interest." M. Bar R. 7.3(j)(5). Following the initial evidentiary hearing, the single justice in this matter declined to authorize Bailey's admission to the Bar until Bailey adequately addressed an outstanding judgment against him for a tax obligation that was then estimated to be approximately $2 million. After Bailey moved for reconsideration, the single justice determined that Bailey could be admitted because he was making a genuine effort to meet his tax responsibilities by seeking to resolve the matter through the litigation process and because he had paid or resolved every other obligation that had been imposed on him in a final judgment. As the majority notes, we have learned, since the single justice's ruling, that the United States Court of Appeals has affirmed the decision of the Tax Court. *See Bailey v. IRS,* No. 13–1455 (1st Cir. Mar. 14, 2014). The IRS has filed tax liens of more than $4.5 million against Bailey's property. Accordingly, we would conclude that the single justice's findings must be augmented on this issue.

[¶ 72] In determining the propriety of admission, a single justice must consider whether a particular candidate presents a risk to the public if entrusted with client

funds.[42] Bailey admittedly used the appreciation in value of stock entrusted to him as Duboc's attorney to pay personal expenses associated with developing an airplane, paying for a house, and maintaining his yacht. He also concedes that he was found in contempt and incarcerated when he could not repay sums that he obtained through sale of that stock, and that he stopped paying his mortgage and consented to a foreclosure on a Florida home when he could not afford payments on that property. In preparation for the pending application to the Maine Bar, he neglected to include information about several aspects of his finances or holdings, and indicated, once again, that he "made a mistake" and "overlooked" certain property. A consistent difficulty in maintaining accurate financial records is evident on this record.

[¶ 73] Because we now know that the United States Court of Appeals has affirmed ***1169** the Tax Court's decision and that Bailey is therefore subject to tax liens of approximately $4.5 million, and because the record contains evidence that Bailey has difficulty maintaining proper financial records, additional evidence and analysis are necessary to evaluate whether Bailey's personal obligations could create a risk to the public. Accordingly, we would remand the matter for the single justice to take evidence and reconsider whether the risk that Bailey would mismanage funds in the context of paying his substantial tax debt would render his admission to the Bar "detrimental ... to the public interest." M. Bar R. 7.3(j)(5).

All Citations

90 A.3d 1137, 2014 ME 58

Footnotes

1 The Board challenges the judgment's factual findings and legal conclusions, arguing that (1) Bailey has not recognized the wrongfulness and seriousness of the ethical violations that led to his disbarment in Florida in 2001; (2) Bailey was not honest in his bar application and in his testimony before the Board; (3) at least three tribunals have found that Bailey testified falsely since 1996; (4) Bailey provided a false proffer of evidence to the United States District Court for the District of Massachusetts in 2005 in connection with his reciprocal disbarment in that court; (5) Bailey underreported his income for federal tax purposes and had an outstanding federal tax obligation in the amount of $4.5 million; (6) Bailey made several unwarranted attacks on the judges who have ruled against him as well as on the Department of Justice; and (7) Bailey failed to comply with Massachusetts income tax laws when he was a resident of that state.

2 For purposes of consistency with the single justice's opinion and *Florida Bar v. Bailey,* 803 So.2d 683 (Fla.2001) (per curiam), we refer to Biochem Pharma as "Biochem."

3 In ordering Bailey's disbarment, the Massachusetts Supreme Judicial Court denied Bailey's request for a de novo hearing based on his allegation, among others, that Judge Ellis was biased against him. *In re Bailey,* 439 Mass. 134, 786 N.E.2d 337, 340–41 (2003). Likewise, in Bailey's reciprocal disbarment proceeding in the United States District Court for the District of Massachusetts, a three-judge panel denied Bailey's request for an evidentiary hearing to present new evidence regarding the agreement Bailey entered into with the prosecutors in the Duboc case, noting that the precise nature of the agreement was not dispositive because Bailey's disbarment did not hinge exclusively on his mishandling of the stock. *In re Bailey,* No. M.B.D. NO. 02–10093, 2005 WL 2901885, at *4 (D.Mass. Nov. 1, 2005), *aff'd, In re Bailey,* 450 F.3d 71 (1st Cir.2006) (per curiam).

4 Pursuant to M.R. Evid. 201, we take judicial notice of the publicly available federal tax liens.

5 The Board does not contend that the Maine Bar Rules require disbarred applicants to obtain readmission in the disbarring jurisdiction prior to petitioning for admission in Maine. *See In re Hughes,* 594 A.2d 1098, 1101 n. 2.

6 Rule 7.3(j)(5) enumerates a list of required factors to be considered:

> (A) The petitioner has fully complied with the terms of all prior disciplinary orders;
> (B) The petitioner has neither engaged nor attempted to engage in the unauthorized practice of law;
> (C) The petitioner recognizes the wrongfulness and seriousness of the misconduct;
> (D) The petitioner has not engaged in any other professional misconduct since resignation, suspension or disbarment;
> (E) The petitioner has the requisite honesty and integrity to practice law;
> (F) The petitioner has met the continuing legal education requirements of Rule 12(a)(1)....

M.Bar R. 7.3(j)(5)(A)-(F). "[T]he petitioner must present clear and convincing evidence concerning each of the factors described in Rule 7.3(j)(5)." *Bd. of Overseers of the Bar v. Campbell,* 663 A.2d 11, 13 (Me.1995).

7 The Board's motion for findings of fact and for reconsideration, filed in June 2013, did not request findings of fact relating to each of the specific acts of misconduct for which Bailey was disbarred.

8 The Florida Supreme Court explained:

> Count I of the Bar's complaint charged Bailey with commingling. Bailey was entrusted with liquidating stock that belonged to Duboc, referred to as "the Japanese Stock." Upon liquidation, Bailey was then to transmit the proceeds to the United States. Bailey sold the Japanese stock and deposited approximately $730,000 into his Credit Suisse account on or about July 6, 1994. Bailey then transferred the money into his Barnett Bank Money Market Account. The money was paid to the United States Marshal on or about August 15, 1994. The referee found that Bailey admitted that his money market account was not a lawyer's trust account, nor did Bailey create or maintain it as a separate account for the sole purpose of maintaining the stock proceeds. In concluding that Bailey had engaged in commingling, the referee rejected Bailey's claims that there were no personal funds in the Barnett Bank account at the time Bailey transferred the funds from the Japanese Stock into this account, and that Bailey's deposit of the proceeds into a non-trust account was "inadvertent error." The referee concluded that Bailey violated Rule Regulating the Florida Bar 4–1.15(a) by failing to set up a separate account for these funds and also by commingling client funds with his personal funds.

Florida Bar, 803 So.2d at 686–87.

9 The Florida Supreme Court explained:

> Count II of the Bar's complaint charged Bailey with misappropriating trust funds and commingling. On or about May 9, 1994, the 602,000 shares of Biochem stock were transferred into Bailey's Credit Suisse Investment Account. Bailey sold shares of stock and borrowed against the stock, deriving over $4 million from these activities. Bailey then transferred $3,514,945 of Biochem proceeds from the Credit Suisse account into his Barnett Bank Money Market Account. Bailey had transferred all but $350,000 of these proceeds into his personal checking account by December 1995. From this account, Bailey wrote checks to his private business enterprises totaling $2,297,696 and another $1,277,433 for other personal expenses or purchases. Bailey further paid $138,946 out of his money market account toward the purchase of a residence.
>
> The referee rejected Bailey's two defenses to the Bar's charge of misappropriation: (1) he never held the stock in trust for Duboc or the United States; rather, it was transferred to him in fee simple absolute; and (2) this stock was not subject to forfeiture. The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3–4.3 (lawyer shall not commit any act that is contrary to honesty and justice), 4–1.15(a) (commingling funds), 4–8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 4–8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and 5–1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a specific purpose).

Florida Bar, 803 So.2d at 687.

10 Bailey testified before the Board:

> [BOARD]: So do you agree that you commingled funds when you transferred the [Biochem] funds from your Credit Suisse account to your money market account and then to your personal checking account?
>
> [BAILEY]: I did on one occasion commingle.

11 Specifically, Bailey testified before the single justice:

> Q. So you spent roughly $3 million of the BioChem Pharma's stock during 1994, 1995, and 1996?
>
> A. Well, I think lumping them together is a bad idea for this reason: I was allowed to draw down, in my view, fees from the original shares of stock and—and the loans against them. When the stock began to rise, I believe that all of that money was mine. And most of the money that you're speaking of was drawn down after it began to show a profit.

12 Bailey provided the following testimony before the single justice:

> Q. Would you agree that Judge Paul had not approved any of those roughly $3 million in expenditures that you made from the BioChem Pharma proceeds?
>
> A. They were never presented to him, to my knowledge.
>
> Q. So that's a yes, he did not ever approve them?
>
> A. I—I think implicitly he may have approved some but certainly not the way they should have been approved and that's by court order.
>
> Q. And would you agree the Department of Justice did not expressly approve of your spending that $3 million on your personal and business ventures?
>
> A. That is a conflict which will go on forever, but I will agree to this: I was unable to show their approval at a critical time and have suffered mightily because of it.

13 Bailey provided the following testimony before the single justice:

Q. Another piece of this that I've heard you testify to, Mr. Bailey, is that you believed the appreciated value of the BioChem Pharma stock belonged to you?

A. Yes, I have testified to that.

Q. And is that what your testimony is today?

A. Well, my testimony today is if it ever did, I lost it through my own negligence and perhaps substandard conduct. There was a time when I thought it was clear that he who takes the downside risk necessarily gets the upside gain; otherwise, you sell the asset as fast as you can and avoid both.

Q. Fair to say the Department of Justice didn't share your view of that agreement?

A. Oh, they denied it, yes.

....

Q. And there was nothing in writing to support your claim, correct? No letters, no e-mails, no written agreement?

A. Well, I think there is.

Q. There are letters that support your view that you were entitled—

A. You said no written agreements. Do you have the transfer letter that caused the funds to go to my account?

Q. All right. Is that your—your view? That's the document [transferring the Biochem stock to Bailey's account] that entitled you to the appreciation in the stock?

A. Well, the transfer purported to be in fee simple and without restriction. Although I didn't see [the transferring document] at the time, I was told that's what it said, and indeed, it does, both in French and in English.

....

Q. At the end of the day, Mr. Bailey, it's fair to say that you spent $3 million that didn't belong to you on your personal and business affairs?

A. I spent $3 million that has been adjudged was not mine. At the time I spent it, I think I had a reasonable belief that it was mine.

14 Bailey testified before the single justice:

Q. So would you agree, Mr. Bailey, that you misappropriated roughly $3 million?

A. No, sir. Because misappropriated is a word used in criminal law, which is the equivalent of larceny and that takes an intent, and I never had an intent to steal anyone—anything from anyone.

15 Bailey testified before the single justice:

[BAILEY]: [United States Attorney] Gregory Miller said, “No. We've given $6 million to the defense for fees and that's enough.”

And I said, “Your Honor, we've agreed that we'll be accountable to you ultimately and no money has been taken so far.”

And Judge Paul did this, kind of don't worry about that, and we went on. That was what I thought was implicit approval of Miller's statement to him that we have—

....

THE COURT: You're going to have to describe what you just did.

[BAILEY]: Yes. I meant the motion to show that Judge Paul was showing I'm not worried about that. It's not of great importance. We don't—

THE COURT: He's motioning his arm away.

[BAILEY]: It was kind of—pff—I realize—

THE COURT: Describe that.

[BAILEY]: P-f-f I thought that he accepted the notion and didn't want any further discussion or didn't need any further, I should say.

16 Bailey testified before the single justice:

Q. I'd just like you from your perspective, if you could, summarize to the Court what you think happened in *DuBoc.* What mistakes did you make that led you to be—to the order of disbarment there and then the reciprocal order in Massachusetts?

A. They began, Your Honor, over the acceptance of a fee in the form of stock on April 26th, 1994, a month after I'd been hired and we had a tentative plea agreement in the case. We had an agreed fee of $3,000,000. And it was about to be transferred to my account when a DEA agent said, look, we got stock here which we'll have to really impair. Why don't you take that instead?

And I didn't know much about stock and didn't think it was a great idea, but my client insisted that I should take the stock. And so I did after a conversation where the prosecutor said, you can have whichever you want, but you understand that if the stock goes down, there's nothing left for you to get a fee.
And I said fine. And I did that very unwisely.

....

A. In any event, the acceptance of the stock was riddled with conflicts I really didn't see at the outset. Beyond that, it never occurred to me at the time but the United States Attorney didn't have the authority to make that deal as was ultimately ruled in the Court of Claims.

17 The Florida Supreme Court explained:

Count III charged Bailey with continuing to expend Biochem funds in contravention of two federal court orders. In January 1996, Judge Paul issued two orders regarding the Duboc criminal case; one on the 12th and the other on the 25th. The January 12 order relieved Bailey as Duboc's counsel, substituting the Coudert Brothers law firm. The order further required Bailey to give within 10 days "a full accounting of the monies and properties held in trust by him for the United States of America." The order froze all of the assets received by Bailey from Duboc and further prohibited their disbursement. The January 25 order directed Bailey to bring to a February 1, 1996, hearing all of the shares of Biochem stock that Duboc had turned over to Bailey. The referee found that Bailey continued to use the Biochem proceeds that he held in trust after service and knowledge of the January 12 and January 25, 1996, orders. The referee rejected Bailey's argument that the January 25 order did not restrain him from utilizing the funds to meet his prior financial obligations, finding that "the order ... require[d] [Bailey] to bring with him the Biochem Pharma stock or any replacement asset.... Clearly there were judicial restraints in place when the money was disbursed."

The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3–4.3 (lawyer shall not commit an act that is contrary to honesty and justice), rule 4–8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), rule 4–8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and rule 5–1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a specific purpose). The referee further found that by knowingly expending trust account funds from the money market account after entry of the January 12 order, Bailey violated Rules Regulating the Florida Bar 3–4.3, 4–3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal), 4–8.4(a) (lawyer shall not violate the Rules of Professional Conduct), and 4–8.4(d) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Florida Bar, 803 So.2d at 687–88.

18 Bailey testified before the single justice:

Q. Do you recall that after learning of [the January 12] order you spent at least an additional $300,000 of BioChem Pharma proceeds on your personal and business obligations?

A. Well, I did spend additional funds, and I did so improperly because I assumed that the January 25th order had supervened any prior orders now that suit had been filed. And I didn't read it as prohibiting distribution of what was already in my account. That was a presumption I never should have made. I should have found out whether the government thought it supervened the original order or whether the judge did, and so those transfers were made improperly.

Q. So is it your testimony, Mr. Bailey, that you assumed that one order that you claim not to have read supervened an earlier order that you claimed not to have read?

A. No. I'm saying that an order which was read to me, and I don't see a distinction between reading and having something read to you, if you have a reasonably well-developed memory. I'm claiming that I thought that order was the new order and controlled by supervening, and I'm saying to you that was not good lawyering on my part. It was a selfish position to take.

Q. Would you agree that Exhibit 27 [the January 25 order] did not supervene Exhibit 26 [the January 12 order]?

A. It doesn't say anything about supervening it nor does it say anything about 26 still being in force. It doesn't speak either way. But I think a lawyer should assume that they're both in force, and I did not.

Q. Well, rather than make assumptions, Mr. Bailey, let—let's look at Exhibit 26 for a second, the order of Judge Paul.

A. Uh-huh.

Q. And Paragraph 5 frees all DuBoc-related assets unless off—excuse me—and prohibits any further disbursement unless authorized by this court?

A. Yes, that's what it says.

Q. Did Judge Paul ever authorize any further disbursements of DuBoc funds in your accounts after January 12, 1996?

A. No, he did not. But please bear in mind between January 12th and January 25th I made no disbursements of DuBoc's money. I spent money that came in from other cases.

Q. And is it your contention that Exhibit 27, the January 25th order, authorized you to spend DuBoc money in your bank accounts?

A. No. It did not authorize anything.

Q. Would you agree that you violated [the January 25 order], Mr. Bailey?

A. In retrospect, I would say I did.

Q. And would you agree that you violated [the January 12 order]?

A. No. Unless you view them as running in parallel after January 27th and the answer is yes.

What I'm telling you is between January 12th of #96 and January 25th, I spent $40,000, which came from a law firm in New York for cases we had settled, not any money attributable to *DuBoc.* So I don't think this order [January 12 order] is violated until after this one [January 25 order] comes into existence.

But you're quite right. It's proper to consider this one [January 12 order] still viable, and then it was violated.

19 Bailey testified before the single justice:

Q. The referee in Florida found that after you learned of the substance of Exhibit 27 [the January 25 order], you arranged for the Swiss government to be notified so that the BioChem Pharma shares were frozen by the Swiss government?

A. She found as a fact that I engineered that. The truth is my lawyer did do it. I learned about it afterwards, but I don't think it made any difference. It was frozen under Swiss law, and the freeze was rather quickly removed, thanks mostly to my efforts.

20 The Florida Supreme Court explained:

> Count IV of the Bar's complaint charged Bailey with giving false testimony. The referee found that Bailey testified falsely before Judge Paul and the U.S. Attorneys that he did not see the January 12 or January 25 orders until the morning of a civil contempt hearing held on February 2, 1996. The referee further found that Bailey was not being truthful when: (1) in his answer to the Bar's complaint, Bailey denied that he had received the orders and that he had testified falsely before Judge Paul; and (2) Bailey testified before the referee at the final hearing.
>
> Specifically, the referee found numerous reasons why this testimony was false. First, Bailey had a conversation with the Assistant U.S. Attorney about the terms of the January 12 order following its entry. Indeed, on January 19, when Bailey met with the Assistant U.S. Attorneys, he accused them of obtaining the order from the judge ex parte. In addition, when Bailey returned to his Palm Beach office on January 18, he marshaled documents in support of the accounting that the January 12 order required him to provide. In the letter to Judge Paul dated January 21, 1996, Bailey "plainly concedes that he knew of the terms of the order as early as January 16, 1996." In that letter, he referred to the manner, mode and method by which Judge Paul entered the order. He complained in the letter that "Your Honor was persuaded to act on representations which are *at a minimum* subject to sharp challenge." As the referee notes, "these assertions could not have been made *unless* [Bailey] had seen the January 12 order." Further, as to the January 25, 1996, order, it was served upon Bailey by "fax transmission, United States mail, and personally by the U.S. Marshal's Service pursuant to the very terms of the order." Based on these factual findings, the referee found Bailey guilty of violating Rules Regulating the Florida Bar 3–4.3, 4–8.4(b), 4–8.4(c), and 4–3.3(a)(1) (lawyer shall not knowingly make a false statement of material fact or law to a tribunal).

Florida Bar, 803 So.2d at 688 (alteration in original).

21 Bailey testified before the single justice:

Q. Is it your testimony that you did not read Exhibit 26 [the January 12 order] until February [2], 1996?

A. It was never in front of me. I certainly would have read it if it had been, but I thought I knew what was in it. It—I must hasten to add that certainly was substandard performance on my part. I should have made it my business to read the letter and not assume anything, to read the order. And I just didn't do that.

....

Q. Mr. Bailey, is it fair to say that you have testified previously that you did not see Exhibit 27 [the January 25 order] until February 2nd, 1996?

A. That's the date on which it was shown to me by Mr. Zuckerman, and that is what I have testified to. I am not testifying that I was unaware of its contents until that date.

Q. And your testimony is that February 2nd, 1996, was the first time that you saw Exhibit 27?

A. The first time it was physically in my presence, that's correct.

22 Bailey testified before the single justice: “And I think technically it was after midnight on February 2nd when I first saw [the orders]. But I knew what was in the order. I'm not backing away from that.”

23 The Florida court explained:

> Count V of the Bar's complaint charged Bailey with self-dealing in the course of his representation of Duboc. The referee found that Bailey's claim that he owned the stock in fee simple created a financial conflict of interest between Bailey and Duboc. “The more [Bailey] received, the less his client would produce in his column at the time of sentencing.” This finding refers to the fact that under the plea agreement, it was in Duboc's interest to maximize the amount of assets he forfeited to the United States Government in hopes of receiving a reduced sentence, and that for Bailey to claim entitlement to the appreciation of the stock would be directly contrary to the interests of his client. The referee concluded that Bailey's claim of entitlement to the stock was in no way consistent with the premise that ultimate approval and payment of fees rested with Judge Paul.
>
> The referee further found that Bailey used information relating to his representation of Duboc to the disadvantage of his client. The referee found that Bailey managed one of the French properties to his own personal benefit by procrastinating in his efforts to sell the property. The referee ultimately concluded that Bailey had engaged in self-dealing, and therefore violated Rules Regulating the Florida Bar 4–1.7(b) (lawyer shall not represent a client if lawyer's exercise of independent professional judgment may be materially limited by the lawyer's own interest), 4–1.8(a) (lawyer shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client), and 4–1.8(b) (lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation).

Florida Bar, 803 So.2d at 688–89.

24 *See* Bailey's testimony before the single justice *supra* n. 16.

25 Bailey testified before the Board:

> [BOARD]: And did you not see it as a conflict at the time to retain the increase in value of the stock when that could have been put to your client's benefit by producing that to the Government which might have had a direct impact on his sentencing?
>
> [BAILEY]: I didn't see it as a conflict at the time. He had given them 30 million; I was trying to give them another 35 from the French properties. I had been offered cash and should have taken it and we wouldn't be here, and it was a mistake not to clarify from the outset where any profits would go.
>
> [BOARD]: In retrospect, do you see that as a conflict?
>
> [BAILEY]: Oh, certainly, a bad conflict.
>
> [BOARD]: Yeah, and had you not made a—taken the position that you were entitled to that increase in value but rather had turned it over to the Government, then that may have had an impact on proceedings at that point in time in your client's benefit?
>
> [BAILEY]: Well, in retrospect, sir, I should have sold the stock very quickly and turned it into cash and avoided this issue. The reason the stock was given to me was because the Government felt they had to sell it in a block, and this little company might have croaked; more important, they had agreed to give me 3.5 million in cash. It was in the same account in Luxembourg and they asked me to take the stock. I never should have done it. When I did it, I should have sold it as quickly as I could and given the balance, if it was more than 3.5, the agreed amount, to whoever the Government told me to.

26 Bailey testified before the single justice:

> Q. The trial judge who presided over your disbarment proceeding found that you deliberately procrastinated with respect to the sale of Le Belvoire so that you could enjoy it, is that correct?
>
> A. Well, with all due respect to Referee Ellis, she was in error. I wrote a letter saying I was in no hurry to sell it because we were being offered crumbs, and it was a ploy to tell the marketplace to stop offering crumbs.

27 The Florida Supreme Court explained:

> Count VII of the Bar's complaint charged Bailey with ex parte communications, self-dealing, and disclosure of confidential information. In connection with this count, the referee found that on May 17, 1994, Duboc appeared before Judge Paul and entered a plea and cooperation agreement. Duboc pled guilty to counts II and III of the indictment. The referee found that the only way Duboc would get a reduced sentence was if Judge Paul was convinced that Duboc had completely and totally cooperated and had forfeited all of his assets to the United States. On January 4, 1996, Bailey wrote a letter to Judge Paul stating, “*I have sent no copies of this letter to anyone,* since I believe its distribution is within Your Honor's sound discretion.” (Emphasis added.) This letter contains an express admission that it was ex parte. In this ex parte letter to Judge Paul, Bailey stated that: (1) Duboc pled guilty because

he had no defense due to the strength of the case, (2) Duboc chose this course because it was his only option, not in a spirit of remorse or cooperation, (3) Duboc was a "multimillionaire druggie," (4) by consulting with other counsel, Duboc was no longer acting in the spirit of cooperation, and (5) Duboc's new defense team had interests contrary to those of his client and the court. Bailey sent a second letter to Judge Paul on January 21, 1996, a copy of which was sent to the U.S. Attorney's Office, threatening to seek an order to invade the attorney-client privilege in an attempt to defeat Duboc's position that the stock was held in trust.

The referee found that both of Bailey's letters were sent to compromise Duboc before the sentencing judge and to protect Bailey's interest and control of Duboc's and the U.S. Government's money. The referee recommended that Bailey be found guilty of violating Rules Regulating the Florida Bar 4–1.6(a) (lawyer shall not reveal information relating to representation of a client), 4–1.8(a), 4–1.8(b), 4–3.5(a) (lawyer shall not seek to influence a judge), 4–3.5(b) (in an adversary proceeding, lawyer shall not communicate as to the merits of the cause with a judge).

Florida Bar, 803 So.2d at 689.

28 Bailey testified before the single justice:

A. But I was very concerned about Uscinski [Duboc's new counsel] and his representation of DuBoc. I thought it would not go well. And so quite improperly I wrote a letter to Judge Paul, because I could not get down to see him personally, and tried to warn him that things might not go very well. And it was kind of a you should keep your hands high. And in one paragraph of that letter I used language which I thought he would interpret as very serious language. But he never read the letter, he says.

In reflection, without question I should have consulted someone, and preferably, I think, a retired judge, because I had access to some, to find out what, if any, would be a proper method to notify a judge ex parte of a situation that I thought should be of his concern. I consulted nobody. I simply wrote the letter.

Bailey further testified before the single justice:

Q. Mr. Bailey, when you sent this letter, did you understand you were engaging in unethical conduct?

A. If I'd stopped and thought about it, I guess I would have. I would certainly agree now that it was unethical conduct, improper, unwise, and a knee-jerk reaction at a time when I was totally focused on a different case. And I make no excuses for having that transgression.

29 Bailey testified before the single justice:

Q. Mr. Bailey, do you—do you stand by your testimony that the reason you wrote [the ex parte letter] was to alert Judge Paul to a bribe?

A. No. The reason I wrote Exhibit 25 was to alert him to a serious condition which I planned to tell him might involve an attempt to bribe him, but he never read the letter. We never had that conversation.

Q. Because it's fair to say that Exhibit 25 doesn't use the word "bribe," agreed?

A. It does not use the word "bribe," but if you ascribe the plain meaning to seclusion and clear watershed, I think you get the idea that something improper is in the wind. That's all I was trying to say.

30 The relevant excerpt from this ex parte letter stated:

Not without some pride in authorship, I believe that I set Mr. Duboc on a course which—if assiduously followed—would have caused his release at the earliest possible date, whatever Your Honor might have determined that to be. It is my fervent wish that if this noble purpose is to be confounded by lawyers who have some other agenda in seclusion, a clear watershed be documented at this juncture of the case.

31 Bailey testified before the single justice:

Q. And it's fair to say the letter disparaged your client, Mr. DuBoc, didn't it?

A. No.

Q. The letter referred to him as a multi-millionaire druggy?

A. No, sir. And that's totally unfair. In quotes I said very specifically every lawyer around sees him as a multi-millionaire druggy and they're all giving him advice and it's making things very difficult.

The letter stated, in pertinent part: "In short order, word got out that a 'multi-millionaire druggie' had been arrested, and the interest of many lawyers was evidently stimulated. Mr. Duboc began to consult more attorneys than I can count—which he had every right to do—and was given advice by many that he should have gone to jury verdict."

32 The letter stated, in pertinent part:

The central purpose of this letter is to alert the Court to the fact that—as never before in my experience—Mr. Duboc's foray into the thicket of legal advice has served him badly in many instances. Without pointing the finger at specific attorneys, suffice it to say that Mr. Duboc was at one time urged to help set up a drug offense so that he could disclose it to the government and win "brownie points" for sentencing purposes. On two other occasions Mr. Duboc

was counseled to "hold back" information from Special Agent Carl Lilley and others connected to the prosecution, in order to have "a little something left" to offer in exchange for a Rule 35 motion by the government. A failure to be totally forthcoming during his debriefings would of course have been in total violation of his plea agreement, something I'm sure Mr. Duboc did not comprehend when he received and acted upon this advice.

Footnote 1 of the letter further stated: "I wish to make it very clear that none of these matters represents an incursion upon the attorney-client privilege. Each was known to the government before it was disclosed to me."

33 Bailey testified before the single justice:

Q. Mr. Bailey, did you tell Judge Paul that your client had violated the plea agreement on page 2 of your letter? ... The last full paragraph that begins, A failure to be totally forthcoming during his debriefings would, of course, have been in total violation of his plea agreement, something I'm sure Mr. DuBoc did not comprehend when he received and acted upon this advice.

A. Yes. I was not accusing Mr. DuBoc of anything. I said the two lawyers were deliberately giving him legal advice which was totally improper. He had pledged total cooperation and total transparency prior to his plea agreement. And these two fellows who were not his lawyers were advising him to hold back information. And I said I don't think DuBoc realizes that that is a flat violation of his plea agreement, and that's why I'm concerned about his representation.

Q. Mr. Bailey, isn't it fair to say that you told Judge Paul that, in fact, your client had violated the plea agreement?

A. I don't think that's what the words say, but—

Q. All right.

A. —without sounding too lawyer-like, may I not suggest that the words speak for themselves. I think I'm telling the judge that he's getting bad advice, and if he acts on it, will be a violation of the plea agreement. I don't think I told the judge that he is withholding the evidence.

But I think you ought to, in fairness, read Footnote 1, which says, I wish to make it clear that none of these matters represents an incursion on the attorney/client privilege. Each was known to the government before it was disclosed to me. And by that I meant they told me about it.

34 Bailey testified before the single justice:

Q. Mr. Bailey, it's fair to say that you dispute the legitimacy of the disbarment rendered by the Florida courts?

A. I don't dispute the legitimacy because they did it, the Supreme Court refused cert, and that's the end of the road. And I think they had some grounds, in retrospect, that warranted disbarment. I do think it was kind of harsh.

35 Bailey testified before the single justice:

Q. It's fair to say, Mr. Bailey, that you told the Tax Court you believe there's an ongoing conspiracy involving the Florida bar, the Department of Justice, and the IRS to violate your constitutional rights?

A. I think I put that in a pleading, yes. Or perhaps an offer of proof.

36 The Florida Supreme Court made a similar observation: "Bailey's false testimony and disregard of Judge Paul's orders demonstrate a disturbing lack of respect for the justice system and how it operates." *Florida Bar,* 803 So.2d at 694.

37 Patrick McKenna, a private investigator who worked with Bailey, provided the following testimony regarding Bailey's life in the 1999–2000 time period during the Florida bar proceeding:

Q. Can you tell us whether at that particular time [in 1999–2000] in Lee's life, what do you recall about the circumstances of that time?

A. Well, I remember when it started, we had a case in New York that I think Judge Fishman referred to. There was a lot of stuff going on in Lee's life. I remembered we had a case in North Carolina that there were a number of lawyers involved. Lee was the lead lawyer. And I think it was right before closing argument—pardon me—that Lee got a call from the hospital that Patty [his late-wife] was unconscious and may not make it. So Lee went on and delivered a closing. I think the jury was out 13 minutes, and they acquitted our client. That night at the hotel, Lee broke down in my arms. Sorry.

It then became—I'm not an expert in grief process, but I think that became a point of anger and denial in Lee's life that Patty was going down. So and then the *McCorkle* case, she was dying during the *McCorkle* case, so I was able to, you know, kind of observe Lee, banging away, doing his job as best as he could. But in terms of personal, it was very difficult.

Debbie Elliot, Bailey's current partner, also testified as to Bailey's difficulty during the time of his wife's illness:

Q. Do you believe that Lee also intends and expects to stay here in Maine?

A. Yes, yes. He's very—I suspect, and maybe you've heard testimony about Patty dying, that was not a quick process. She was given that death sentence.... And she was told that she had three months to live with pancreatic cancer.

> And they stretched it to 13 months, but probably the last 12 months of it was not easy for anybody including her. And she would not let Lee tell anybody that she was dying. She didn't want people to feel sorry for her. She was very proud.
>
> ... Lee is a very private person. Patty was too. I mean that was not a quick process, and that was going on during all of those cases. And he was still functioning at a very high level while emotionally he was breaking. I mean, there was no way you couldn't break. I mean Patty was an incredible person.

38 After serious consideration, we must reject the dissenting opinion's assertion that this opinion engages in improper "credibility determinations of its own" regarding Bailey's testimony. *See* Dissenting Opinion ¶ 61. By so asserting, the dissenting opinion mischaracterizes what is at issue in this appeal.

> The central question here is not witness credibility or the adequacy of the single justice's factual findings, but rather whether the sum of the evidence, viewed in the light most favorable to the court's judgment, supports the single justice's findings and ultimate conclusion that Bailey recognizes the wrongfulness and seriousness of his various acts of misconduct as required by Maine Bar Rule 7.3(j)(5)(C). Our analysis turns on the sufficiency of the evidence and not on a reexamination of witness credibility. *See Me. Eye Care Assocs. P.A. v. Gorman,* 2008 ME 36, ¶ 12, 942 A.2d 707; *Taylor v. Comm'r of Mental Health & Mental Retardation,* 481 A.2d 139, 153 (Me.1984).
>
> The dissenting opinion contains no discussion of the record evidence concerning each of the six counts of ethical violations that formed the basis of Bailey's disbarment. By treating "misconduct" as used in Rule 7(j)(5) as an amorphous and general concept, the dissenting opinion avoids the tedious but necessary consideration of the sufficiency of the evidence in relation to specific acts of misconduct. As we discussed at length earlier, in his testimony before the single justice, Bailey failed to acknowledge as wrongful and serious his misconduct in commingling the Japanese stock (Count I); commingling and misappropriating client trust funds (Count II); failing to freeze assets and surrender the Biochem stock pursuant to the January 12 and 25 orders (Count III); giving false testimony before Judge Paul (Count IV); self-dealing (Count V and VII); and disclosing confidential client information (Count VII). These acts of misconduct were among those justifiably characterized by the Florida Supreme Court as "some of the most egregious rules violations possible." *Florida Bar,* 803 So.2d at 694. Bailey's failure to prove that he recognizes the wrongfulness and seriousness of these acts—acts of misconduct that are central to Bailey's disbarment—defeats his request.

39 Maine is not a jurisdiction in which an attorney who is subject to disciplinary sanctions in another jurisdiction is barred from seeking admission to practice. *Compare* M. Bar R. 7.3(h) *with* Tex.R. Governing Admission to the Bar IV(e)(2) (stating that an individual disciplined for professional misconduct in another jurisdiction "is deemed not to have present good moral character and fitness and is therefore ineligible to file an Application for Admission to the Texas Bar during the period of such discipline" unless the attorney has regained a license in the other jurisdiction or five years have passed). Nor does Maine have a reciprocal discipline provision similar to the type in place in Florida, which precludes admission or readmission if the in-state disbarment or disciplinary resignation is based on conduct that occurred in a foreign jurisdiction and the person has not been "readmitted in the foreign jurisdiction in which the conduct that resulted in discipline occurred." Fla. State Bar Admission R. 2–13.1.

40 *See U.S. Bank, Nat'l Ass'n v. Thomes,* 2013 ME 60, ¶ 15, 69 A.3d 411.

41 Although Bailey may not fully respect the individual adjudicators who found him to have committed ethical violations, he has by all accounts complied with the resulting orders themselves.

42 For instance, in *In re Hughes,* a single justice admitted a candidate to the Bar although she owed $400,000 in restitution after illegally diverting funds from an escrow account to cover law firm and personal expenses in another state. 608 A.2d 1220, 1220 (Me.1992); *In re Hughes,* 594 A.2d 1098, 1099 (Me.1991). Her admission was affirmed because she had been working for approximately five years as a paralegal in the Legal Division of the Maine Department of Transportation, had "supervise[d] the expenditure of large amounts of public funds," evidently without incident, and had a financial history that did not preclude a finding of good character despite her failure to make restitution. *In re Hughes,* 608 A.2d at 1220; *In re Hughes,* 594 A.2d at 1099.

EJIS-NewKirk
GC

DIRECT INDICTMENT

Clerk No. 16SC144430

FULTON SUPERIOR COURT

THE STATE OF GEORGIA

V.

MYE BROOKE BRINDLE Ct 1, 2, 3 & 4
DA #: 16DA02635
JOHN BUTTERS Ct 1, 2 & 3
DA #: 16DA02630/4113351
DAVID COHEN Ct 1, 2 & 3
DA #: 16DA02629

1 **CONSPIRACY TO COMMIT EXTORTION O.C.G.A. §16-8-16 A FELONY O.C.G.A. §16-4-8**
2 **CONSPIRACY TO COMMIT UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62 A FELONY O.C.G.A. §16-4-8**
3 **UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62**
4 **UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62**

TRUE BILL

06/17, 2016

FILED IN OFFICE
JUN 17 2016
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

Grand Jury Foreperson

PERSONID: 4113384

PAUL L. HOWARD, JR., District Attorney

The Defendant waives copy of indictment, list of witnesses, formal arraignment and pleads _____ Guilty.

Defendant

Attorney for Defendant

Assistant District Attorney

This____day of_____,_____

The Defendant waives copy of indictment, list of witnesses, formal arraignment and pleads _____ Guilty.

Defendant

Attorney for Defendant

Assistant District Attorney

This____day of_____,_____

The Defendant waives copy of indictment, list of witnesses, formal arraignment and pleads _____ Guilty.

Defendant

Attorney for Defendant

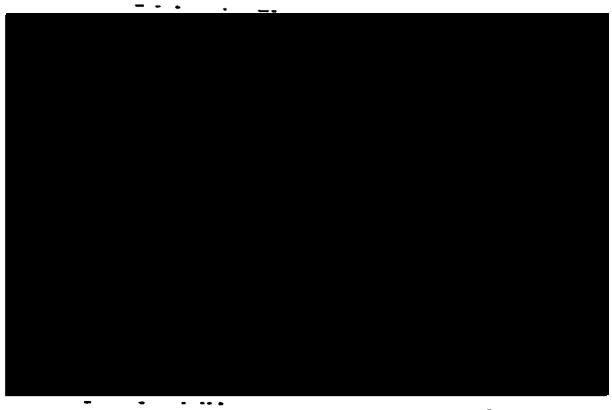
Assistant District Attorney

This____day of_____,_____

STATE OF GEORGIA, COUNTY OF FULTON

IN THE SUPERIOR COURT OF SAID COUNTY

THE GRAND JURORS, selected, chosen and sworn for the County of Fulton, to wit:



in the name and behalf of the citizens of Georgia, do charge and accuse **MYE BROOKE BRINDLE, JOHN BUTTERS, and DAVID COHEN** with the offense of **CONSPIRACY TO COMMIT A FELONY O.C.G.A. §16-4-8,** for the said accused, in the County of Fulton and State of Georgia, on the **6th day of June, 2012, did unlawfully, together, conspire to commit the crime of EXTORTION O.C.G.A. §16-8-16, and at least one of those persons did an overt act to effect the object of said conspiracy, to wit:**

OVERT ACTS

1.

On or about **the 3rd day of June, 2012, JOHN BUTTERS,** an attorney authorized to practice law in Georgia, contacted Thomas Hawkins, a private investigator, to arrange a meeting to discuss making a covert video recording of a wealthy individual without that person's knowledge or consent.

2.

On or about **the 4th day of June, 2012,** attorneys **JOHN BUTTERS and DAVID COHEN** met with private investigators Michael Deegan and Thomas Hawkins at the offices of Hawk Private Investigations ("Hawk P.I.") in **Fulton County** to discuss making a covert video recording of a wealthy person inside his residence without that person's knowledge or consent. **BUTTERS and COHEN** did not reveal the name of the wealthy person.

3.

At the conclusion of this meeting, Michael Deegan and Thomas Hawkins agreed to help **JOHN BUTTERS and DAVID COHEN** purchase the spy camera even after expressly stating to **BUTTERS and COHEN** that it would be illegal to covertly record someone in their residence without that person's knowledge or consent.

4.

On or about **the 6th day of June, 2012,** attorneys **JOHN BUTTERS and DAVID COHEN** met with investigator Michael Deegan a second time at the offices of Hawk P.I. in **Fulton County.** Accompanying **BUTTERS and COHEN** to this meeting was a person they identified as their client "Sam" and another person they identified as "Sam's mother." The purpose of this meeting was to further discuss the making of a covert video recording of a wealthy individual without that person's knowledge or consent.

5.

At the conclusion of the meeting at the offices of Hawk P.I. in **Fulton County, DAVID COHEN** purchased a spy camera made to look like a cell phone and designed to create covert video recordings.

6.

On or about **the 11th day of June, 2012,** Michael Deegan delivered the spy camera to **MYE BRINDLE,** the person previously identified as "Sam," and showed her how to use it.

7.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped the victim, later identified as **JOE ROGERS,** without his knowledge or consent, naked in the bathroom of his residence at 3303 Chatham Road in **Fulton County.**

8.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped **JOE ROGERS,** without his knowledge or consent, naked in the bedroom of his residence at 3303 Chatham Road in **Fulton County.**

9.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped a sexual encounter between her and **JOE ROGERS,** without his knowledge or consent, which took place in the bedroom of his residence on 3303 Chatham Road in **Fulton County.**

10.

On or about **the 22nd day of June, 2012, MYE BRINDLE** delivered the spy camera and the video recordings referenced in Overt Acts 7 through 9 to Michael Deegan.

11.

On or about **the 22nd day of June, 2012,** Michael Deegan had the video recording made by **MYE BRINDLE** of **JOE ROGERS** on June 20, 2012 placed on DVD(s) and then delivered the DVD(s) to **DAVID COHEN** in Marietta, Georgia.

12.

On or about the 16th day of July, 2012, DAVID COHEN sent a letter to **JOE ROGERS** threatening a lawsuit on behalf of **MYE BRINDLE.** Said letter stated that there were

"[n]umerous audio and video recordings" of sexual harassment and abuse by **ROGERS** upon **BRINDLE**. This letter sought to settle the matter before public litigation so that Joe Rogers may avoid potential "media attention ... intrusive governmental investigations, Department of Justice, Attorneys General or SEC involvement, as well as civil and criminal charges ...."

13.

On or about **the 2nd day of August, 2012, JOHN BUTTERS, DAVID COHEN,** and Hylton Dupree, attorneys for **MYE BRINDLE** met with Robert Ingram and Jeffrey Daxe, attorneys for **JOE ROGERS,** to discuss the claims listed in the July 16, 2012 letter addressed to **ROGERS. COHEN** played an edited video of the sexual encounter that was secretly recorded by **MYE BRINDLE** on June 20, 2012, in the bedroom of Joe Rogers' residence, without his knowledge or consent, at 3303 Chatham Road in **Fulton County. BUTTERS** informed Robert Ingram and Jeffrey Daxe that **MYE BRINDLE** wanted "millions" of dollars to settle her claim.

14.

On or about **the 2nd day of August, 2012, DAVID COHEN** told attorneys Robert Ingram and Jeffrey Daxe that he possessed videos of other sexual encounters between **JOE ROGERS** and **MYE BRINDLE.** Said statements made by **COHEN** furthered the extortion plot by asserting that there was another embarrassing video of **ROGERS,** which would tend to subject **ROGERS** to even more contempt and ridicule.

15.

On or about **the 14th day of September, 2012,** mediation was held in which, **JOHN BUTTERS, DAVID COHEN,** and Hylton Dupree asked for twelve million dollars to settle **MYE BRINDLE'S** claims which they argued were supported by the June 20, 2012 video of **JOE ROGERS** taken without his knowledge or consent.

16.

On or about **the 19th day of September, 2012, DAVID COHEN** filed a civil lawsuit in **Fulton County** on behalf of **MYE BRINDLE,** which stated that **BRINDLE** "made audio and video recordings of some of the incidents of sexual harassment and battery" which occurred in **Fulton County** and at Sea Island in Glynn County, Georgia.

17.

On or about **midnight of the 28th day of September, 2012, MYE BRINDLE** and one of her attorneys went to the Atlanta Police Department, hours before a court order sealing the record in Cobb County took effect, to report that **JOE ROGERS** physically forced himself sexually upon **BRINDLE** on numerous occasions.

18.

On or about **the 9th day of October, 2012,** the Honorable Judge Susan Forsling of Fulton County State Court, questioned **DAVID COHEN** during a hearing about the existence of another covert videotape of **JOE ROGERS** and **MYE BRINDLE** engaged in a sexual encounter. **COHEN** responded that **ROGERS** was "[p]artially naked" in the videotape. Said statements made by **COHEN** furthered the extortion plot by asserting that there was another embarrassing video of **ROGERS,** which would tend to subject **ROGERS** to even more contempt and ridicule.

19.

On or about **the 24th day of October, 2012, JOHN BUTTERS, DAVID COHEN,** and **MYE BRINDLE** served discovery requests on **JOE ROGERS** asking him to admit that a particular video recording labeled as "Exhibit 1 hereto is a true and correct video recording of a sexual encounter involving **ROGERS** and **BRINDLE** at the Roger's[sic] Sea Island residence." Said request was made by **BUTTERS** and **COHEN** to further the extortion plot by asserting that there was another embarrassing video of **ROGERS**, which would tend to subject **ROGERS** to even more contempt and ridicule.

Said offense in the County of Fulton and State of Georgia –contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT 2 of 4

and the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, do charge and accuse **MYE BROOKE BRINDLE, JOHN BUTTERS, and DAVID COHEN** with the offense of **CONSPIRACY TO COMMIT A FELONY O.C.G.A. §16-4-8,** for the said accused, in the County of Fulton and State of Georgia, on the **20th day of June, 2012, did unlawfully, together, conspire to commit the crime of UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62, and at least one of those persons did an overt act to effect the object of said conspiracy, to wit:**

OVERT ACTS

1.

On or about **the 3rd day of June, 2012, JOHN BUTTERS,** an attorney authorized to practice law in Georgia contacted Thomas Hawkins, a private investigator, to arrange a meeting to discuss making a covert video recording of a wealthy individual without that person's knowledge or consent.

2.

On or about **the 4th day of June, 2012,** attorneys **JOHN BUTTERS and DAVID COHEN** met with private investigators Michael Deegan and Thomas Hawkins at the offices of Hawk Private Investigations ("Hawk P.I.") in **Fulton County** to discuss making a covert video recording of a wealthy person inside his residence without that person's knowledge or consent. **BUTTERS and COHEN** did not reveal the name of the wealthy person.

3.

At the conclusion of this meeting, Michael Deegan and Thomas Hawkins agreed to help **JOHN BUTTERS and DAVID COHEN** purchase the spy camera even after expressly stating to **BUTTERS and COHEN** that it would be illegal to covertly record someone in their residence without that person's knowledge or consent.

4.

On or about **the 6th day of June, 2012,** attorneys **JOHN BUTTERS and DAVID COHEN** met with investigator Michael Deegan a second time at the offices of Hawk P.I. in **Fulton County.** Accompanying **BUTTERS and COHEN** to this meeting was a person they identified as their client "Sam" and another person they identified as "Sam's mother". The purpose of this meeting was to further discuss the making of a covert video recording of a wealthy individual without that person's knowledge or consent.

5.

At the conclusion of the meeting at the offices of Hawk P.I. in **Fulton County, DAVID COHEN** purchased a spy camera made to look like a cell phone and designed to create covert video recordings.

6.

On or about **the 11th day of June, 2012,** Michael Deegan delivered the spy camera to **MYE BRINDLE,** the person previously identified as "Sam," and showed her how to use it.

7.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped the victim, later identified as **JOE ROGERS,** without his knowledge or consent, naked in the bathroom of his residence at 3303 Chatham Road in **Fulton County.**

8.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped **JOE ROGERS,** without his knowledge or consent, naked in the bedroom of his residence at 3303 Chatham Road in **Fulton County.**

9.

On or about **the 20th day of June, 2012, MYE BRINDLE** secretly videotaped a sexual encounter between her and **JOE ROGERS,** without his knowledge or consent, which took place in the bedroom of his residence on 3303 Chatham Road in **Fulton County.**

10.

On or about **the 22nd day of June, 2012, MYE BRINDLE** delivered the spy camera and the video recordings referenced in Overt Acts 7 through 9 to Michael Deegan.

11.

On or about **the 22nd day of June, 2012,** Michael Deegan had the video recording made by **MYE BRINDLE** of **JOE ROGERS** on June 20, 2012 placed on DVD(s) and then delivered the DVD(s) to **DAVID COHEN** in Marietta, Georgia.

12.

On or about the 16th day of July, 2012, DAVID COHEN sent a letter to **JOE ROGERS** threatening a lawsuit on behalf of **MYE BRINDLE.** Said letter stated that there were "[n]umerous audio and video recordings" of sexual harassment and abuse by **ROGERS** upon **BRINDLE.** This letter sought to settle the matter before public litigation so that Joe Rogers may

avoid potential "media attention ... intrusive governmental investigations, Department of Justice, Attorneys General or SEC involvement, as well as civil and criminal charges ...."

13.

On or about **the 2ND day of August, 2012, JOHN BUTTERS, DAVID COHEN,** and Hylton Dupree, attorneys for **MYE BRINDLE** met with Robert Ingram, and Jeffrey Daxe, attorneys for **JOE ROGERS** to discuss the claims listed in the July 16, 2012 letter addressed to **JOE ROGERS. DAVID COHEN** played an edited video of the sexual encounter that was secretly recorded by **MYE BRINDLE** on June 20, 2012, in the bedroom of Joe Rogers' residence, without his knowledge and consent, at 3303 Chatham Road in **Fulton County.** Further, Robert Ingram and Jeffrey Daxe were given a copy of the June 20, 2012 video taken by **MYE BRINDLE** of the naked **JOE ROGERS** by **JOHN BUTTERS** and **DAVID COHEN.**

Said offense in the County of Fulton and State of Georgia –contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT 3 of 4

and the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, do charge and accuse **MYE BROOKE BRINDLE, JOHN BUTTERS, and DAVID COHEN** with the offense of **UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62,** for the said accused, in the County of Fulton and State of Georgia, on the **20th day of June, 2012, through the use of a SPY CAMERA, a device, without the consent of all persons observed, did unlawfully record the activities of JOE ROGERS which occurred at 3303 CHATHAM RD, ATLANTA, GA 30305, a private place, out of the public view** -contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT 4 of 4

and the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, do charge and accuse **MYE BROOKE BRINDLE** with the offense of **UNLAWFUL EAVESDROPPING OR SURVEILLANCE O.C.G.A. §16-11-62,** for the said accused, in the County of Fulton and State of Georgia, on the **20th day of June, 2012, through the use of a SPY CAMERA, a device, without the consent of all persons observed, did unlawfully record the activities of KATHERINE MARIE MAYNARD which occurred at 3303 CHATHAM RD, ATLANTA, GA 30305, a private place, out of the public view** -contrary to the laws of said State, the good order, peace and dignity thereof.

PAUL L. HOWARD, JR., District Attorney

Related Clerk No:

Complaint #:

Defendant	DA #	Booking	Race	Sex	Birthdate	OTN	Agency
BRINDLE, MYE BROOKE	16DA02635						
BUTTERS, JOHN	16DA02630						
COHEN, DAVID	16DA02629						

WITNESS LIST

Cameron Crandall
136 Pryor ST
Atlanta GA 30303

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

JOE ROGERS, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DAVID M. COHEN, COMPLEX LAW GROUP, LLC, D.M. COHEN, INC., HYLTON B. DUPREE, JR., DUPREE & KIMBROUGH LLP, HYLTON B. DUPREE, JR., P.C., JOHN C. BUTTERS, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, ABC COMPANY 1, ABC COMPANY 2, ABC COMPANY 3, ABC COMPANY 4 AND ABC COMPANY 5,	)	CIVIL ACTION NO.: 14-1-4143-53
	)	
	)	JURY TRIAL DEMANDED
Defendants.	)	

COMPLAINT

Plaintiff Joe Rogers, Jr. ("Plaintiff" or "Rogers") hereby files his Complaint and shows the Court as follows:

THE PARTIES

1.

Plaintiff is an individual and is a citizen of Georgia.

2.

Defendant David M. Cohen ("Cohen") is an individual who resides in Cobb County, Georgia. Service may be made on Cohen by personally serving him at 40 Powder Springs Street, Marietta, Georgia 30064. Cohen is an attorney licensed to practice law in Georgia.

3.

Defendant Complex Law Group, LLC ("Complex Law Group") is a limited liability company organized and existing under the laws of the State of Georgia and its principal place of business in Georgia is located at 40 Powder Springs Street, Marietta, Georgia, 30064. Complex Law Group may be served through its registered agent, Charles M. Cushing, Jr. at 191 Peachtree Street, Atlanta, Georgia 30303. Complex Law Group is a law firm, and Cohen manages and controls its operations.

4.

Defendant D.M. Cohen, Inc. ("Cohen, Inc.") is a corporation organized and existing under the laws of the State of Georgia with its principal place located at 40 Powder Springs Street, Marietta, Georgia 30064. Cohen, Inc. uses the trade name "Complex Law Group, LLC", and represents that the nature of its business is the practice of law. Cohen is the President of Cohen, Inc. and controls its operations. Cohen, Inc. may be served by serving Cohen at 40 Powder Springs Street, Marietta, Georgia 30064.

5.

Defendant Hylton B. Dupree, Jr. ("Dupree") is an individual who resides in Cobb County, Georgia. Service may be made upon Dupree by personally serving him at 49 Green Street, Marietta, Georgia 30061. Dupree is an attorney licensed to practice law in Georgia.

6.

Defendant Dupree & Kimbrough LLP holds itself out as a limited liability partnership with its principal place of business at 49 Green Street, Marietta, Georgia, 30061. Dupree & Kimbrough may be served by serving Dupree at the above-referenced address. Dupree &

Kimbrough LLP is a law firm, of which Dupree is a named partner with substantial control over its operations.

7.

Defendant Hylton B. Dupree, Jr., P.C. ("Dupree PC") is an entity which has its principal place of business at 49 Green Street, Marietta, Georgia 30061. Dupree PC may be served by serving Dupree at the above-referenced address. The nature of Dupree PC's business is the providing of legal services, and Dupree controls its operations.

8.

Defendant John C. Butters ("Butters") is an individual who resides in Cobb County, Georgia. Service may be made upon Butters by personally serving him at 40 Powder Springs Street, Marietta, Georgia 30064. Butters is an attorney licensed to practice law in Georgia.

9.

Defendants John Doe 1, John Doe 2, John Doe 3, John Doe 4 and John Doe 5 are unknown individuals who conspired with the other Defendants and engaged in the wrongful conduct described herein. One unknown individual is the private investigator who provided the illegal spy camera at issue and worked with other Defendants in the making of an illegal video recording. After Plaintiff unearths the identity of the John Doe Defendants, this pleading will be amended to reflect their names and these Defendants will be served.

10.

ABC Company 1, ABC Company 2, ABC Company 3, ABC Company 4, and ABC Company 5 are unknown corporate entities who conspired with and participated in the wrongful conduct described herein. After Plaintiff unearths the identity of the ABC Company Defendants, this pleading will be amended to reflect their names and these Defendants will be served.

JURISDICTION AND VENUE

11.

Because Defendants conspired and worked with one another to commit and committed tortious acts in Cobb County, Georgia, thereby causing injury and giving rise to the causes of action set forth herein, this Court has jurisdiction over each of the Defendants. Venue is also proper in this Court with respect to each of the Defendants. Several Defendants, including many of the principal actors, reside in Cobb County. Substantial relief is sought against the Defendants residing in Cobb County, and Defendants are co-conspirators, joint tortfeasors, and joint actors.

FACTUAL BACKGROUND

12.

From approximately May 2003 to January 2009, Mye Brindle ("Brindle") provided housekeeping services at Rogers' Residence. During this time period, Brindle, who was employed by others, engaged in consensual sexual activity with Rogers. On numerous occasions, Brindle would initiate the sexual activity.

13.

When Brindle stopped providing the housekeeping services in January 2009, the consensual sexual activity between Rogers and Brindle also ended at that time.

14.

In October 2009, Rogers contacted Brindle to determine if she would be interested in interviewing for a house manager position. Brindle interviewed for and was offered the position, which she accepted.

15.

At the time she accepted the position, Brindle was an employee of a company known as "The Balancing Act", which was Brindle's mother's business. Brindle was placed at the Rogers' home as the house manager through The Balancing Act's employee leasing program.

16.

After Brindle began working again in Rogers' residence, the consensual sexual activity resumed.

17.

In late 2011 and early 2012, Brindle and her mother began experiencing significant financial distress, and Brindle's work performance deteriorated.

18.

When Rogers addressed the financial issues with Brindle, Brindle became upset. Thereafter, Brindle decided that she would record her sexual encounters with Rogers so she could use the recordings and threats of public disclosure in an attempt to obtain money from Rogers.

19.

In 2012, without Rogers' knowledge or consent, Brindle began recording certain of their sexual encounters.

20.

Without Rogers' knowledge or consent, Brindle also took towels which had been used during the sexual encounters.

21.

In or around late spring 2012, Brindle approached Defendants about representing and assisting her in attempting to extract money from Rogers.

22.

On or around June 6, 2012, Brindle formally engaged Defendants to represent her.

23.

Brindle provided Defendants with recordings and stolen towels. Recognizing that there was no evidence to support any legal claims, Defendants designed a scheme and conspired to extort money from Rogers.

24.

The scheme designed by Defendants would include obtaining evidence via illegal means, misrepresenting the existence of evidence, filing false police reports if necessary, threatening the public disclosure of the sexual encounters between Rogers and Brindle, demanding an exorbitant sum from Rogers, and, if necessary, causing the public disclosure of the sexual relationship to pressure Rogers into meeting their demands.

25.

As part of their scheme, Defendants decided that a video clearly depicting the sexual encounters would enable them to force Rogers to pay exorbitant sums under the threat that they would disclose publicly the sexual encounters which had occurred between Brindle and Rogers.

26.

Defendants convinced Brindle to make a video of her sexual activity with Rogers without his knowledge or consent, and advised her on how to obtain this illegal evidence.

27.

Defendants arranged for a meeting between Brindle and a private investigator so that the investigator could provide to her an illegal spy camera and instruct her on how to make the video.

28.

A meeting took place between all or some of the Defendants, Brindle, and the private investigator. At this meeting the private investigator provided Brindle with a video recorder which was disguised as a cell phone.

29.

The possession of the video recording device (*i.e.*, an illegal eavesdropping device) provided by the private investigator to Brindle at Defendants' direction is a violation of O.C.G.A. § 16-11-63.

30.

On June 20, 2012, at the direction of Defendants, Brindle came to work at the Rogers' residence equipped with the illegal spy camera.

31.

After Rogers' wife left the house, Brindle entered Rogers' bathroom, and began filming him as he shaved without clothes.

32.

Rogers asked Brindle to adjust his back, and Rogers laid down on the bed in his bedroom. Brindle positioned the illegal spy camera to capture the activity and continued recording. After Brindle adjusted Rogers' back, Brindle and Rogers engaged in a consensual sex act which was recorded by the illegal spy camera.

33.

Brindle provided Defendants with the illegal spy camera and the video recording.

34.

On June 29, 2012, Brindle left a resignation letter for Rogers resigning her position.

35.

By making the video recording without Rogers' knowledge and consent, Brindle and Defendants violated O.C.G.A. § 16-11-62.

36.

On information and belief, at Defendants' direction, without Rogers' knowledge or consent, Brindle took sensitive and confidential financial information from Rogers' residence so that Defendants could use such information as part of their scheme.

37.

On July 16, 2012, armed with the illegal video tape, Defendants delivered an extortion letter to Rogers signed by Cohen. Attached hereto as Exhibit A is a true and correct copy of the July 16, 2012 extortion letter.

38.

The July 16, 2012 extortion letter states as follows:

> This letter is written on behalf of my client Ms. Mye Brindle. The long history of unwelcome sexual demands and other sexual harassment and abuse toward Ms. Brindle as a condition of her employment is something for which you are well familiar. Thus, I do not intend to belabor those points. The fact that the actions were committed is undeniable and well documented by numerous audio and video recordings of the acts, as well as other evidence, including your seminal fluid and DNA. It is also clear that Ms. Brindle is not alone in having been subjected to your unlawful predatory sexual conduct during the years of her employment. Ms. Brindle is prepared to proceed with a lawsuit, including filing a Charge of Discrimination on the basis of sex

with the Atlanta Regional Office of the Equal Employment Opportunity Commission, due to the sexual abuse and emotional distress you have caused her to suffer over many years. Before going down that path we wanted to provide you with the opportunity to review the issues set forth herein and let us know if you would prefer to attempt to resolve the matter outside of litigation.

Additionally, the facts and circumstances here raise serious questions, at a minimum, as to your continued ability to serve in several public director positions. There is no light under which your actions, including years of adultery and sexual abuse of employees, could be considered appropriate for a public figure role model.

It is my experience that these sensitive type matters involving claims of a sexual nature are always best resolved early and outside of public litigation. I have been involved in numerous matters where defendants engaged in a scorched earth strategy of counteraccusations, denial, attempted delay, obfuscation and refusal to address the core issues promptly and properly. Never have I seen that strategy successful. Whether through their own arrogance or "filtered" information and poor advice of defense counsel who seemed more interested in billing and protracted litigation than the best interests of their clients and that of their clients' families, the results were ultimately the same.

In virtually all of those situations, the documents, facts, witnesses and other matters that came to light through protracted litigation and media attention drew other private litigation, shareholder derivative demands for the immediate removal of those individuals, intrusive governmental investigations, Department of Justice, Attorneys General or SEC involvement, as well as civil and criminal charges that resulted in disgorgement, forfeiture, lengthy incarceration periods in several instances, divorce and the destruction of families.

Ironically, all of those same defendants also eventually settled the civil cases we filed. On the other hand, I have not been involved in any matters where the same problems resulted to any defendants that promptly and fully addressed the issues prior to the initiation of litigation and public focus on the issues.

My point here is simply to attempt to convey my belief that it is in the best interest of all involved to avoid this type of protracted litigation, injurious publicity to all parties, etc.

In summary, I am writing to explore the possibility of scheduling a meeting within the next two weeks with you and/or your counsel to engage in early and substantive discussions focused on resolution of this matter, including a release of all potential claims, past and future. We would of course agree that

any meeting, including anything discussed thereat, be treated as confidential and inadmissible.

If you would like to discuss this matter before we proceed with litigation, please contact me by close of business on Monday July 23, 2012. If we do not hear from you or your counsel before then, we will move forward and assert all available claims for relief.

39.

After receiving the extortion letter, Rogers engaged Robert Ingram, Esq. ("Ingram") and Jeff Daxe, Esq. ("Daxe") with Moore Ingram Johnson & Steele, LLP to represent and advise him in relation to this matter.

40.

On August 2, 2012, after contacting Cohen, Ingram and Daxe met with Cohen, Butters and Dupree.

41.

During the August 2, 2012 meeting, Cohen represented to Ingram and Daxe that Defendants were in possession of multiple video tapes. During the meeting, Defendants showed Ingram and Daxe part of the video recording from the June 20, 2012 sexual encounter between Rogers and Brindle. The illegal video shown to Ingram and Daxe did not depict unwelcome or nonconsensual sexual activity. Ingram and Daxe requested to see the other video recordings which Defendants had represented existed. Defendants refused to show any other videos at that time, and Cohen claimed that the other videos were of poor quality.

42.

On September 14, 2012, in an effort to resolve the matter, Rogers and his counsel participated in mediation with Brindle and Defendants. However, at the mediation, consistent with their scheme, Brindle and Defendants demanded $12 million, and the mediation ended.

43.

After the mediation, litigation ensued between Brindle, who was represented by Defendants, and Rogers. Defendants' scheme continued, and their conduct during this on-going litigation is consistent with and confirms conclusively the nature of their scheme.

44.

Upon the ending of the mediation, Rogers filed an action in the Superior Court of Cobb County (Civil Action No. 12-1-8807-18 ("Cobb County Action")), seeking, among other things, to enjoin Brindle from distributing, disseminating, broadcasting, or otherwise using any recordings which had been made without Rogers' knowledge and consent, including the illegal June 20, 2012 video. After amending his Complaint in the Cobb County Action, Rogers filed a motion to seal the record in that action.

45.

Although Ingram, who represents Rogers in the Cobb County Action, told Defendants that any claims by Brindle would be compulsory counterclaims in the Cobb County Action, on September 19, 2012, Defendants, on behalf of Brindle, filed a Complaint in the State Court of Fulton County, (Civil Action No. 12-EV-015804 ("Fulton County Action")), wherein Defendants and Brindle disclosed in the public record her sexual relationship with Rogers and made frivolous claims related thereto.

46.

On September 24, 2012, the Court in the Cobb County Action heard Rogers' Motion to Seal Record. Thereafter, Brindle and Rogers negotiated a consent order which provided, in part, that the record would be sealed in the Cobb County Action and included a gag order precluding the parties and counsel from discussing the matter.

47.

On September 28, 2012, counsel for Brindle and Rogers submitted the consent order to the Cobb County court which entered it. However, unbeknownst to Rogers and his counsel, after the parties had agreed to the consent order but prior to its entry and on the night before it was submitted to the Court, Cohen took Brindle to the Atlanta Police Department. At approximately 12:15am on September 28, 2012 shortly after midnight, Brindle at the direction of Cohen and with his assistance made a false police report with the Atlanta Police Department wherein she recited almost verbatim the allegations from her Fulton County Complaint. Indeed, Cohen provided the Atlanta Police Department with an electronic file containing Brindle's false allegations so that it could be copied into the police report. Also at that time, the illegal video tape was shown to the Atlanta Police. Soon thereafter, the police report was leaked to members of the media.

48.

On October 5, 2012, Rogers filed a Motion to Seal the Record in the Fulton County Action. On October 8, 2012, the court in the Fulton County Action entered a Temporary Restraining Order limiting access to the record until an evidentiary hearing could be conducted. On October 9, 2012, the court in the Fulton County Action conducted an evidentiary hearing. At the evidentiary hearing, Cohen represented that he had multiple video tapes.

49.

On the record, at the conclusion of the evidentiary hearing in the Fulton County Action, the Fulton County Court granted Rogers' Motion to Seal.

50.

On October 11, 2012, Brindle voluntarily dismissed without prejudice the Fulton County Action.

51.

On October 16, 2012, the Court in the Fulton County Action entered a written Order confirming the oral ruling made on the record during the evidentiary hearing, finding that Rogers had a right to privacy in his bedroom and bathroom and finding that the video recording of Rogers violated criminal statute O.C.G.A. § 16-11-62.

52.

At or around the time that Brindle filed the Fulton County Action, Brindle's Complaint in that action was mailed to the Daily Report. On information and belief, as part of their scheme, Defendants caused Brindle's Fulton County Complaint to be mailed to the Daily Report.

53.

On October 29, 2012, in an effort to appeal the sealing of the record in the Fulton Court Action, Brindle and Defendants filed an Application for Appeal to the Georgia Supreme Court. In the Application, Defendants attached fourteen exhibits but did not file the Application or its exhibits under seal, thereby placing these documents in the public domain. The exhibits attached to the application had been sealed by order in the Fulton County Action, and one of the exhibits had also been sealed by order in the Cobb County Action. The exhibits included excerpts from the transcript of the October 9, 2012 hearing in the Fulton County Action which went into great detail concerning the subject matter at issue.

54.

On November 1, 2012, Rogers filed an Emergency Motion to Seal the case with the Supreme Court of Georgia, which granted the Motion that same day.

55.

Prior to the sealing of the case in the Georgia Supreme Court, the Georgia Supreme Court, however, e-mailed the file to a newspaper reporter for the Marietta Daily Journal. On information and belief, Defendants provided information to the newspaper reporter that the Application had been filed with the Supreme Court so the newspaper reporter could obtain the Application and publish a story about the sexual relationship between Rogers and Brindle and Brindle's related false accusations.

56.

On November 8, 2012, the Marietta Daily Journal published an article entitled "Acworth woman says CEO forced her into sex acts" containing the false allegations against Rogers which Brindle had made in her Complaint in the Fulton County Action and her Counterclaims in the Cobb County Action.

57.

As a result of the Marietta Daily Journal story, numerous news outlets published articles about Brindle's false allegations.

58.

Given that the false accusations had been widely disseminated in the media, Rogers requested the Cobb County Court unseal the case and lift the gag order so that he could respond to these accusations.

59.

On November 14, 2012, the Cobb County Court unsealed the action. After the filing of a motion for contempt, the Cobb County Court entered an Order ordering Brindle and her counsel to deposit into the registry of the Court under seal all original evidence in the form of audio and video recordings and the devices which were used to capture or create any video and audio files within their possession, custody, or control. Accordingly, the recordings are now held by the Cobb County Court under seal.

60.

Eventually, at Rogers' request, the Fulton County Court also unsealed the record in that case.

61.

As a result of Defendants' and Brindle's misconduct in the Fulton County Action, the Fulton County Court granted a motion for attorneys' fees and expenses of litigation filed by Rogers, and ordered that Brindle and Defendant Cohen pay attorney fees and litigation expenses to Rogers in the amount of $142,656.82.

62.

During the Cobb County Action, discovery disputes have arisen between the parties, necessitating the filing of a number of motions to compel by Rogers. In conjunction with Rogers' Third Motion to Compel in the Cobb County Action seeking information about the illegal recording that Defendants claim was privileged, the Court conducted a crime fraud hearing, and thereafter entered an Order granting Rogers' Motion. The Order granting Rogers' Third Motion to Compel in the Cobb County Action included findings that Brindle consented to the sexual activity reflected in the video, and that Brindle's claim that she was a victim of the

crime of sexual battery is extremely unpersuasive. The Cobb County Court further concluded that Rogers had made a *prima facia* showing that Butters' and Cohen's assistance was obtained in furtherance of the illegal activity and was closely related to it, *i.e.*, the crime fraud exception applied.

63.

In the Cobb County Action, Cohen filed an Affidavit sworn to on April 25, 2013 wherein he testifies that he was only aware of one video, the one impounded by the Court, and that he never stated that any other videos exist.

64.

Cohen's April 25, 2013 Affidavit is false.

65.

Although Defendants have repeatedly represented that there were multiple videos, they now claim that there is only one video reflecting sexual activity between Rogers and Brindle, *i.e.*, the June 20, 2012 video. Defendants have therefore knowingly made misrepresentations regarding the number of video recordings, or destroyed the other videos. Either case is further evidence of their wrongful scheme.

66.

There are currently appeals filed by Brindle in the Georgia Court of Appeals related to the Fulton County Courts' order awarding litigation expenses to Rogers, and the Cobb County Court's grant of Rogers' Third Motion to Compel.

67.

Through the design and execution of their scheme, Defendants have engaged in numerous wrongful and tortious acts and in rank bad faith.

68.

As a result of Defendants' wrongful conduct, Rogers has suffered and continues to suffer harm.

COUNT ONE:
INVASION OF PRIVACY – INTRUSION UPON SECLUSION, SOLITUDE AND PRIVATE AFFAIRS

69.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 68 of this Complaint as if fully set forth herein.

70.

Rogers has a constitutional, common law and statutory right to privacy.

71.

Rogers had a reasonable expectation of privacy in his home, and in particular, in his bathroom and bedroom.

72.

By working together and in concert to have Rogers filmed and recorded while engaging in sexual encounters in the privacy of his bedroom without his knowledge or consent, Defendants invaded Rogers' right to privacy.

73.

Defendants' secret and covert filming and recording of Rogers is offensive and objectionable to a reasonable person with ordinary sensibilities under the circumstances.

74.

By filming and recording Rogers in his home without his knowledge or consent, Defendants committed an illegal act by violating O.C.G.A. § 16-11-62. As a result of this criminal act, Defendants are liable *per se* for invasion of privacy.

75.

In invading Rogers' privacy and intruding upon his seclusion and solitude and into his private affairs, Defendants acted with a specific intent to cause harm.

76.

Defendants' invasion into Rogers' privacy and intrusion into his seclusion and solitude and into his private affairs has caused Rogers to suffer damages including mental suffering, emotional distress, and injury to his personal sensibilities and mental repose. Rogers is therefore entitled to recover compensatory damages from Defendants, including general damages, in an amount to be proven at trial.

77.

By engaging in the misconduct described above and invading Rogers' privacy, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT TWO:
INVASION OF PRIVACY – PUBLIC DISCLOSURE OF PRIVATE FACTS

78.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 77 of this Complaint as if fully set forth herein.

79.

Defendants made a public disclosure of private facts of Rogers by causing the disclosure to the public that he was having a sexual relationship with Brindle.

80.

Rogers' sexual relationship with Brindle was private, secluded, and secret.

81.

The public disclosure of the sexual relationship between Brindle and Rogers is objectionable and offensive to a reasonable person. Rogers is therefore entitled to recover compensatory damages, including general damages, in an amount to be proven at trial.

82.

By disclosing publicly private facts about Rogers, Defendants caused Rogers damages including mental suffering, emotional distress and injuries to his personal sensibility and mental repose.

83.

By engaging in the misconduct described above and invading Rogers' privacy, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT THREE:
CIVIL CONSPIRACY

84.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 83 of this Complaint as if fully set forth herein.

85.

Beginning at or around June 2012 and continuing thereafter, Defendants agreed, schemed, combined, and conspired to commit the acts described herein by unlawful means, including but not limited to violation of Title 16 of the Georgia Code, invasion of privacy, intentional infliction of emotional distress, breach of confidential relationship, and theft.

86.

In furtherance of the above described agreement, scheme, and conspiracy, Defendants committed unlawful and overt acts described herein.

87.

The above mentioned overt acts committed in furtherance of the above described agreement, scheme, and conspiracy caused injury and substantial harm to Rogers. Rogers is therefore entitled to recover compensatory damages, including special and general damages, in an amount to be proven at trial.

88.

By engaging in the misconduct described above and engaging in a civil conspiracy, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT FOUR:
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

89.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 88 of this Complaint as if fully set forth herein.

90.

Defendants' illegal videotaping of Rogers and other related wrongful conduct was intentional and reckless.

91.

Defendants' scheme, including their illegal videotaping of Rogers, their attempts to extort money from him, their threats of public disclosure of his private relationship, their causing to be disclosed to the public private information and other invasions of privacy, are extreme, outrageous, and shock the conscience.

92.

As a result of Defendants' wrongful conduct, Rogers has suffered emotional distress which has been severe.

93.

As a result of their wrongful conduct, Defendants are liable for intentional infliction of emotional distress. As a result of their intentional infliction of emotional distress, Rogers is entitled to recover compensatory damages, including general damages, in an amount to be proven at trial.

94.

By engaging in the misconduct described above and intentionally inflicting emotional distress, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT FIVE:
CONSPIRACY TO VIOLATE THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

95.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 94 of this Complaint as if fully set forth herein.

96.

The Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. §§ 16-14-1, *et seq.*, prohibits a conspiracy among persons employed by or associated with any enterprise to conduct or participate in such enterprise through a pattern of racketeering activity.

97.

The association in fact of Defendants for the purpose of illegally extorting money from Rogers is an enterprise.

98.

Defendants are and were associated with the above-described enterprise.

99.

Defendants conspired to conduct or participate, directly or indirectly, in the affairs of the above-described enterprise through a pattern of racketeering activity, including, but not limited to:

(a) Illegally filming Rogers in a private place without his knowledge and consent as part of an extortion scheme;

(b) Attempting to commit theft by extortion in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-16;

(c) Possessing and using an illegal eavesdropping device as part of an extortion scheme;

(d) Filing a false police report in violation of O.C.G.A. § 16-10-26;

(e) Making false statements in violation of O.C.G.A. § 16-10-20;

(f) Attempting extortion in violation of 18 U.S.C. § 1951;

(g) Attempting to commit theft by deception in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-3;

(h) Executing and filing a false Affidavit in violation of O.C.G.A. § 16-10-70 and O.C.G.A. § 16-10-71; and

(i) Committing and attempting to commit theft by taking in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-2.

100.

Defendants in conjunction with each other and individually, committed overt acts in furtherance of the above-described conspiracy.

101.

Rogers was injured and suffered substantial harm by Defendants' overt acts committed in furtherance of the above-described conspiracy.

102.

Rogers is entitled to recover actual and compensatory damages in an amount to be proven at trial and be trebled pursuant to O.C.G.A. § 16-14-6(c).

103.

By engaging in the misconduct described above, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the

specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

104.

As a result of Defendants' violation of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 *et seq.*, Rogers is entitled to recover his attorney's fees in prosecuting his claims.

105.

Rogers is entitled to an order prohibiting Defendants from engaging in the same type of enterprise.

106.

Rogers is entitled to an order dissolving the enterprise.

COUNT SIX:
VIOLATION OF THE GEORGIA RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

107.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 106 of this Complaint as if fully set forth herein.

108.

The Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. §§ 16-14-1, *et seq.*, prohibits persons employed by or associated with any enterprise to conduct or participate in such enterprise through a pattern of racketeering activity.

109.

The association in fact of Defendants for the purpose of illegally extorting money from Rogers is an enterprise.

110.

Defendants are and were associated with the above-described enterprise.

111.

Defendants conducted and participated, directly or indirectly, in the affairs of the above-described enterprise through a pattern of racketeering activity, including, but not limited to:

(a) Illegally filming Rogers in a private place without his knowledge and consent as part of an extortion scheme;

(b) Attempting to commit theft by extortion in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-16;

(c) Possessing and using an illegal eavesdropping device as part of an extortion scheme;

(d) Filing a false police report in violation of O.C.G.A. § 16-10-26;

(e) Making false statements in violation of O.C.G.A. § 16-10-20;

(f) Attempting extortion in violation of 18 U.S.C. § 1951;

(g) Attempting to commit theft by deception in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-3;

(h) Executing and filing a false Affidavit in violation of O.C.G.A. § 16-10-70 and O.C.G.A. § 16-10-71; and

(i) Committing and attempting to commit theft by taking in violation of O.C.G.A. § 16-4-1 and O.C.G.A. § 16-8-2.

112.

Rogers was injured and suffered substantial harm by Defendants' acts committed through a pattern of racketeering activity.

113.

Rogers is entitled to recover actual and compensatory damages in an amount to be proven at trial and be trebled pursuant to O.C.G.A. § 16-14-6(c).

114.

By engaging in the misconduct described above, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their wrongful conduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

115.

As a result of Defendants' violation of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 *et seq.*, Rogers is entitled to recover his attorney's fees in prosecuting his claims.

116.

Rogers is entitled to an order prohibiting Defendants from engaging in the same type of enterprise.

117.

Rogers is entitled to an order dissolving the enterprise.

COUNT SEVEN:
AIDING AND ABETTING BREACH OF CONFIDENTIAL RELATIONSHIP

118.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 117 of this Complaint as if fully set forth herein.

119.

By virtue of their relationship, a confidential relationship existed between Brindle and Rogers which required Brindle to act in the utmost good faith and imposed upon her certain duties including a duty to disclose material facts to Rogers.

120.

By recording Rogers without his knowledge and consent, Brindle breached their confidential relationship. By, among other things, devising and attempting to execute an extortion scheme with Brindle, assisting her in the making of an illegal recording, equipping her with an illegal spy camera, encouraging her to steal personal property, and sending the extortion letter, Defendants aided and abetted Brindle's breach of confidential relationship.

121.

As a result of Defendants' aiding and abetting the breach of confidential relationship, Rogers has suffered damages in an amount to be proven at trial.

122.

By engaging in the misconduct described above and aiding and abetting breaches of a confidential relationship, Defendants have acted with malice, wantonness, oppression, and with a conscious indifference to circumstances and/or with the specific intent to cause Rogers harm. Accordingly, to punish, penalize, and deter Defendants for their tortious and wrongful conduct,

Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT EIGHT: NEGLIGENCE

123.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 122 of this Complaint as if fully set forth herein.

124.

Defendants had a duty imposed by law to respect the privacy rights of others, including Rogers, and not to violate such rights.

125.

Defendants had a duty imposed by law to others, including Rogers, to not use the threat of public disclosure of private facts in an attempt to obtain money from others.

126.

Defendants had a duty imposed by law to others, including Rogers, to not cause the making of false statements to law enforcement agencies and the filing of false police reports.

127.

Defendants should have known that videoing someone in a private place while engaged in sexual activity was illegal and violated the privacy rights of such a person.

128.

Defendants should have known that threatening to disclose publicly private facts about a person violates the law.

129.

Defendants should have known that Brindle did not have any basis to allege that criminal activity had taken place.

130.

By causing a video recording to be made of Rogers engaged in sexual activity in a private place, causing private facts about Rogers to be disclosed publicly, causing Brindle to make false statements to law enforcement agencies about Rogers, and causing the filing of a false police report against Rogers, Defendants breached their duty to Rogers.

131.

By threatening to disclose to the public private facts about Rogers, Defendants breached their duty to Rogers.

132.

By violating numerous Georgia statutes, Defendants were negligent *per se*.

133.

As a proximate result of Defendants' negligence, Rogers has been damaged and is entitled to recover compensatory damages, including general damages, in an amount to be proven at trial.

134.

By engaging in the negligent conduct described above, Defendants have acted with malice, oppression, recklessness and with a conscious indifference to consequences. Accordingly, to punish, penalize and deter Defendants for their misconduct, Rogers is entitled to punitive damages in an amount to be determined by the enlightened conscience of a jury.

COUNT NINE:
LITIGATION EXPENSES

135.

Rogers incorporates by reference the allegations contained in paragraphs 1 through 134 of this Complaint as if fully set forth herein.

136.

Defendants have acted in bad faith, been stubbornly litigious, and have put Rogers through unnecessary trouble and expense.

137.

By engaging in the wrongful conduct described above, Defendants have demonstrated the requisite bad faith for recovery of litigation expenses, including attorney's fees and costs.

138.

Because Defendants have acted in bad faith, been stubbornly litigious, and put Rogers through unnecessary trouble and expense, Rogers is entitled to all litigation expenses incurred in prosecuting this action including, but not limited to, attorney's fees and costs pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Rogers respectfully requests that judgment be entered in his favor against all Defendants, jointly and severally, including but not limited to a judgment granting actual damages, statutory damages, treble damages, punitive damages, exemplary damages, attorney's fees, costs of litigation, special damages, general damages, and all other damages provided by Georgia law and for such other further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands that all claims in this Complaint that are proper for presentation to a jury be tried to a jury.

This 30th day of May, 2014.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEPHEN CHRISTOPHER DIACO,

Respondent.

_____/

Supreme Court Case
No. SC14-1052

The Florida Bar File
No. 2013-10,735 (13F)

THE FLORIDA BAR,

Complainant,

v.

ROBERT D. ADAMS,

Respondent.

_____/

Supreme Court Case
No. SC14-1054

The Florida Bar File
No. 2013-10,736 (13F)

THE FLORIDA BAR,

Complainant,

v.

ADAM ROBERT FILTHAUT,

Respondent.

_____/

Supreme Court Case
No. SC14-1056

The Florida Bar File
No. 2013-10,737 (13F)

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On June 2, 2014, The Florida Bar filed separate Complaints against the Respondents, Stephen Christopher Diaco, Esq. ("DIACO"), Robert D. Adams, Esq. ("ADAMS"), and Adam Robert Filthaut, Esq. ("FILTHAUT"). On June 4, 2014, Amended Complaints were filed against Respondents ADAMS and FILTHAUT. The Honorable W. Douglas Baird was appointed as Referee in each matter pursuant to the Supreme Court of Florida's June 4, 2014 Order and the June 10, 2014 Order of the Honorable J. Thomas McGrady, Chief Judge of the Sixth Judicial Circuit. Because the cases against the Respondents arise out of the same facts, the cases were consolidated for the purpose of discovery on July 28, 2014, and subsequently consolidated for trial. Prior to trial, the Respondents filed motions for partial summary judgment, which were denied on May 11, 2015. The trial was bifurcated, with the guilt phase conducted between May 11, 2015, and May 21, 2015, and the sanctions phase conducted on August 6-7, 2015.

During the course of these proceedings, Respondent DIACO was represented by Gregory W. Kehoe, Esq., Danielle Kemp, Esq., and Joseph A. Corsmeier, Esq. Respondent ADAMS was represented by William F. Jung, Esq.

and Respondent FILTHAUT was represented by Mark J. O'Brien, Esq. The Florida Bar was represented by Jodi A. Thompson, Esq., Sheila Tuma, Esq., and Katrina Brown, Esq. All items properly filed, including pleadings, transcripts, exhibits, and this Report, constitute the record in this case and are being forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT: TFB No. 2013-10,735 (13F); No. 2013-10,736 (13F); No. 2013-10,737 (13F)

A. Jurisdictional Statement

Respondents are, and at all times mentioned during this Investigation were, members of The Florida Bar subject to the jurisdiction and Disciplinary Rules of the Supreme Court.

B. Narrative Summary – all cases

Narrative Summary Introduction

This matter involves three members of The Florida Bar who the Referee finds, individually and through a conspiracy among themselves and others, violated the Standards of Conduct and Rules of Professional Conduct of the Rules Regulating Members of The Florida Bar. The Referee believes that in order to more easily explain the factual circumstances that were proven by clear and convincing evidence at trial, a comprehensive narrative of each of the key findings will provide a more comprehensible format. Preceding that narrative, the major participants in the events that resulted in these proceedings are identified.

Respondent DIACO is an equity partner in the law firm of Adams & Diaco, P.A., whose offices are located in the Bank of America Building in downtown Tampa, Florida. He is the brother of Joseph A. Diaco, Jr., Esq., who is also an equity partner in Adams & Diaco, P.A. Throughout this proceeding, Respondent DIACO has refused to testify, either in deposition or at trial, based on his right against self-incrimination.

Respondent ADAMS is the third equity partner in Adams & Diaco, P.A., along with the Diacos. Throughout this proceeding, Respondent ADAMS refused to answer any questions in deposition, based on his right against self-incrimination. On the morning of trial, with all discovery completed and disclosed by The Florida Bar, he chose to testify.

Respondent FILTHAUT is a non-equity partner (also referred to as an "associate") in Adams & Diaco, P.A. Throughout this proceeding, Respondent FILTHAUT has refused to testify, either in deposition or at trial, based on his right against self-incrimination.

Melissa Personius is, and at all times pertinent to this matter was, a paralegal employed by Adams & Diaco, P.A. She worked primarily for Respondent ADAMS, but was subject to the direction or authority of all the partners, be they equity or non-equity. At the time of the material events, Ms. Personius lived in Brandon, a Tampa suburb, with Kristopher Personius, her ex-husband. Ms.

Personius refused to testify at trial based on her right against self-incrimination. She gave some testimony to the Pinellas County State Attorney's Office investigators and signed a short affidavit prior to these proceedings being brought, but she claimed to have no recollection of many significant portions of the events.

Sergeant Raymond Fernandez was, at all times material to these proceedings, a Sergeant with the City of Tampa, Florida Police Department. He had been with the Department for over 18 years, of which he spent the last 15 years on the Traffic Enforcement Unit. At the time of these events, he was the commander of the Traffic Enforcement Unit, otherwise known as the DUI Squad. Sergeant Fernandez was a close personal friend of Respondent FILTHAUT. Sergeant Fernandez refused to testify at trial based on his right against self-incrimination. Before these proceedings, however, he provided deposition testimony to investigators from the Pinellas County State Attorney's Office and testified at various administrative hearings regarding both the arrest of C. Philip Campbell, Jr., Esq., and his discharge from the Tampa Police Department.

Brian Motroni, Esq., was an associate attorney with the firm of Adams & Diaco, P.A. at all times material to this matter. Mr. Motroni provided some information when he spoke with an investigating attorney for the Thirteenth Judicial Circuit Grievance Committee. At trial, Mr. Motroni refused to testify based upon his right against self-incrimination.

Charles Philip Campbell, Jr., Esq., is a partner in the law firm of Shumaker, Loop, & Kendrick whose offices are also in the Bank of America Building in downtown Tampa. At the time of all relevant events, Mr. Campbell was lead counsel in the *Schnitt v. Clem* trial before Thirteenth Circuit Judge James D. Arnold, a high profile case between two radio "shock jock" personalities. Mr. Campbell represented Todd and Michele Schnitt while Adams & Diaco represented "Bubba the Love Sponge" Clem and Bubba Radio Network. Mr. Campbell testified at trial and the Referee found him to be a credible witness.

Jonathan J. Ellis, Esq., is also a partner in Shumaker, Loop, & Kendrick, and, at all times material to this matter, co-counsel with Mr. Campbell in the *Schnitt v. Clem* litigation.

I.

Respondents DIACO, ADAMS, and FILTHAUT, members of Adams & Diaco, PA, conspired among themselves and with others to deliberately and maliciously effect the arrest of Mr. Campbell, an opposing attorney.

THURSDAY, NOVEMBER 29, 2012 – FIRST ATTEMPTED ARREST

The major events that comprise this narrative occurred between the evening of January 23, 2013, and the afternoon of January 25, 2013. An earlier event, however, puts them in perspective and reveals a pattern of intentional conduct that resulted in these proceedings. The first effort to manipulate the arrest of Mr. Campbell by members of the Adams & Diaco law firm began approximately 60

days prior to January 23, 2013, and were revealed in a deposition of Sergeant Fernandez that was taken prior to the filing of these proceedings.

On the evening of November 29, 2012, Respondent FILTHAUT called his close friend Sergeant Fernandez and said: *"There's this guy that works in my building. He's an attorney. He gets drunk all the time. He goes to Malio's and drinks it up and then he drives home drunk."* Sergeant Fernandez was given the name *"Philip Campbell."* Respondent FILTHAUT did not tell Sergeant Fernandez that Mr. Campbell was the lead opposing attorney in a five-year-old high-profile civil action being defended by Adams & Diaco.

Sergeant Fernandez, based upon the information provided by Respondent FILTHAUT, ordered Officer Michael Lyon of the Tampa Police Department DUI Squad to stakeout Malio's Steakhouse in downtown Tampa, with specific instructions to look for Mr. Campbell. Officer Lyon was given Mr. Campbell's name and a vehicle description. Mr. Campbell was not observed driving that night and no arrest was made. After 45 minutes, the surveillance was discontinued. A compilation of recorded and preserved Tampa Police Mobile Data Terminal ("MDT") text communications between the officers of the DUI Squad on the evening of November 29, 2012, further confirms the effort to look for Mr. Campbell.

Respondent ADAMS admitted during trial that he learned of the November attempt to target Mr. Campbell shortly after it occurred. There was no evidence that he admonished Respondent FILTHAUT for those actions or made any effort to prohibit similar acts in the future.

WEDNESDAY, JANUARY 23, 2013 – THE SETUP AND ARREST

The evening's events played out over a five or six hour period beginning around 5:00 p.m. on January 23, 2013. Following a day in the *Schnitt v. Clem* trial, Mr. Campbell walked from his office to Malio's Steakhouse in downtown Tampa to meet his trial partner, Mr. Ellis, for dinner and drinks.

Ms. Personius had also decided to go to Malio's for drinks after work with her friend Vanessa Fykes. They arrived at Malio's around 5:00 p.m. and had a glass of wine. After a short while, they decided to drive to the Fly Bar, a few blocks away. As they were leaving Malio's, Ms. Personius noticed that Mr. Campbell was at the bar. When Ms. Personius arrived at the Fly Bar, she contacted Respondent ADAMS and informed him that Mr. Campbell was at Malio's. Respondent ADAMS, after notifying Respondent DIACO of the information received from Ms. Personius, called her back. Following the call from Respondent ADAMS, Ms. Personius returned to Malio's.

Although she refused to testify at trial, Ms. Personius previously admitted during the State Attorney's investigation: *"I offered—I believe I offered to just go*

back if they needed, you know, anything, any other–to see maybe if he's still there. I don't know. Whatever information the police or authorities needed." She also admitted knowing that*"[t]he Police have a contact."* Sergeant Fernandez, in earlier sworn testimony, admitted that the "contact" that night was his close friend, Respondent FILTHAUT.

While Ms. Personius was returning to Malio's, Respondent ADAMS, after discussions with Respondent DIACO, called Respondent FILTHAUT to alert him that Mr. Campbell was at Malio's. As he had done two months earlier, Respondent FILTHAUT called Sergeant Fernandez to again encourage him to stakeout Malio's with the intent of arresting Mr. Campbell for Driving under the Influence. Sergeant Fernandez testified that he asked Respondent FILTHAUT, *"Is that the guy you called me about before?"* Respondent FILTHAUT acknowledged that it was and told Sergeant Fernandez, *"Hey, the attorney that's in my building, he's out drinking again at night at Malio's."* He also told Sergeant Fernandez, *"He's going to drive home again tonight drunk."* Sergeant Fernandez told Respondent FILTHAUT, *"Well, we didn't get him last time. We'll sit on him again and see what he does."* Respondent FILTHAUT again failed to tell Sergeant Fernandez that Mr. Campbell was the opposing attorney in the much-publicized and ongoing *Schnitt v. Clem* trial.

Sergeant Fernandez assigned a member of his DUI Squad, Officer Joseph Sustek, to sit outside of Malio's and look for Mr. Campbell's black BMW. Shortly after 8:00 p.m. that night, Sergeant Fernandez and another member of the DUI Squad, Officer Tim McGinnis, took up the surveillance and relieved Officer Sustek. During the evening, Sergeant Fernandez received periodic updates about what Mr. Campbell was doing inside Malio's by text or voice call from Respondent FILTHAUT.

While Sergeant Fernandez was setting up his surveillance for Mr. Campbell, Ms. Personius and Ms. Fykes had returned to Malio's. Ms. Personius took a seat at the bar next to Mr. Campbell. From about 7:00 p.m. until about 9:45 p.m., she engaged in conversation with Mr. Campbell, Mr. Ellis, and attorney Michael Trentalange. She told them that she was a paralegal working for Nathan Carney, Esq., at the firm of Trenam Kemker. She openly and obviously flirted with Mr. Campbell, encouraged him to drink, and bought him drinks herself.

While the drinking and conversation were occurring that night, Ms. Personius managed to carry on a steady series of cell phone texts and calls with each of the Respondents. For example, between 6:30 p.m. and 9:30 p.m. that night Ms. Personius either sent or received approximately 19 separate communications with Respondent FILTHAUT. During that same period, she had approximately 17 communications with Respondent ADAMS, and approximately 11 with

Respondent DIACO. In the half hour between 9:30 p.m. and 10:00 p.m., the approximate time Sergeant Fernandez pulled Mr. Campbell and Ms. Personius over after they left Malio's, Ms. Personius had approximately another 12 communications with Respondent FILTHAUT, 7 with Respondent ADAMS, and 2 with Respondent DIACO. The Florida Bar's Exhibit 59 provides a minute-by-minute chart of the dozens of cell phone communications that were occurring between the Respondents and Ms. Personius, as well as those among the Respondents themselves. The actual substance of those text messages is not known. If the Respondents' phones still exist, they chose not to produce them. Ms. Personius disposed of her phone before these proceedings began, and Sergeant Fernandez previously testified that all his texts were erased when he put some new software on his phone. It was obvious, however, from the recorded and preserved Tampa Police MDT text messages between patrol vehicles that night that Ms. Personius was providing Respondent FILTHAUT with regular updates. He passed on those updates to Sergeant Fernandez, who in turn, communicated them to Officers Sustek and McGinnis. At one point, Officer Sustek sent a MDT text to Sergeant Fernandez asking if he was going to be informed when Mr. Campbell left Malio's. Sergeant Fernandez replied that he was. That exchange was around 8:17 p.m., long before Mr. Campbell had left. It confirmed not only that Sergeant

Fernandez was being updated, but also that whoever was doing the updating intended to remain at Malio's until Mr. Campbell decided to leave.

By 9:30 p.m. to 9:45 p.m., Ms. Fykes and Mr. Ellis had left Malio's. Mr. Trentalange was leaving to make a 9:45 p.m. dinner reservation. During the evening, Ms. Personius learned that Mr. Campbell had walked to Malio's, did not have a car there, and that he intended to also walk the few blocks home. That was not out of the ordinary for Mr. Campbell, as was confirmed by the testimony of bartender Denise DiPietro, restaurant manager Dina Kuchkuda, Mr. Ellis, and attorney Michael Trentalange, all of whom the Referee found credible. In fact, Mr. Trentalange had a specific conversation with Mr. Campbell that night about his plans for the evening. Mr. Campbell told Mr. Trentalange that he planned to go home and be in bed around 10:00 p.m. and get up at 2:00 a.m. to work on the next day's witness testimony for the ongoing jury trial, then in its second week. Mr. Trentalange had known Mr. Campbell professionally for a number of years and testified that this was a routine Mr. Campbell regularly followed during jury trials.

Some of the witnesses who observed Ms. Personius that evening testified that she appeared to be intoxicated. That was certainly the opinion of Ms. Fykes, who, before leaving, told her not to drive and to call a cab. Mr. Campbell also felt that she was intoxicated and, as they were leaving, offered to call her a cab. She told him that her car was in valet parking. Mr. Campbell said he would see if it

could be kept overnight in the parking garage. Ms. Personius then told Mr. Campbell that she needed to get to her car. Mr. Campbell took her valet ticket to the attendant and had the car brought up. Mr. Campbell confirmed with the attendant that the car could be left overnight.

At that point, Ms. Personius refused to leave her car and insisted that it needed to be in a secure public parking lot where she could have access to it. Mr. Campbell tried to convince her to leave the car, but she maintained that it had to be moved[1]. Out of frustration, Mr. Campbell agreed to move the car to a lot near his apartment building and to call her a cab from there. Mr. Campbell fully admitted that she never asked him directly to drive her car. He chose instead to run the risk of a two-minute drive as a favor to someone who appeared too impaired to drive safely. Mr. Campbell was unaware that the self-professed paralegal from Trenam Kemker was feigning being stranded and, at that point and throughout the evening, was plotting with the Respondents to have him arrested.

The video of the parking lot area, which Mr. Campbell narrated during his testimony, shows that these events occurred between approximately 9:40 p.m. and 9:57 p.m. The timing is noteworthy. Cell phone call and text records show that at

[1] In reality, Ms. Personius was easily able to get herself and her car home that evening without any assistance from Mr. Campbell. Later she was quickly able to arrange, through her constant contact with the Respondents, for Mr. Motroni to be dispatched for that purpose. The fact that this alternative was not exercised until after Mr. Campbell drove into the waiting police stakeout is further confirmation of their intent to effect his arrest.

9:28 p.m., Ms. Personius sent a text to Respondent DIACO. Immediately thereafter, Respondent DIACO made a phone call to Respondent FILTHAUT. Immediately following that, Respondent FILTHAUT sent a text to Sergeant Fernandez. One minute later, at 9:29 p.m., Sergeant Fernandez sent a MDT text message to Officer McGinnis, who was part of the stakeout, which read *"leaving bar now,"* referring to Mr. Campbell. Since Mr. Campbell had hardly walked out into the parking area before this whole exchange, it clearly demonstrates how diligently Ms. Personius was keeping the Respondents informed about what was happening. Her information was immediately relayed to the DUI Squad through Respondent FILTHAUT's communication with Sergeant Fernandez.

When Sergeant Fernandez informed Officer McGinnis that Mr. Campbell was leaving the bar at Malio's, both officers were under the impression that Mr. Campbell would be driving his black BMW. Officer McGinnis sent an MDT text to Sergeant Fernandez which read *"blk convertible?"* At 9:31 p.m., Sergeant Fernandez replied *"BMW_yes."* At the same time, Ms. Personius was having her own text exchanges. At 9:32 p.m., she received a text from Respondent FILTHAUT. At 9:35 p.m., she received a text from Respondent DIACO. At 9:36 p.m., she sent a text to Respondent FILTHAUT. At 9:37 p.m., she got a text back from Respondent FILTHAUT. At 9:39 p.m., she got another text from Respondent FILTHAUT. At 9:42 p.m., she got another text from Respondent FILTHAUT.

Immediately after, she made a 57 second phone call to Respondent FILTHAUT, which was followed by another text from Respondent FILTHAUT at 9:44 p.m. She immediately made another phone call to Respondent FILTHAUT, that one lasting 53 seconds. At 9:45 p.m., she sent a text to Respondent FILTHAUT. At 9:48 p.m., she got a text from Respondent ADAMS, which was immediately followed by a call to Respondent ADAMS at 9:49 p.m. that lasted 46 seconds. She then received a text from Respondent ADAMS at 9:52 p.m. At 9:53 p.m. and 9:54 p.m., she got texts from Respondent FILTHAUT. During that same minute, she got a text from Respondent DIACO and sent another to Respondent ADAMS. During these exchanges, Ms. Personius obviously informed Respondent FILTHAUT that Mr. Campbell did not plan to leave Malio's in his own vehicle, since he didn't have one there, and instead would be driving her Nissan. Some or all of this was passed on to Sergeant Fernandez who, at 9:51 p.m., sent another MDT text to Officer McGinnis that read *"dark Nissan...valet malios."* Sergeant Fernandez asked Officer McGinnis to drive by Malio's to *"see if you see it"* at 9:51 p.m. Officer McGinnis did so and reported back *"female driving"* at 9:54 p.m.

Officer McGinnis had been misled into believing a female would be driving because he had observed Ms. Personius near the driver's door of her car at Malio's valet stand. However, the Respondents knew that Mr. Campbell would be driving, because Ms. Personius had told them. It was therefore unnecessary to advise

Sergeant Fernandez about anything other than which car he was to target. As Mr. Campbell pulled out of Malio's parking lot at approximately 9:57 p.m. that night, the Respondents and their employee, Ms. Personius, knew that the trap was set.

Almost immediately after the Nissan left Malio's, Sergeant Fernandez, who was off duty and driving an unmarked car, pulled Mr. Campbell over for a traffic stop. He claimed that Mr. Campbell had made an illegal right turn from a through lane on Ashley Street across a right turn lane and into an intersecting street. No one else observed this driving. Officer McGinnis arrived immediately thereafter, and Sergeant Fernandez turned Mr. Campbell over to him for what became a typical DUI investigation. Mr. Campbell was arrested, handcuffed, and taken to the County Jail.

Although the law provides that vehicles used in a DUI be impounded, Sergeant Fernandez, as leader of the unit, was authorized to waive that requirement if a sober driver was available. He did so after more text messages with Respondent FILTHAUT. Sergeant Fernandez had already communicated to Respondent FILTHAUT that he could not release the car to Ms. Personius because her driver's license was suspended. Phone records show that Ms. Personius, after several conversations with Respondent ADAMS, called associate Mr. Motroni, who was dropped off at the scene.

Mr. Motroni drove Ms. Personius and her car to her home in Brandon. Waiting for her there, and caring for their two children, was her ex-husband and then current roommate Kristopher Personius. The Personius's marriage had been dissolved for seven years, but their relationship continued. At trial, Mr. Personius testified to the following: when Ms. Personius arrived home she admitted to him in an excited state that she had participated in setting up Mr. Campbell at the direction of her employers, specifically Respondent ADAMS and Respondent DIACO. She told him that the Respondents were looking to set Mr. Campbell up, that she had been directed to go to Malio's to spy on him and *"get him to stay longer and drink more,"* and that Respondent DIACO and Respondent ADAMS were *"going to Adam Filthaut, too, to get the cop in place."* Ms. Personius also said that she had made Mr. Campbell drive and told her ex-husband that she *"got him"* and *"made him drive my car."* Mr. Personius further testified that Ms. Personius stated that Respondent DIACO had told her that she would receive a big bonus and would be his best-paid paralegal. All of these admissions occurred in the presence of not only Mr. Personius, but also Mr. Motroni who, after driving her car home, was waiting for a cab. Mr. Motroni refused to testify at trial on Fifth Amendment grounds.

Credible support for Mr. Personius's account of the evening's events came from another witness at trial, Lyann Goudie, Esq. Ms. Goudie is a former

prosecutor and experienced criminal defense attorney in Tampa. After the arrest of Mr. Campbell and the intense media attention that followed, Mr. and Ms. Personius were still living together in Brandon when the FBI arrived on the morning of May 23, 2013, with a search warrant. Several days later, Mr. Personius was contacted by an FBI representative who wanted to discuss the events of January 23, 2013. Mr. Personius told his ex-wife about the call, and she told him not to talk to them. Immediately thereafter, Ms. Personius's attorney, Todd Foster, who was being paid by Adams & Diaco, arranged for Mr. Personius to consult with Ms. Goudie. Adams & Diaco also paid Ms. Goudie $2,500 for her representation of Mr. Personius. Mr. Personius's knowledge of events was important enough to Adams & Diaco that they paid for an attorney to represent him before the FBI. Yet, each Respondent failed to disclose Mr. Personius as a person with knowledge of the events of January 23, 2013, in response to The Florida Bar's interrogatories during discovery in this matter.

At trial, Ms. Goudie testified that Mr. Personius had waived the attorney/client privilege regarding her representation of him, and she was free to answer any questions about their privileged discussions. She then described how Mr. Personius had come to her in early June 2013, because the FBI wanted to talk with him. He told her that the publicity regarding his ex-wife's role in the Campbell matter had hurt his teenage daughters because their unusual last name

was so recognizable, and he didn't want to get drawn in further. Ms. Goudie further testified that Mr. Personius related to her the events that occurred when Mr. Motroni brought Ms. Personius home after Mr. Campbell's arrest on January 23, 2013. Her recounting of his description of the events of that night was consistent with the testimony Mr. Personius gave at trial.

During Ms. Goudie's consultation with Mr. Personius, he voiced no animosity toward his ex-wife or her employer. Essentially, he wanted to avoid any involvement and be left alone. Further, during that consultation, Mr. Personius also advised Ms. Goudie that he had recorded a video that night on his cell phone that included his wife's admissions regarding the plan to set up and arrest Mr. Campbell. Ms. Goudie told him that the recording might be considered illegal if it was done without the consent of his ex-wife, and that if he was going to share it with anyone, it should be the FBI. According to allegations contained in motions filed prior to trial, the recording that Mr. Personius made of his ex-wife on the night of January 23, 2013, is now in the possession of the FBI. It was not offered into evidence at the trial and its contents are unknown to the Referee. But the testimony that Mr. Personius gave at trial, regarding the admissions of his ex-wife on the night of Mr. Campbell's arrest, is credible not only because it was not recently fabricated, but also because it was supported by the other credible evidence and testimony in the case.

Ms. Personius's active participation in the events surrounding the set up and arrest of Mr. Campbell essentially ended when Mr. Motroni drove her home that night in her car. However, before moving on to subsequent events, there are additional facts regarding her participation that require some comment. The first fact concerns the state of Ms. Personius's sobriety that night. It was previously noted that several people commented that she appeared intoxicated during the evening. That was the impression Mr. Campbell testified he had at the time he decided to leave Malio's. Regardless of the amount of alcohol she consumed that night, the evidence clearly shows that Ms. Personius was capably providing the Respondents with a constant stream of texts and voice calls from the time she first noticed Mr. Campbell at Malio's through the events that led to his arrest and thereafter. Ms. Personius was also alert enough regarding what she had said and done that night to attempt to cover her tracks. Early the next morning, she texted Nate Carney: *"if someone calls looking for me tell them you don't know me or don't tell them who I am."* Mr. Carney, who testified at trial, was the attorney at Trenam Kemker that Ms. Personius falsely told Mr. Campbell and Mr. Ellis she worked for. The Referee found Mr. Carney's testimony to be credible. Two days later, Ms. Personius also called and left a message on Vanessa Fykes phone to let her know that an investigator for Adams & Diaco would be calling her to "prep" her regarding any questions about the evening's events that she might subsequently

be asked. Ms. Fykes, after seeing news reports the morning following the arrest, cut off any further communication with Ms. Personius. Ms. Fykes also refused to return numerous calls from the Adams & Diaco investigator and those of Respondent DIACO himself. The Referee also found her testimony regarding these events to be credible.

When called to testify at trial, Ms. Personius refused to answer every question that she was asked after giving her name. She claimed her right to remain silent under the Fifth Amendment. She had also made the same assertion of rights before Judge Arnold when she was asked about the events of the night of January 23 during the hearing on the Motion for Mistrial in the *Schnitt v. Clem* case. In doing so, she subjected herself and the Respondents to the adverse inferences that are appropriate to impose, given the nature of all the other evidence in this case. *Coquina Investments v. TD Bank, N.A.,* 760 F.3d 1300 (11th Cir. 2014); *Atlas v. Atlas,* 708 So. 2d 296, 299 (Fla. 4th DCA 1998).

Prior to this matter being filed, when Ms. Personius was interviewed by the Pinellas County State Attorney's Office regarding Mr. Campbell's DUI charge (it had been transferred from Hillsborough), she admitted her involvement. When she was questioned regarding her many phone calls and text messages with the Respondents that evening, however, she consistently denied any recollection. Given the sheer volume of texts and phone calls and the significance of the night,

that was simply not credible. In addition, the fact that she continues working for the Respondents' firm, that she received a $9,000 bonus for 2013, a $6,500 raise, and a credit card paid for by Adams & Diaco all support the conclusion that her conduct on the night of January 23, 2013, was known and approved by the Respondents.

The active participation of all of the Respondents in the effort to effect the arrest of Mr. Campbell is beyond dispute. Respondent DIACO directed Respondent ADAMS to call Respondent FILTHAUT when he first learned that Mr. Campbell was at Malio's that evening. Respondent DIACO was aware that Respondent FILTHAUT's close relationship with Sergeant Fernandez would result in the Tampa Police Department's DUI Squad making another special effort to target Mr. Campbell, as it had attempted in November. Respondent DIACO was aware that Ms. Personius was drinking with Mr. Campbell at Malio's and that she was passing on updates regarding their activities to him and the other Respondents. He was aware that her information was being shared with Sergeant Fernandez on a regular basis through Respondent FILTHAUT. He was aware that Mr. Campbell would be driving Ms. Personius's car from Malio's and that the vehicle information had been provided to Sergeant Fernandez. He maintained constant contact with the other Respondents throughout the evening as the plan progressed, and did nothing to discontinue the effort directed at Mr. Campbell's arrest.

Respondent DIACO was an attorney with supervisory authority over Respondent FILTHAUT, associate Mr. Motroni, and nonlawyer employee Ms. Personius. Respondent DIACO failed or refused to properly supervise Respondent FILTHAUT, associate attorney Mr. Motroni, and nonlawyer employee Ms. Personius that evening and thereafter.

Respondent DIACO refused to testify for a deposition and at trial on Fifth Amendment grounds. When questioned by Judge Arnold regarding the evening of January 23 during the *Schnitt v. Clem* case, he either invoked his right to the Fifth Amendment, claimed he could not recall conversations or events that occurred less than 48 hours earlier, or denied any active participation. Respondent DIACO's memory had improved by the time he filed an affidavit on March 4, 2013, in opposition to a Motion for New Trial in *Schnitt v. Clem.* Respondent DIACO swore that his involvement in the events of the night of Mr. Campbell's arrest consisted of "*respond[ing] to requests for information made by the Tampa Police Department.*" That statement is so misleading and so far from the truth regarding the known events of that night that it amounts to a deliberate falsehood. The Referee infers from Respondent DIACO's silence at trial that truthful responses

would have further demonstrated his complicity in the conspiracy proven by clear and convincing evidence to exist. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).[2]

Respondent ADAMS was also a major participant in the conspiracy to effect the arrest of Mr. Campbell. The clear and convincing evidence establishes that he was aware of the November 29, 2012 attempt to arrest Mr. Campbell. He did not advise Respondent FILTHAUT against using his friendship with Sergeant Fernandez to effect the arrest of Mr. Campbell. Instead, he called Respondent FILTHAUT early on the evening of January 23, 2013, at the request of Respondent DIACO, to accomplish a DUI Squad stakeout of Malio's with the specific intent of seeking Mr. Campbell's arrest. He was aware that Ms. Personius was drinking with Mr. Campbell at Malio's and that she was passing on updates regarding their activities to him and the other Respondents. He was aware that her information was being shared with Sergeant Fernandez on a regular basis through Respondent FILTHAUT. He was aware that Mr. Campbell would be driving Ms. Personius's car from Malio's and that the vehicle information had been provided to Sergeant Fernandez. He maintained constant contact with the other Respondents throughout the evening as the plan progressed and did nothing to discontinue the effort to

[2] The Florida Bar has also cited *The Florida Bar v. Garcia*, 31 So. 3d 782 (Fla. 2010) to support the proposition that the Referee may impose an adverse inference against the Respondents as a result of their refusal to testify on Fifth Amendment grounds. *Garcia* is an unreported case and the Referee has no access to an opinion or the record to confirm The Florida Bar's assertion.

arrest Mr. Campbell. Respondent ADAMS was an attorney with supervisory authority over Respondent FILTHAUT and nonlawyer employee Ms. Personius. Respondent ADAMS failed or refused to properly supervise Respondent FILTHAUT and nonlawyer employee Ms. Personius on that evening or thereafter.

Respondent ADAMS also twice refused to answer any questions regarding his conduct at depositions scheduled by The Florida Bar during these proceedings. His counsel maintained, until the morning of trial, that Respondent ADAMS and the other Respondents would not testify based upon their Fifth Amendment rights against self-incrimination. On the first day of trial, after Respondent DIACO had so refused, Respondent ADAMS took the witness stand and indicated that he would testify. The Florida Bar was unprepared to proceed regarding Respondent ADAMS, since he had twice before declined to answer any questions in discovery. The Referee allowed a short recess of the trial for the purpose of permitting The Florida Bar to depose Respondent ADAMS before he testified.

When he again took the witness stand, Respondent ADAM's testimony was crafted to admit those facts that he knew from discovery he could not deny and to present a set of circumstances that put him in the most favorable light possible. Much of his testimony concerned the content of text messages and phone communications during January 23-24, 2013, between himself, the other Respondents, and Ms. Personius — all of which Respondent ADAMS admitted he

had deleted. His testimony about this unverifiable content defied common sense and was inconsistent with the other evidence presented at trial. Thus, while Respondent ADAMS avoided the adverse inference that could be properly imposed for his refusal to testify, his less-than-credible testimony given at the eleventh hour did nothing to aid in his defense.

Respondent FILTHAUT's close personal relationship with Sergeant Raymond Fernandez was the single most important factor that allowed the Respondents to plot the arrest of Mr. Campbell. Without the trust and long years of friendship that existed between Respondent FILTHAUT and Sergeant Fernandez, it seems doubtful that the Tampa Police Department would have devoted the resources to spend the better part of three hours staking out a bar for one potentially impaired driver on the unverified "tip" of one citizen. The fact that the DUI Squad did this, not once, but on two separate occasions is a testament to the influence Respondent FILTHAUT was able to exert. To accomplish that, Respondent FILTHAUT betrayed the trust of Sergeant Fernandez by lying to him regarding Mr. Campbell's habit of drinking and driving. The Respondents produced no evidence at trial regarding Mr. Campbell's drinking habits. Nothing was offered to suggest, as Respondent FILTHAUT had assured his friend, that Mr. Campbell *"gets drunk all the time. He goes to Malio's and drinks it up and then he drives home drunk."* The evidence at trial was just the opposite. Both the bartender

and the manager at Malio's testified that Mr. Campbell would come in one or two times a week, have one or two drinks, and walk home to his apartment. Respondents made no attempt to prove otherwise.

The most important information that Respondent FILTHAUT knew about Mr. Campbell and the events taking place at Malio's was withheld from his friend. Sergeant Fernandez was never told that Mr. Campbell was the opposing attorney in a multi-million dollar lawsuit that Adams & Diaco, P.A. were defending. Nor was Sergeant Fernandez told that the person inside Malio's who was providing the information about Mr. Campbell's status was an Adams & Diaco employee who was buying him drinks while she passed on information to the Respondents. He learned of Mr. Campbell's position as an opposing attorney the next morning when the arrest became headline news. Sergeant Fernandez confronted his friend about failing to share that important fact. Respondent FILTHAUT responded, *"Well, Ray, what's the big deal?"* Sergeant Fernandez was later discharged from the Tampa Police Department as a result.

Respondent FILTHAUT, in addition to misleading his friend in furtherance of the conspiracy, played an active role in orchestrating the events of January 23, 2013. He maintained regular contact with the other Respondents, Ms. Personius, and Sergeant Fernandez throughout the evening as the plan progressed, and did nothing to discontinue the effort directed at Mr. Campbell's arrest. Respondent

FILTHAUT's immediate and direct connection to the commander of the Tampa Police DUI Squad allowed him to coordinate the arrest by passing on exactly where Mr. Campbell was, what he was doing, when he was doing it, and what car to target when the time came.

Respondent FILTHAUT also twice refused to be deposed regarding the events surrounding these proceedings and refused to answer any questions at trial, based upon his right against self-incrimination under the Fifth Amendment. He specifically refused at trial to respond to a question confirming that he had erased, secreted, or otherwise destroyed the actual cell phone messages that would constitute direct evidence of the nature of his communications that night. The Referee has indulged all the adverse inferences that may permissibly be imposed as a result. *Martino v. Wal-Mart Stores Inc.*, 835 So. 2d 1251 (Fla. 4th DCA 2003); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Atlas v. Atlas,* 708 So. 2d 296, 299 (Fla. 4th DCA 1998); *Fraser v. Security and Investment Corporation*, 615 So. 2d 841 (Fla. 4th DCA 1993); *New Hampshire Ins. Co., v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990). In addition, the wealth of testimony provided by Sergeant Fernandez in various forums before these proceedings were commenced further confirmed that Respondent FILTHAUT's active participation is beyond dispute.

Respondent FILTHAUT, through his counsel's opening statement and his arguments regarding the "guilt phase" and the "sanctions phase" of the trial, suggested that he was only an associate at Adams & Diaco and that his participation in the setup and arrest conspiracy was solely the result of following the orders of his superiors, presumably Respondents DIACO and ADAMS. That variation of the Nuremburg Defense is only available when the conduct ordered is *"in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."* Rule 4-5.2. The Referee finds that using a nonlawyer employee to set up the opposing attorney for arrest in a multi-million dollar, high profile jury trial doesn't conceivably fall within that exception.

II.

Respondent DIACO, following an 8:30 a.m. hearing on January 24, 2013, during which all parties agreed to a brief continuance of the ongoing jury trial, made public statements to the news media criticizing the conduct of Mr. Campbell and falsely claiming that Respondent did not agree with the recess of the trial. Respondent DIACO's comments failed to disclose his own active participation in the events that resulted in the recess or the participation of Respondents ADAMS, FILTHAUT, and others.

On the morning of January 24, 2013, Mr. Ellis, Mr. Campbell's co-counsel, asked Judge Arnold for a recess in the *Schnitt v. Clem* trial. He proposed giving the jury the day off and working on jury instructions instead. Mr. Campbell's trial bag containing all of his notes and witness preparation for that morning's testimony had been left in the back seat of Ms. Personius's car when the arrest occurred.

Judge Arnold had previously planned to recess after the morning session, even before Mr. Campbell's arrest. In light of the disruption caused by the arrest and Mr. Campbell's inability to locate his trial bag, counsel for all parties agreed to the recess as a professional courtesy. It was decided that testimony would resume the next day. While Mr. Campbell and his partner continued their search for the missing trial bag, Respondent DIACO appeared outside the courthouse and gave interviews to the media about the case. These are examples of some of the statements Respondent DIACO made that appeared later that day as sound bites on various local television news programs:

> *"Well, you know, I'm shocked that the case was continued. I feel horrible for this jury that has been sequestered and pulled from the jobs, their lives, their families. And so now we have to wait."*

> *"Well, you know, I don't know exactly what the jury has been told, and, you know, they are supposed to be sequestered and not watching the news or hearing the reports, but this is front page news now."*

> *"And this is his second time. So it's just –you know, the whole thing makes me embarrassed to be an attorney, and I'm ashamed of all this whole process has continued to be a mockery of the system. But we believe in the system. We believe in the jury, and we're going to let Bubba's peers decide this case."*

> *"We were prepared for today. We were working last night in preparation for the trial. And so now we have to wait. The jury has to wait, and we have to see how this plays out. I don't understand why his other partners who have been in there every single day of the trial, can't continue this case."*

"I hope he gets help. My partner and Greg Hearing were working on this trial last night. Phil didn't seem to be doing the same. And now we're being penalized."

"Shocked, shocked, disappointed, sad, sad for the jury having to be taken out of their lives another day that this is continued. Two other partners have been trying this case every single day. I don't understand why it was continued."

"To his advantage, now he gets a good night's sleep. Now he gets to prepare his witnesses."

"His last DUI was almost twice the legal limit. He didn't learn his lesson."

At the time those statements and others of a similar nature were made, Respondent DIACO knew that his firm and all other counsel had agreed to the short recess. He also knew, or should have reasonably anticipated, that his statements would receive a great deal of public exposure in the media. They did. The next day, partially as a result of those statements, Mr. Ellis moved for a mistrial in *Schnitt v. Clem*. Judge Arnold felt compelled to question each of the jurors to determine if they had seen or heard anything regarding Mr. Campbell's arrest. One juror had learned of Mr. Campbell's arrest, but Judge Arnold was satisfied that the trial could go forward. Respondent DIACO offered no evidence at trial to explain why he made false statements to the news media about the short stipulated recess of the trial, and there was no explanation for his public "piling on" of Mr. Campbell. Nor was there evidence presented at trial to justify Respondent DIACO's efforts to publically criticize and humiliate Mr. Campbell in

the media when Respondent had full knowledge of the part he and the other members of his firm played in the arrest. The Referee infers, from Respondent DIACO's refusal to testify regarding these issues, that his purpose in making those public statements was to potentially influence any jurors that might have heard them and to otherwise gain an advantage in the ongoing trial.

III.

On January 24, 2013, Respondents DIACO and ADAMS became aware that the trial bag belonging to Mr. Campbell had been left in the car of Adams & Diaco, P.A.'s paralegal Ms. Personius. Neither Respondent DIACO, Respondent ADAMS, nor Brian Motroni, another member of the firm who also learned this fact, made any effort to immediately return Mr. Campbell's property to him or to advise him that it was in their possession.

On the morning of January 24, 2013, testimony in the *Schnitt v. Clem* trial was scheduled to resume at 9:00 a.m. After his release from jail at approximately 6:30 a.m., Mr. Campbell and Mr. Ellis began their search for Mr. Campbell's missing trial bag. Initially, it was presumed that this would simply involve contacting Trenam Kemker and retrieving the bag from the car of their paralegal. Upon inquiring, they learned that there was no paralegal named "Melissa" at Trenam Kemker. The trial bag was still not located when Mr. Campbell and Mr. Ellis entered the courtroom for the continuation of the trial. Judge Arnold considered the circumstances of Mr. Campbell's arrest and was amenable to Mr. Ellis's Motion for Recess, delaying testimony until the next day. All counsel

agreed, out of professional courtesy to Mr. Campbell, to give the jury the day off. Counsel were to remain for a jury instruction conference that morning. After the morning session, Mr. Campbell and Mr. Ellis went back to their office to continue the search for the missing trial bag.

Between 10:00 p.m. on January 23, 2013, and approximately 5:00 p.m. on January 24, 2013, Mr. Campbell's trial bag containing his notes and witness preparation material was out of his possession. Mr. Ellis and Mr. Campbell did not discover who had possession of the bag until around 4:00 p.m. on January 24. During that 19-hour period, the bag was in the sole possession of members of the Adams & Diaco firm or their employees.

The evidence regarding who possessed the bag, for how long, and what was done with it was derived almost exclusively from four sources. First, there was testimony from Respondent DIACO, Ms. Personius, and associate Mr. Motroni at a hearing on a Motion for Mistrial before Judge Arnold on the afternoon of January 25, 2013. Secondly, there was testimony from Ms. Personius given on May 23, 2013, during the DUI investigation. Thirdly, there were statements made by Mr. Motroni before Richard Martin, Esq., the investigating member to the Thirteenth Circuit Grievance Committee on April 30, 2014. Finally, though Respondent DIACO, Ms. Personius, and Mr. Motroni each refused to testify at trial regarding this matter on Fifth Amendment grounds, there was the trial testimony of

Respondent ADAMS. His testimony, however, was given after twice refusing to answer questions at scheduled depositions and after all other discovery was completed and disclosed. In the testimony prior to trial and at the trial itself (in regard to Respondent ADAMS only), the account of the possession and activity surrounding Mr. Campbell's trial bag was consistent. Mr. Personius also confirmed some aspects of the saga involving the discovery of the bag and its eventual return, although it is difficult to ascertain whether his knowledge was first hand or as a result of what Ms. Personius told him. The following is their account, pieced together from the various sources in the record and at trial.

The morning after Mr. Campbell's arrest, Ms. Personius was told not to come into the office. Around noon, Ms. Personius claimed she discovered Mr. Campbell's briefcase on the back seat of her car and called Respondent ADAMS to tell him. Respondent ADAMS saying he was too busy to deal with it, told Respondent DIACO about it. Respondent DIACO told him that he would take care of it, and tasked Mr. Motroni with retrieving the briefcase. The pass card records for the garage indicated that Mr. Motroni's car left the Bank of America building at 1:46 p.m.

Mr. Motroni claimed that upon arriving at the Personius home, he discovered that the briefcase was a large trial bag. Mr. Motroni called Respondent DIACO at 2:07 p.m. and was instructed to bring the trial bag to the Adams &

Diaco offices. The pass card records indicate that he re-entered the building's parking garage at 2:19 p.m. The bag remained at the Bank of America building from then until Mr. Motroni and Respondent DIACO left with the bag at 3:23 p.m. There was never a logical explanation given why Respondent DIACO, or Mr. Motroni, or some other member of the firm had not simply walked the trial bag to the Shumaker, Loop & Kendrick's offices in the same building. Nor was it ever explained why Mr. Campbell, or anyone at Shumaker, Loop & Kendrick, was not notified that his trial bag was in the building and that he could come and get it. Instead, Respondent DIACO, along with Mr. Motroni, drove the bag back to Ms. Personius's residence and left it with her to return. Respondent DIACO's said he took the bag back to her residence to question her about whether she had looked in the bag. Why he could not have just questioned her over the phone was never explained. Once Respondent DIACO and Mr. Motroni had driven the bag back to Ms. Personius's home, she was instructed to transport the bag back to the Bank of America building by cab and to see that it was delivered to a security officer in the lobby. The obvious intent was to have the bag returned anonymously. The evidence suggests that Respondent DIACO believed that Mr. Campbell would not discover the true identity of Ms. Personius and, therefore, never connect Adams & Diaco to his arrest. In fact, Respondent DIACO left a telephone message for Mr. Ellis that afternoon proposing a meeting of counsel, including Mr. Campbell, to

discuss settlement. Mr. Ellis returned the call while Respondent DIACO and Mr. Motroni were driving the trial bag back to Ms. Personius's home. Respondent DIACO made no mention of his possession of the trial bag during that telephone conversation.

After leaving the trial bag with Ms. Personius, Mr. Motroni and Respondent DIACO returned to their office in the Bank of America building, re-entering the parking garage at 4:21 p.m. Shortly before that time, Ms. Personius's true identity had been discovered. While driving back to the office, Respondent DIACO received another phone call from Mr. Ellis. Mr. Ellis confronted Respondent DIACO with the information that the identity of Ms. Personius was known and that she had possession of Mr. Campbell's trial bag. Respondent DIACO then told Mr. Ellis that the trial bag would be returned to the Bank of America building lobby. Mr. Ellis insisted that it be returned directly to the offices of Shumaker, Loop & Kendrick.

Sometime later, Ms. Personius took a taxi back to the Bank of America building, brought the bag into the lobby, and had the cab driver deliver it to Shumaker, Loop & Kendrick at about 5:15 p.m. By their own account, Respondents ADAMS and DIACO were in possession of Mr. Campbell's trial bag or knew that one of their employees had possession of it for over four hours.

Neither of them made any effort to contact Mr. Campbell or his firm to advise them of that fact. It was not returned until Mr. Ellis demanded it.

IV.

The actions of the Respondents, as set out above, and subsequent efforts to cover up or otherwise destroy evidence of those actions, were intended to disrupt, unfairly influence, and/or otherwise prejudice the tribunal, the administration of justice, opposing attorney Mr. Campbell and/or opposing parties in ongoing litigation in which the Respondents' law firm was engaged.

Even before Respondents became aware that the identity of Ms. Personius had been discovered, they began to withhold, destroy, or otherwise secrete the direct evidence of their involvement in Mr. Campbell's arrest. The first indication of the Respondents' efforts to hide their participation was their refusal to notify Mr. Campbell that they were in possession of his trial bag on the day following the arrest. Another example occurred later that afternoon, when Mr. Ellis's process server was locked out of the Adams & Diaco offices, even though there were obviously people working inside. Mr. Ellis, Mr. Campbell's partner, was attempting to subpoena Respondent DIACO for a hearing before Judge Arnold the next morning, January 25, 2013. The hearing concerned Shumaker, Loop & Kendrick's motion for mistrial of the *Schnitt v. Clem* case. The motion was based upon the Respondent's possession and retention of Mr. Campbell's trial bag and the false and inflammatory comments made by Respondent DIACO to the media

the morning after Mr. Campbell's arrest. The subpoena also demanded that Respondent DIACO produce his cell phone at the hearing.

Although the process server was locked out of the Adams & Diaco offices the day before, he was able to serve the Respondent through his wife early the next morning, January 25, 2013. Regardless, Respondent DIACO failed to appear at the morning hearing on that date. He had already hired counsel to appear on his behalf and move for a protective order. Judge Arnold commented at trial that his immediate concern was the exposure the jury may have had to all the publicity surrounding Mr. Campbell's arrest, rather than Respondent DIACO's disregard of the subpoena. The Judge did, however, insist that Respondent DIACO appear for a continuation of the Motion for Mistrial in the afternoon. Respondent DIACO appeared, but without his cell phone. When questioned about whether he had any conversations with Ms. Personius or Respondent FILTHAUT on the evening of Mr. Campbell's arrest, less than 48 hours earlier, Respondent DIACO replied that he couldn't remember. When asked who his cell phone carrier was, he said he didn't know. Respondent DIACO's obvious lies to Judge Arnold demonstrate the lengths to which he was willing to go to avoid discovery of evidence of his participation in the plot, which could have led to a mistrial of *Schnitt v. Clem.* Ms. Personius appeared at the same hearing and testified regarding the trial bag saga, but when questioned about whether she had been asked to meet and buy drinks for

Mr. Campbell, she too refused to testify on Fifth Amendment grounds. By that afternoon, Ms. Personius also had her own counsel, paid for by Adams & Diaco, and Respondent DIACO was represented by two attorneys, one for civil and apparently one for criminal liability. In order to complete the trial, Judge Arnold put a moratorium on discovery regarding the Motion for Mistrial which remained in effect until February 5, 2013. As a result, Mr. Campbell and Shumaker, Loop & Kendrick were unable to take steps to obtain the cell phone records or message transcripts from the phones of all the Respondents, their employees, or Sergeant Fernandez. All the Respondents had been provided with notices to preserve that data. Since then, all of the participants in the conspiracy to arrest Mr. Campbell have destroyed or secreted the cell phones and/or the important objective evidence they contained. Respondent ADAMS, Ms. Personius, and Sergeant Fernandez have all admitted erasure or destruction directly. Respondent ADAMS admitted that all the Respondents and Ms. Personius had turned their phones over to attorney Lee Gunn, but Respondent ADAMS refused to say why, claiming attorney-client privilege. At trial, both Respondent DIACO and Respondent FILTHAUT refused to answer any questions about the destruction of their cell phone messages and are subject to the adverse inference that they too have deliberately destroyed them. The cell phone messages on the Respondents' phones from the night of Mr. Campbell's arrest are the only objective evidence that could speak to their incrimination or

exculpation. The fact that they were erased, destroyed, or that the Respondents failed to produce them, strongly infers that they did not contain anything exculpatory.

Finally, the Respondents failed to offer any credible justification for their two-month effort to have Mr. Campbell arrested. Respondents' counsel suggested that the Respondents were motivated by a strong desire to keep intoxicated drivers off the streets. Although unsupported by evidence, such motivation would seem more plausible if it had not knowingly been the Respondents' own employee buying Mr. Campbell drinks and presenting him with the automobile to drive. It would also have appeared more believable if that employee had not been funneling information about Mr. Campbell directly through Respondents to waiting police surveillance. The Referee was presented with no competent evidence that would support any credible motive, except that the Respondents sought to gain some advantage in the ongoing civil case brought by Mr. Campbell's client. Respondent DIACO's affirmative efforts to propose settlement discussions with Mr. Ellis and Mr. Campbell before the identity of Ms. Personius was discovered further supports this finding.

Another argument suggested that Respondents should not be responsible for Mr. Campbell's decision to drink and drive that night. The argument's logic being that Mr. Campbell's decision to drive was an intervening independent event that

broke the chain of causation leading from their actions to his arrest. The argument has no merit. The acts of the Respondents on January 23 were not unethical because they ultimately resulted in Mr. Campbell's arrest. They were unethical because they were prohibited acts, and the Respondents willingly committed them. Ethical violations are not necessarily dependent upon the existence of harm or injury. Damage is not an indispensable element, as it might be in a civil case. If Mr. Campbell had walked away from Malio's valet that night and left Ms. Personius to her own devices, the Respondents' actions would have been just as unethical and egregious. The unsuccessful effort to target Mr. Campbell for arrest on November 29, 2012, was just as much a violation of Rules Governing The Florida Bar as the successful effort was on January 23, 2013.

Ultimately, the Referee was presented with nothing to suggest that Respondents' intent was anything other than what the clear and convincing evidence demonstrates. It was a deliberate and malicious effort to place a heavy finger on the scale of justice for the sole benefit of the Respondents and their client. For the Respondents, the harm inflicted on Mr. Campbell, his clients' cause, Sergeant Fernandez, the legal system, the profession, and the public's confidence in justice was simply collateral damage.

Subsequent Events

The DUI arrest of Mr. Campbell was investigated by the State Attorney's Office for the Sixth Judicial Circuit, after the State Attorney for the Thirteenth Judicial Circuit recused his office from the case. On July 29, 2013, a *nolle prosequi* was filed. Mr. Campbell's arrest was subsequently expunged. Although evidence of the basis for refusing to prosecute was not adduced at trial, it appears that all of the statutory elements of a valid entrapment defense existed. Fla. Stat. §777.201.

Following the events of January 23-25, 2013, the *Schnitt v. Clem* jury trial was completed. There was a defense verdict. Following the trial, the Plaintiff's Motion for Mistrial was converted into a Motion for New Trial, and the restriction on discovery was lifted. Before an evidentiary hearing was held on the alleged misconduct of Defendant's counsel, the parties entered into mediation and agreed to a settlement.

After the settlement, the Schnitts discharged Mr. Campbell and the firm of Shumaker, Loop, & Kendrick from further representation. As of the date of trial, there was ongoing litigation between Shumaker, Loop, & Kendrick and their former clients regarding the payment of fees.

The Tampa Police Department, after an administrative personnel hearing, discharged Sergeant Raymond Fernandez from the force. Officer Tim McGinnis was removed from the DUI Squad.

Several witnesses at trial, as well as Respondent DIACO's counsel, have asserted that the United States Attorney for the Middle District of Florida is conducting a Federal grand jury investigation that is continuing. As of this date, no Federal criminal charges have been filed against the Respondents or others regarding the events described above.

III. RECOMMENDATIONS AS TO GUILT

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c); Rule 4-3.6(a); Rule 4-4.4(a); Rule 4-5.1(c); Rule 4-5.3(b);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

   The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy contrary to honesty and justice.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence or other material)**

   The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately obstructed access to or concealed the trial bag of C. Philip Campbell, Esq.; destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding; and refused to produce his cell phone or information about his cell phone provider at the January 25, 2013 hearing, which

he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing litigation.

4. **Violation: Rule 4-3.5(c) (conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

2**Violation: Rule 4-3.6(a) (prejudicial extrajudicial statements**

5. **Violation: Rule 4-3.6(a) (prejudicial extrajudicial statements prohibited)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** made statements to the media on January 24, 2013, regarding: his disagreement with the Court granting a stipulated trial recess; the arrest of C. Philip Campbell, Esq.; and the work ethic and prior history of Mr. Campbell. All statements were made with the knowledge that there was a substantial likelihood of materially prejudicing the ongoing jury trial.

6. **Violation: Rule 4-4.4(a) (means that have no substantial purpose other than to embarrass, delay, or burden)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately failed to immediately return the trial bag of C. Philip Campbell, Esq. or notify him or his firm of the bag's location in order to delay or burden Mr. Campbell in an ongoing trial.

7. **Violation: Rule 4-5.1(c) (Responsibilities of partners, Managers and Supervisory Lawyers)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately conspired with or otherwise ordered or ratified the conduct of Respondents ADAMS and FILTHAUT regarding their actions taken to improperly effect the arrest of C. Philip Campbell, Esq. and/or failed to take remedial action to avoid or mitigate the foreseeable potential results of those wrongful actions. Further Respondent DIACO ordered or ratified the conduct of associate Brian Motroni in concealing the trial bag of Mr. Campbell. As an attorney with managerial authority, Respondent DIACO was responsible for the conduct of Respondent FILTHAUT and attorney Brian Motroni.

8. **Violation: Rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with, ordered and/or ratified the conduct of his nonlawyer employee, Melissa Personius, to improperly effect the arrest of C. Philip Campbell, Esq. and conceal his trial bag; failed to take appropriate remedial action when he knew that the consequences of her conduct could be avoided; and failed to make reasonable efforts to ensure that her conduct was compatible with Respondent's professional obligations. As an attorney with managerial authority, Respondent DIACO was responsible for the conduct of Melissa Personius.

9. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, nonlawyer employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and covered up or otherwise destroyed evidence of his participation in that conspiracy. Respondent DIACO further engaged in fraudulent, dishonest, or

deceitful conduct by lying to Judge Arnold on January 25, 2013, regarding his knowledge of his cell phone provider and his recollection of discussions or communications with Melissa Personius and Respondent FILTHAUT on the evening of January 23, 2013. He further engaged in misleading and deceitful conduct by making public statements to the news media that were intended to embarrass and humiliate opposing counsel in regard to his arrest for DUI on the previous evening without disclosing his own active role in those events or the role played by the other Respondents, his employee Melissa Personius, and that of Sergeant Raymond Fernandez. In addition, this conduct delayed the ongoing litigation and required Judge Arnold to interview the jurors regarding this trial publicity.

B. Robert D. Adams - No. 2013-10,736 (13F)

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c); Rule 4-4.4(a); Rule 4-5.1(c); Rule 4-5.3(b);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

   The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence)**

   The clear and convincing evidence is that **ROBERT D. ADAMS** deliberately concealed the trial bag of C. Philip Campbell, Esq. and destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing civil litigation.

4. **Violation: Rule 4-3.5(c) (conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

5. **Violation: Rule 4-4.4(a) (means that have no substantial purpose other than to embarrass, delay, or burden)**

The clear and convincing evidence is that **ROBERT D. ADAMS** failed to immediately return the trial bag of C. Philip Campbell, Esq. or notify him or his firm of the bag's location in order to delay or burden Mr. Campbell in an ongoing trial.

6. **Violation: Rule 4-5.1(c) (Responsibilities of Partners, Managers, and Supervisory Lawyers)**

The clear and convincing evidence is that **ROBERT D. ADAMS** deliberately conspired with or otherwise ordered or ratified the conduct of Respondents DIACO and FILTHAUT regarding their actions taken to improperly effect the arrest of C. Philip Campbell, Esq., and/or failed to take remedial action to avoid or mitigate the foreseeable potential results of those wrongful actions. Respondent ADAMS ordered Respondent FILTHAUT to contact Sergeant Raymond Fernandez of the Tampa Police Department in furtherance of the effort to effect Mr. Campbell's arrest; Respondent ADAMS was aware of Respondent FILTHAUT's prior improper conduct and ratified it. As an attorney with managerial authority, Respondent ADAMS was responsible for the conduct of Respondent FILTHAUT.

7. **Violation: Rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with, ordered and/or ratified the conduct of his nonlawyer employee, Melissa Personius, to improperly effect the arrest of C. Philip Campbell, Esq.; failed to take appropriate remedial action when he knew that the consequences of her conduct could be avoided; and failed to make reasonable efforts to ensure that her conduct was compatible with Respondent's professional obligations. As an attorney with managerial authority, Respondent ADAMS was responsible for the conduct of Melissa Personius.

8. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to effect the arrest of C. Philip Campbell, Esq., and then covered up or otherwise destroyed evidence of his participation in that conspiracy. In addition, this conduct delayed or otherwise disrupted the ongoing litigation and required Judge Arnold to interview the jurors regarding trial publicity produced as a result of the conspiracy.

C. <u>Adam Robert Filthaut - No. 2013-10,737 (13F)</u>

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing civil litigation.

4. **Violation: Rule 4-3.5(c) (Conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

5. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then covered up or otherwise destroyed evidence of his participation in that conspiracy. Respondent FILTHAUT further engaged in dishonesty, deceit and/or misrepresentation when he failed to disclose to Sergeant Fernandez that Mr. Campbell was the opposing attorney in a high profile civil action that was then currently being defended by the Adams & Diaco law firm. In addition, this conduct delayed the ongoing litigation and required Judge Arnold to interview the jurors regarding trial publicity produced as a result of the conspiracy.

IV. CASE LAW

Before arriving at a recommendation as to the disciplinary measures to be applied the Referee considered the following case law:

Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001); *Florida Bar v. Rotstein*, 835 So. 2d 241 (Fla. 2002); *Florida Bar v. Korones*, 752 So. 2d (Fla. 2000); *Florida Bar v. Bern,* 425 So. 2d 526 (Fla. 1982); *Florida Bar v. Swann*, 116 So. 3d 1225 (Fla. 2013); *Florida Bar v. Doherty*, 94 So. 3d 443 (Fla. 2012); *Florida Bar v. Klein*, 774 So. 2d 685 (Fla. 2000); *Florida Bar v. Gardiner*, No. SC11-2311, 2014 WL 2516419 (Fla. June 5, 2014); *Florida Bar v. Glueck*, 985 So. 2d 1052 (Fla. 2008); *Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007); *Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997); *Florida Bar v. Riggs*, 944 So. 2d 167 (Fla. 2006); *Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010).

V. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

I recommend that Respondent **STEPHEN CHRISTOPHER DIACO** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

B. Robert D. Adams - No. 2013-10,736 (13F)

I recommend that Respondent **ROBERT D. ADAMS** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

C. Adam Robert Filthaut - No. 2013-10,737 (13F)

I recommend that Respondent **ADAM ROBERT FILTHAUT** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

VI. PERSONAL HISTORY, PAST DISCIPLINARY RECORD, AND AGGRAVATING AND MITIGATING FACTORS

In recommending sanctions after finding misconduct, the Referee considered the following factors as to each Respondent:

a) the duty violated;
b) the lawyer's mental state;
c) the potential or actual injury caused by the lawyer's misconduct; and
d) the existence of aggravating or mitigating factors.

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent

a. Date of Birth - 1968
b. Date Admitted to the Bar – April 25, 1994[3]

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to Section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

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[3] Subsequent to the sanctions hearing, the Referee requested biographical information from each respondent, including education and employment information. Counsel for Respondents ADAMS and FILTHAUT responded with the information. Referee received no response from counsel for Respondent DIACO, but did obtain his year of birth and date admitted to the Bar from The Florida Bar.

a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. The Potential or Actual Injury Caused By the Respondents Misconduct

a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.;
b. Public humiliation of Mr. Campbell and damage to his professional reputation;
c. Disruption of ongoing jury trial and tainting of jury;
d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department;
e. Removal of Officer Tim McGinnis from DUI Squad;
f. Dismissal of significant number of pending DUI cases[4];
g. Public loss of confidence in lawyers and legal system; and
h. Public loss of confidence in law enforcement.

[4] Although The Florida Bar did not adduce any testimony or produce any documentation regarding the dismissals, a number of the news articles in the compilation submitted by The Bar during the penalty phase hearing contained quotations from Tampa Police officials confirming this fact.

4. The Existence of Aggravating or Mitigating Circumstances

a. Aggravation

The Referee finds the following aggravating factors pursuant to 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
d. Multiple offenses;
f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following as to mitigating factors pursuant to 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

During the two days of testimony regarding the sanctions to be recommended, there was ample testimony from multiple witnesses regarding the generosity of Respondent DIACO, his charitable efforts, public service, and loyalty to friends and employees. Virtually all of the witnesses professed to have little or no knowledge regarding the allegations of Respondent's conduct that resulted in this proceeding.

At the conclusion of the hearing, Respondent's counsel sought to introduce an affidavit from the Respondent, presumably expressing remorse and seeking to take responsibility for the events that led to this proceeding. The Referee refused to admit the affidavit, although counsel was allowed to proffer it for the record. It was not read or considered. Respondent DIACO, throughout this proceeding, has refused to testify under oath regarding anything connected to the events surrounding these proceedings. He may not shield himself from cross-examination by invocation of the Fifth Amendment while at the same time seeking to submit sworn statements supporting mitigation.

Respondent DIACO is an experienced, apparently competent attorney with 20 years in the profession. He and his firm have multiple offices and employ numerous associates and paralegal staff. Adams & Diaco have major clients and are, by all appearances, professionally and financially successful.

Against this backdrop, it is all the more disturbing that Respondent DIACO, one of the firm's managing partners, engaged in actions against a fellow attorney that were inexplicably egregious, spiteful, and malicious. While Mr. Campbell and his firm were reeling from the fallout of the Respondents' conspiracy, Respondent DIACO attempted to leverage the moment to his advantage by proposing to discuss settlement. There was no evidence presented at trial to support the suggestion that Mr. Campbell intended to drink and drive on the night of his arrest,

or that he had a habit of drinking and driving. The clear and convincing evidence was that Respondent DIACO's intent was to target Mr. Campbell for arrest because he was opposing counsel in a high-profile case and that it would benefit his firm and his client.

Respondent DIACO's efforts to exploit the situation did not cease until the identity of Ms. Personius was ultimately discovered. The inevitable attempted cover up followed these multiple offenses, including the bizarre travels of Mr. Campbell's trial briefcase. The cover up effort included false testimony before Judge Arnold, a false affidavit filed in *Schnitt v. Clem*, obstruction of service of process, destruction or secreting of known relevant evidence, and the deliberate failure to disclose a key witness, Kristopher Personius, during discovery in this proceeding.

If the cover up had succeeded, Mr. Campbell would have been the attorney answering charges from The Florida Bar, as well as the State of Florida. This malicious tampering with another person's personal life and career was not only unprofessional, it was inexcusable.

Respondent DIACO's many admittedly generous and unselfish acts do not atone for the multiple aggravated violations he committed. It is the Referee's recommendation that he be permanently disbarred.

B. Robert D. Adams - No. 2013-10,736 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent Robert D Adams:

a. Date of Birth – May 27, 1969
b. Education – University of Florida, B.A. w/Honors, 1991
Stetson College of Law, J.D. w/Honors, 1996
c. Employment – Associate, Harris, Barrett, Mann & Dew, 1996 – 1998; Shareholder Adams & Diaco, 1998 to present.
d. Date Admitted to the Bar – September 26, 1996

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

> a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
> b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. **The Potential or Actual Injury Caused By the Respondents Misconduct**

   a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.
   b. Public humiliation of Mr. Campbell and damage to his professional reputation
   c. Disruption of ongoing jury trial and tainting of jury
   d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department
   e. Removal of Officer Tim McGinnis from DUI Squad
   f. Dismissal of significant number of pending DUI cases
   g. Public loss of confidence in lawyers and legal system
   h. Public loss of confidence in law enforcement

4. **The Existence of Aggravating or Mitigating Circumstances**

   a. Aggravation

The Referee finds the following aggravating factors pursuant to 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
c. A pattern of misconduct;
d. Multiple offenses;
f. submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following mitigating factors pursuant to 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

During the hearing regarding sanctions, several witnesses testified on behalf of Respondent ADAMS. Affidavits were also introduced on his behalf. All were supportive of him as a loyal friend, a worthy mentor to young lawyers, and a generous and competent professional. The Florida Bar conceded that the Respondent had no prior disciplinary record. None of the Respondent's witnesses were aware of any specific information about the Respondent's conduct that resulted in their being called as a character witness.

The Bar did produce one witness to testify in support of an additional aggravation factor for this Respondent.

Dr. Robert Frankl, D.C. is a chiropractor from Miami Shores. During the latter part of 2009 through the first few months of 2010, Dr. Frankl was involved in litigation regarding the collection of fees against Progressive Insurance Company, represented by Respondent ADAMS. The issue in the case was the reasonableness of the doctor's fees for treatment that had been billed to Progressive.

Dr. Frankl testified that a few days prior to trial in the case, two young women appeared at his office for a consultation appointment. Both women gave what were later found to be false names, and when asked, each were unable to provide any identification. Both women claimed to have been injured and in need of chiropractic treatment. Each woman inquired whether Dr. Frankl would be willing to discount his normal rate since they each claimed a lack of applicable insurance coverage. He told them he would not reduce his fees, but was willing to accept payment over time. Dr. Frankl arranged an appointment for both women the following week. Neither woman appeared for their respective appointments and Dr. Frankl never heard from them again.

The week following the consultation with the two women, Dr. Frankl was surprised to see some blown up photographs of his office in the courtroom during the Progressive Insurance Company trial. He could not recall anyone coming in to take the photographs, although they seemed recent since they included a new freezer that had been purchased a few weeks before the trial. After the trial, Dr. Frankl remembered the two strange women who appeared at his office without identification. Using the phone number log on his phone from the women's initial call for an appointment and the internet, Dr. Frankl was able to locate a picture of one of the women and learn that she was a paralegal in the Miami office of Adams & Diaco. He believed that their purpose for visiting him was to lure him into

committing "insurance fraud" or to otherwise obtain admissions from him regarding his fee policy that might be used against him in the upcoming trial.

Dr. Frankl has a history of litigating for his fees, as he freely admitted. He also admitted that he regularly files complaints about attorneys with The Florida Bar. He did so in this instance, and got a response letter back from a Bar representative a few days later. He was advised that it was not a proper Bar matter, and that it would have to be resolved by a civil action. Dr. Frankl was not easily dissuaded. He then filed a complaint with the Division of Consumer Services of the Florida Department of Financial Services regarding the actions of Progressive Insurance Company's counsel and paralegals. In response, Dr. Frankl received a copy of a response letter from a Progressive representative that was sent to the Department responding to the complaint. The letter alleged that Respondent ADAMS did not direct his employees to *"present false information in order to secure evidence against Dr. Frankl at trial; however, it does appear that two non-attorney employees of Adams and Diaco did go to Dr. Frankl's office in order to obtain pictures of Dr. Frankl's office."*

The Division took no further action regarding Dr. Frankl's complaint. A few years later, Dr. Frankl read a newspaper account of the Campbell DUI case and recognized the Adams & Diaco law firm as the subject of one of his numerous ethics complaints. He contacted Mr. Campbell and related his experience regarding

Respondent ADAMS's paralegals that, he was convinced, had attempted to set him up. His story was picked up by a newspaper reporter and thereafter came to the attention of The Florida Bar in this matter.

Dr. Frankl's bias was admitted and his credibility regarding the 2010 incident would be suspect, were it not for the admission by Progressive that two Adams & Diaco employees did appear at his office as he testified. Respondent ADAMS, who testified at the guilt phase of this proceeding, offered no rebuttal to Dr. Frankl's serious accusations during the sanctions phase hearing. If, as the Progressive letter suggests, the only purpose of the two Adams & Diaco employees visit was to obtain photographs of Dr. Frankl's office interior, then there are provisions under the rules that provide for it. At the very least, the incident reflects a willingness to use surreptitious methods to accomplish goals that should have been addressed through an above-board discovery process.

This incident occurred a little over two years before the events that are the subject of this proceeding. No other evidence or testimony regarding it was produced except for copies of the correspondence from Progressive, the letter from The Florida Bar, and some copies of Dr. Frankl's internet search results. In the absence of some reasonable explanation, which was not forthcoming during the sanctions hearing, Dr. Frankl's experience with Respondent ADAM's unorthodox discovery methods cannot be ignored. His counsel in this matter has argued that

Respondent's actions in the events that resulted in this proceeding were "aberrant" or "atypical." Dr. Frankl's unrebutted testimony, confirmed through the correspondence, suggests otherwise. The incident displays willingness to engage in a pattern of conduct employing non-lawyer personnel to deliberately misrepresent their identity to accomplish purposes beyond normal discovery.

The Referee will not reiterate the comments regarding Respondent ADAMS that were previously set out in the narrative of the events of January 23 – 25, 2013. Respondent ADAMS' involvement in those events, as demonstrated by the cell phone call and text records, was extensive. Respondent ADAMS was the first person Ms. Personius called when she spotted Mr. Campbell at Malio's that night, and Respondent ADAMS was the last person she spoke to immediately preceding getting into her car with Mr. Campbell, less than ten minutes before his arrest. She received a text from Respondent ADAMS less than seven minutes before his arrest and sent a text back to Respondent ADAMS two minutes later.

Respondent ADAMS, like his co-Respondents, is an experienced, competent attorney and litigator. His counsel has argued that Respondent suffered a 3-½ hour "lapse in judgment" and that his "mistakes were spontaneous" and "unplanned." The record reflects otherwise. The evidence was clear and convincing that Respondent ADAM's participation in the effort to effect the arrest of Mr. Campbell was calculated and had no other purpose than to gain some advantage in

the ongoing *Schnitt v. Clem* jury trial. Respondent ADAMS had weeks to contemplate the failed attempt to arrest Mr. Campbell on November 29, 2012, and the legal, ethical, and moral implications of that attempt. He had weeks to discuss that effort with the co-Respondents and to exercise his experienced judgment regarding the propriety and advisability of any similar future efforts. When the next opportunity arrived, he didn't caution, he didn't object, he didn't "mentor," and he didn't hesitate.

The next day, Respondent ADAMS was again the first person Ms. Personius called when she discovered Mr. Campbell's trial briefcase in her car. Respondent claimed he was "too busy" to deal with it. When the opportunity came to again exercise some ethical and moral judgment, he declined and passed it off to Respondent DIACO.

The cover up followed. He erased his cell phone text messages and for months refused to testify under oath regarding the events. He too failed to list Kristopher Personius as a person with knowledge of the events of that night in response to The Florida Bar's interrogatories. On the morning of trial, he claimed to have finally realized that his license to practice law might be in jeopardy and chose to testify.

The Referee recommends that Respondent ADAMS be permanently disbarred.

C. Adam Robert Filthaut - No. 2013-10,737 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent Adam Robert Filthaut

a. Date of Birth – June 16, 1974
b. Education – University of Detroit, B.S., 1996
Thomas M. Cooley Law School, J.D., 2000
c. Employment – Hillsborough County Public Defender's Office, 2001 – 2003; Adams & Diaco, P.A., 2003 to present.
d. Date Admitted to the Bar – September 14, 2000

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

> a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
> b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. The Potential or Actual Injury Caused By the Respondents Misconduct

a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.
b. Public humiliation of Mr. Campbell and damage to his professional reputation
c. Disruption of ongoing jury trial and tainting of jury
d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department
e. Removal of Officer Tim McGinnis from DUI Squad
f. Dismissal of significant number of pending DUI cases
g. Public loss of confidence in lawyers and legal system
h. Public loss of confidence in law enforcement

4. The Existence of Aggravating or Mitigating Circumstances

a. Aggravation

The Referee finds the following aggravating factors pursuant to section 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
c. A pattern of misconduct;
d. Multiple offenses;
f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following as to mitigating factors pursuant to section 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

Several witnesses testified on behalf of Respondent FILTHAUT during the sanctions hearing. He was described as a competent professional and a loyal friend. Respondent has no prior disciplinary record and his character and reputation were considered excellent.

Respondent's counsel, in his written argument following the hearing on penalties, argues a number of mitigation factors, but the Referee may not find that they exist based only upon counsel's argument.

The record does not support the remaining mitigating factors urged by Respondent's counsel. There was nothing to suggest the absence of a dishonest or selfish motive. There was no evidence of personal or emotional problems. Negotiating with The Florida Bar for an agreed-upon sanction did not constitute a display of a cooperative attitude toward these proceedings, especially in light of the Respondent's refusal to testify and his failure to retain or produce his cell phone text messages. He certainly has a right to rely on the Fifth Amendment, but doing so did not amount to cooperation. Likewise, the failure to disclose Kristopher

Personius as a person with knowledge of the events that led to these proceedings in response to The Florida Bar interrogatory certainly constitutes the opposite of cooperation.

As the Referee previously indicated in the narrative of the events of January 23 – 25, 2013, the entire two-month effort to accomplish the arrest of C. Philip Campbell, Jr., Esq. was dependent upon the unique relationship of trust and friendship that Respondent FILTHAUT enjoyed with Sergeant Raymond Fernandez. Without Respondent FILTHAUT's participation, which is amply confirmed by the record, the plot had virtually no chance of success. His relationship with Sergeant Fernandez gave him instant access to the efforts of the entire Tampa Police Department DUI Squad. Respondent FILTHAUT acted as the conduit for Sergeant Fernandez regarding the updating of events happening inside Malio's. Respondent FILTHAUT, through his communication with Ms. Personius, became the eyes and ears of the Tampa DUI Squad. He kept the officers immediately informed of what was happening inside Malio's, when Mr. Campbell was leaving, where he was before he left, and what kind of car he would be driving. For over 3 ½ hours, Respondent FILTHAUT essentially presided over a police stakeout of his own creation that was totally dependent upon the information he provided them. That information did not include the fact that Mr. Campbell was an opposing attorney in the *Schnitt v. Clem* case, or that an Adams & Diaco

paralegal, operating under a false identity, was buying him drinks and getting him to drive when he otherwise would not have.

Respondent's willingness to betray a 15-year friendship and sacrifice the career and personal freedom of a fellow attorney for the sake of some potential advantage in an ongoing trial remains stunning. Yet the clear and convincing evidence leaves no doubt that Mr. Campbell was deliberately targeted solely to gain that advantage.

Respondent FILTHAUT also had many weeks to contemplate the professional and ethical propriety of his actions following his first attempt to have Mr. Campbell arrested on November 29, 2012. He was an experienced lawyer with 13 years in the practice. During any stage of the 3 ½ hours that the Respondents remained engaged in the effort to improperly effect Mr. Campbell's arrest, any one of them, including particularly Respondent FILTHAUT, could have called a halt to it.

As was previously suggested in the narrative, following orders is not a legal or ethical basis for avoiding personal and professional responsibility for the many serious violations that the Referee found by clear and convincing evidence were committed.

The Referee recommends that Respondent FILTHAUT be permanently disbarred.

VII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

The following costs regarding Respondent DIACO were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,108.18
3. Bar Counsel Expenses..... $620.27
4. Investigative Costs $819.47
5. Copy Costs $1,350.75
6. Witness Expenses..... $1,029.61

Total $14,178.28

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

B. Robert D. Adams - No. 2013-10,736 (13F)

The following costs regarding were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,488.56

3. Bar Counsel Expenses.....$620.27
4. Investigative Costs.....$819.47
5. Copy Costs.....$1,350.75
6. Witness Expenses.....$1,029.61

Total $14,558.66

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

C. <u>Adam Robert Filthaut - No. 2013-10,737 (13F)</u>

The following costs regarding Respondent FILTHAUT were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,108.18
3. Bar Counsel Expenses.....$620.27
4. Investigative Costs.....$819.47
5. Copy Costs.....$1,350.75
6. Witness Expenses.....$1,029.61

Total $14,178.28

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

/s/ W. Douglas Baird
Honorable W. Douglas Baird, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been sent by U.S. Mail to THE HONORABLE JOHN A. TOMASINO, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and sent by email to: THE HONORABLE JOHN A. TOMASINO, Clerk, Supreme Court of Florida, e-file@flcourts.org; Gregory W. Kehoe, Esq., kehoeg@gtlaw.com, attorney for Respondent Diaco; Joseph A. Corsmeier, Esq., jcorsmeier@jac-law.com, attorney for Respondent Diaco; Mark J. O'Brien, Esq., mjo@markjobrien.com, attorney for Respondent Filthaut; William F. Jung, Esq., wjung@jungandsisco.com, attorney for Respondent Adams; and Jodi Anderson Thompson, Esq., JThompso@flabar.org, Bar Counsel, The Florida Bar, this 27th day of August, 2015.

/s/ W. Douglas Baird
Honorable W. Douglas Baird, Referee

Supreme Court of Florida

THURSDAY, JANUARY 28, 2016

CASE NO.: SC14-1052
Lower Tribunal No(s).:
2013-10,735(13F)

THE FLORIDA BAR	vs.	STEPHEN CHRISTOPHER DIACO
Complainant		Respondent

Respondent's "Notice of Voluntary Dismissal" of his "Notice of Intent to Seek Review of Report of Referee" is granted. The notice of intent to seek review is hereby dismissed.

The uncontested report of referee is approved and respondent is permanently disbarred. Respondent is currently suspended; therefore, the permanent disbarment is effective, nunc pro tunc, January 22, 2016. See Fla. Bar v. Diaco, SC14-1052 (Jan. 25, 2016). Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h).

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Stephen Christopher Diaco in the amount of $14,178.28, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed,

determined. The filing of a motion for rehearing shall not alter the effective date of this permanent disbarment.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

dd
Served:

JODI ANDERSON THOMPSON
SHEILA MARIE TUMA
KATRINA S. BROWN
JOSEPH ARNOLD CORSMEIER
GREGORY W. KEHOE
JULISSA RODRIGUEZ
STEPHANIE LAUREN VARELA
ELLIOT H. SCHERKER
DANIELLE SUSAN KEMP
ADRIA E. QUINTELA
WILLIAM FREDERIC JUNG
MARK JON O'BRIEN
HON. WILLIAM DOUGLAS BAIRD, JUDGE

Supreme Court of Florida

No. SC14-1054

THE FLORIDA BAR,
Complainant,

vs.

ROBERT D. ADAMS,
Respondent.

No. SC14-1056

THE FLORIDA BAR,
Complainant,

vs.

ADAM ROBERT FILTHAUT,
Respondent.

[August 25, 2016]

PER CURIAM.

We have for review a referee's report recommending that Robert D. Adams and Adam Robert Filthaut be found guilty of professional misconduct and permanently disbarred. We have jurisdiction. See art. V, § 15, Fla. Const. As

more fully explained below, we approve the referee's factual findings, recommendations as to guilt, and recommendations as to discipline in their entirety.[1]

FACTS

The Respondents in these two cases, Adam Robert Filthaut and Robert D. Adams, were members of a law firm, Adams & Diaco, P.A., in Tampa, Florida. Stephen Christopher Diaco was also a member of this firm and also took part in the events that are the subject of these proceedings. As a result of disciplinary action against Diaco and the withdrawal of his petition seeking review of the referee's report, which jointly addressed Adams, Filthaut, and Diaco, Diaco has been permanently disbarred. See Fla. Bar v. Diaco, No. SC14-1052 (Fla. Jan 28, 2016).

The misconduct giving rise to the disciplinary actions against these three attorneys is among the most shocking, unethical, and unprofessional as has ever been brought before this Court. A brief summary of the facts, as found by the referee in his report, is as follows, and the full referee's report is attached to this opinion.[2] In January 2014, Adams & Diaco, P.A. was defending a radio network

1. The referee's report addressed both Adams and Filthaut, as well as a third respondent, Stephen Diaco. Diaco's case has been disposed of separately, and we have consolidated these remaining two cases.

2. The referee's very detailed and thorough report is incorporated herein as a part of this Court's opinion. We commend the referee, the Honorable William

and one of its disc jockeys, “Bubba the Love Sponge” Clem, in a civil suit. Opposing counsel included attorney Phillip Campbell, who represented another disc jockey named Todd Schnitt. Schnitt brought the action against Clem. The lawsuit was hotly contested for over five years and received substantial media coverage in the Tampa area. On the evening of January 23, 2013, while the trial was in recess for the night, Campbell and his cocounsel, Johnathan Ellis, walked to a nearby restaurant, Malio’s Steakhouse, for dinner and a drink. Unbeknownst to Campbell, a paralegal who worked for Respondents happened to be at Malio’s with a friend. Campbell did not know the paralegal, Melissa Personius, but she recognized Campbell as she was leaving the bar.

Personius contacted Adams after she left Malio’s to inform him she had seen Campbell at the bar. Adams then notified Diaco and called Personius back. After this call from Adams, Personius returned to Malio’s. Filthaut called his friend Sergeant Raymond Fernandez of the Tampa Police Department, informing him that Campbell was at Malio’s drinking and might drive while intoxicated. Filthaut did not inform Fernandez that Campbell was opposing counsel in the Schnitt versus Clem litigation.

Douglas Baird, for his dedication and careful consideration of these three difficult attorney disciplinary cases.

Upon returning to Malio's, Personius and her friend took a seat next to Campbell at the bar. Personius told Campbell, Ellis, and another attorney present that she was a paralegal but lied about where she was employed. Personius openly and obviously flirted with Campbell, encouraged him to drink, and bought him drinks. All the while, without Campbell's knowledge, communications continued among Respondents, Personius, and Fernandez. Personius kept Respondents informed about what was transpiring with Campbell inside Malio's. Fernandez assigned another officer to stake out Malio's to see if Campbell would drive while intoxicated.

By 9:30 or 9:45 p.m., Personius' friend and the other attorneys with Campbell had left Malio's. Personius also had learned during the evening that Campbell had walked to Malio's and intended to walk home—he lived a few blocks away. Witnesses who observed Personius that evening testified that she appeared to be intoxicated. Campbell observed the same, and he offered to call her a cab. She told him her car was in valet parking. He offered to see if it could be kept overnight. She told him that she needed to get to her car. He took her valet ticket, had the car brought up, and confirmed with the valet that it could be left overnight. She then refused to leave her car and insisted that it needed to be moved to a secure public parking lot where she could have access to it. He tried to convince her to leave the car, but she insisted that it had to be moved. Out of

frustration, he agreed to move the car to a lot near his apartment building and call her a cab from there.

Shortly after leaving Malio's driving Personius' car, Campbell was pulled over by Fernandez and subsequently arrested for DUI and taken to jail. Additionally, Campbell inadvertently left his trial bag in Personius' car. Personius and her car were later driven to her home by an associate attorney in Respondents' firm.

The next day, Stephen Diaco made several statements to the media about the DUI of his opposing counsel Campbell, how the arrest caused the trial to be continued, and how Campbell's behavior was a mockery of the judicial system and an embarrassment to Diaco as an attorney. Additionally, the Respondents were in possession of Campbell's trial bag for several hours and made no attempt to inform him or return the bag until after Personius' identity was discovered and Campbell's cocounsel, Ellis, demanded return of the bag.

The referee's report recommended permanent disbarment for Diaco, Adams, and Filthaut. The report sets forth the extensive communications among the three Respondents, Personius, and Fernandez on the night at issue. The referee found that Respondents engaged in numerous acts of misconduct, including a previous attempt to have Campbell arrested for DUI by Filthaut and his friend Sergeant Fernandez.

Respondents Adams and Filthaut seek review of the referee's report and recommendations. Neither Adams nor Filthaut challenges the referee's factual findings. Filthaut challenges the referee's denial of a motion to disqualify, the denial of a motion for summary judgment, the referee's alleged reliance on facts not in evidence, and the referee's recommendation that he be found guilty of violating Rule Regulating the Florida Bar 3-4.3. Filthaut also challenges the referee's recommendation of permanent disbarment, arguing for the lesser sanction of a rehabilitative suspension up to disbarment. Adams challenges only the recommendation of permanent disbarment and advocates instead for disbarment. As discussed below, we approve the referee's recommendations in full.

ANALYSIS

First, we reject without further discussion Filthaut's claim that the referee improperly failed to disqualify himself, as the grounds alleged were legally insufficient. Regarding his claim that the referee improperly relied upon facts not in evidence, we also reject this claim as meritless.

As to Filthaut's claim that a partial summary judgment should have been granted in his favor on various rule violations, this is also without merit. The complaint and evidence produced at the final hearing clearly showed that Filthaut actively participated with Adams and Diaco in a scheme to improperly cause the arrest of opposing counsel during the midst of an ongoing high-profile civil trial.

The arrest was designed to and had the effect of disrupting the proceedings, including a postponement of the witness testimony and the necessity of juror interviews regarding the publicity surrounding the arrest. Thus, this claim is without merit.

Tied to Filthaut's argument pertaining to the denial of summary judgment is his argument that he should not have been found guilty of violating rule 3-4.3. Rule 3-4.3 provides, in pertinent part, that the "commission by a lawyer of any act that is unlawful or contrary to honesty and justice . . . may constitute a cause for discipline." Filthaut appears to argue that the referee's recommendation that he be found guilty of violating this rule should be disapproved because there was no direct evidence that he destroyed or consented to the destruction of the cell phone that he used during the events at issue in this case. This argument is meritless, and ignores the referee's detailed findings that Filthaut violated rule 3-4.3 by actively conspiring with Diaco, Adams, Personius, and Fernandez to improperly effect Campbell's DUI arrest. In addition, the referee found that Filthaut specifically refused to respond to questions confirming that he had erased, secreted, or otherwise destroyed cell phone communications that would constitute direct evidence of the nature of his communications that night. The referee "indulged all the adverse inferences that may permissibly be imposed as a result." Filthaut does not dispute that the referee appropriately indulged such adverse inferences, and he

provides insufficient support for his argument that such cannot serve as a basis for the referee's findings that he too erased or destroyed the cell phone communications that would have further implicated him in the scheme to have Campbell arrested. Accordingly, we approve the referee's recommendation that Filthaut be found guilty of violating rule 3-4.3.

As for Adams' and Filthaut's challenges to the referee's recommendation that they be permanently disbarred, the standard of review for a referee's recommendation as to discipline is as follows:

> In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. See Fla. Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989); see also art. V, §15, Fla. Const. However, generally speaking, this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing caselaw and the [Florida] Standards for Imposing Lawyer Sanctions. See Fla. Bar v. Temmer, 753 So. 2d 555, 558 (Fla. 1999).

Fla. Bar v. Ratiner, 46 So. 3d 35, 39 (Fla. 2010).

Neither Filthaut nor Adams seriously contests the referee's recommendation that they be disbarred, and their co-respondent, Stephen Diaco, has already agreed to and been permanently disbarred. Filthaut and Adams simply contend that their misconduct is not so severe as to warrant permanent disbarment. The most persuasive argument in Respondents' favor is that in imposing permanent disbarment, this Court has usually addressed patterns of continuing egregious and

unrepentant misconduct demonstrating that the respondent attorney is not amenable to rehabilitation and is beyond redemption. For example, in Florida Bar v. Norkin, 183 So. 3d 1018, 1023 (Fla. 2015), the Court permanently disbarred an attorney who had been previously suspended from the practice of law for two years for relentless unprofessional behavior towards judges and opposing counsel and who had been ordered to appear before the Court for a public reprimand.[3] Following his suspension, Norkin failed to fully comply with the suspension order, continued to engage in the practice of law, sent unprofessional and threatening e-mails to Bar counsel, and during the public reprimand administered by the Court "intentionally smirked and stared down each Justice one by one." Id. The Court addressed Norkin's discipline as follows:

> Moreover, given Norkin's continuation of his egregious behavior following his suspension and during the administration of the public reprimand, we conclude that he will not change his pattern of misconduct. Indeed, his filings in the instant case continue to demonstrate his disregard for this Court, his unrepentant attitude, and his intent to continue his defiant and contemptuous conduct that is demeaning to this Court, the Court's processes, and the profession of attorneys as a whole. Such misconduct cannot and will not be

3. In the previous disciplinary case, the Court found that despite repeated warnings from judges, Norkin continually engaged in rude, antagonistic, and extremely unprofessional behavior, including making false accusations against a senior judge, disrupting multiple court proceedings by yelling at judges and exhibiting disrespectful conduct, and relentless, unethical, and denigrating behavior toward opposing counsel. Fla. Bar v. Norkin, 132 So. 3d 77, 89-92 (Fla. 2013). Norkin also had previously been publicly reprimanded and required to attend ethics school for similar misbehavior. Id. at 91.

> tolerated as it sullies the dignity of judicial proceedings and debases the constitutional republic we serve. We conclude that Norkin is not amenable to rehabilitation, and as argued by the Bar, is deserving of permanent disbarment.

Id. Similarly, in Florida Bar v. Behm, 41 So. 3d 136 (Fla. 2010), the Court permanently disbarred an attorney who was guilty of trust account violations and knowing failure to file or pay federal income taxes for the entire time he was admitted to practice law. The attorney had previously been publicly reprimanded as a result of misconduct in connection with a probate matter and had been previously suspended for ninety-one days for misconduct in a guardianship matter "that raised serious issues concerning his fitness to practice law." Id. at 151. In addition, at oral argument before this Court he declared his intention "to persist in refusing to file income tax returns '[u]nless the law changes or unless someone can show [him] a law that makes [him] clearly liable for income tax, for federal income tax.' " Id. The Court concluded that the "only appropriate sanction under these circumstances—cumulative misconduct and a persistent course of unrepentant misconduct—is permanent disbarment from the practice of law." Id.

Here, as to both Adams and Filthaut, the referee found as mitigating factors the absence of a prior disciplinary record and good character and reputation. Both have enjoyed relatively lengthy unblemished careers—Adams had been a member of the Florida Bar for approximately 17 years and Filthaut had been a member approximately 13 years at the time the misconduct occurred. And, both were able

to present multiple character witnesses on their behalf. On the other hand, in recommending permanent disbarment, the referee made factual findings linking Adams to a prior incident of unethical behavior involving paralegals for his firm surreptitiously photographing the office of a chiropractor who was a plaintiff in a case in which Adams was counsel for the defendant, and Filthaut had orchestrated (and Adams knew about) a prior attempt to have Campbell arrested.

On balance, we conclude that if the misconduct involved in this case is not comparable to that committed in the cases above, this is in part because the misconduct in this case is unique and essentially unprecedented, at least as documented in this Court's prior case law. The Respondents' actions constituted a deliberate and malicious effort to place a heavy finger on the scales of justice for the sole benefit of themselves and their client. The personal and professional harm inflicted upon Campbell (a fellow attorney) and his clients' case, upon Sergeant Fernandez (a personal friend of Filthaut and officer of the law), and upon the legal system, the legal profession, and the public's confidence in both, was simply collateral damage from the Respondents' point of view. The Respondents' willingness to inflict and indifference to causing such harm is, in the words of the referee, quite "stunning." The referee did not find remorse as a mitigating factor for either Respondent, and neither of them challenges this.

Given all of these circumstances, we conclude that the referee's recommendation of permanent disbarment is warranted and appropriately serves the three-pronged purpose of attorney discipline: (1) it is fair to society; (2) it is fair to the Respondents; and (3) it is severe enough to deter other attorneys from similar misconduct. See Fla. Bar v. Lawless, 640 So. 2d 1098, 1100 (Fla. 1994). We can only hope that our unanimous decision to approve the referee's recommendation to permanently disbar these attorneys, a sanction not contested by and already imposed upon the third attorney involved, Stephen Diaco, will serve to warn other attorneys of the high standards of professional conduct we demand of all attorneys. And we hope in some small way, it will send a message to the public that this Court will not tolerate such outrageous misconduct on the part of attorneys admitted to practice law in Florida.

CONCLUSION

Accordingly, Robert D. Adams and Adam Robert Filthaut are hereby permanently disbarred from the practice of law in the State of Florida. Because the Respondents are currently suspended, the permanent disbarment is effective immediately. Respondents shall fully comply with Rule Regulating the Florida Bar 3-5.1(g).

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Robert D. Adams in

the amount of $14,558.66, and from Adam Robert Filthaut in the amount of $14,178.28, for which sum let execution issue.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARMENT.

Original Proceeding – The Florida Bar

John F. Harkness, Jr., Executive Director, Tallahassee, Florida; Jodi Anderson Thompson and Katrina S. Brown, Bar Counsel, Tampa, Florida; and Adria E. Quintela, Staff Counsel, Sunrise, Florida,

for Complainant The Florida Bar

William Frederic Jung of Jung & Sisco, P.A., Tampa, Florida,

for Respondent Robert D. Adams

Mark Jon O'Brien, Tampa, Florida,

for Respondent Adam Robert Filthaut

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEPHEN CHRISTOPHER DIACO,

Respondent.

_____/

Supreme Court Case
No. SC14-1052

The Florida Bar File
No. 2013-10,735 (13F)

THE FLORIDA BAR,

Complainant,

v.

ROBERT D. ADAMS,

Respondent.

_____/

Supreme Court Case
No. SC14-1054

The Florida Bar File
No. 2013-10,736 (13F)

THE FLORIDA BAR,

Complainant,

v.

ADAM ROBERT FILTHAUT,

Respondent.

_____/

Supreme Court Case
No. SC14-1056

The Florida Bar File
No. 2013-10,737 (13F)

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On June 2, 2014, The Florida Bar filed separate Complaints against the Respondents, Stephen Christopher Diaco, Esq. ("DIACO"), Robert D. Adams, Esq. ("ADAMS"), and Adam Robert Filthaut, Esq. ("FILTHAUT"). On June 4, 2014, Amended Complaints were filed against Respondents ADAMS and FILTHAUT. The Honorable W. Douglas Baird was appointed as Referee in each matter pursuant to the Supreme Court of Florida's June 4, 2014 Order and the June 10, 2014 Order of the Honorable J. Thomas McGrady, Chief Judge of the Sixth Judicial Circuit. Because the cases against the Respondents arise out of the same facts, the cases were consolidated for the purpose of discovery on July 28, 2014, and subsequently consolidated for trial. Prior to trial, the Respondents filed motions for partial summary judgment, which were denied on May 11, 2015. The trial was bifurcated, with the guilt phase conducted between May 11, 2015, and May 21, 2015, and the sanctions phase conducted on August 6-7, 2015.

During the course of these proceedings, Respondent DIACO was represented by Gregory W. Kehoe, Esq., Danielle Kemp, Esq., and Joseph A. Corsmeier, Esq. Respondent ADAMS was represented by William F. Jung, Esq.

and Respondent FILTHAUT was represented by Mark J. O'Brien, Esq. The Florida Bar was represented by Jodi A. Thompson, Esq., Sheila Tuma, Esq., and Katrina Brown, Esq. All items properly filed, including pleadings, transcripts, exhibits, and this Report, constitute the record in this case and are being forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT: TFB No. 2013-10,735 (13F); No. 2013-10,736 (13F); No. 2013-10,737 (13F)

A. Jurisdictional Statement

Respondents are, and at all times mentioned during this Investigation were, members of The Florida Bar subject to the jurisdiction and Disciplinary Rules of the Supreme Court.

B. Narrative Summary – all cases

Narrative Summary Introduction

This matter involves three members of The Florida Bar who the Referee finds, individually and through a conspiracy among themselves and others, violated the Standards of Conduct and Rules of Professional Conduct of the Rules Regulating Members of The Florida Bar. The Referee believes that in order to more easily explain the factual circumstances that were proven by clear and convincing evidence at trial, a comprehensive narrative of each of the key findings will provide a more comprehensible format. Preceding that narrative, the major participants in the events that resulted in these proceedings are identified.

Respondent DIACO is an equity partner in the law firm of Adams & Diaco, P.A., whose offices are located in the Bank of America Building in downtown Tampa, Florida. He is the brother of Joseph A. Diaco, Jr., Esq., who is also an equity partner in Adams & Diaco, P.A. Throughout this proceeding, Respondent DIACO has refused to testify, either in deposition or at trial, based on his right against self-incrimination.

Respondent ADAMS is the third equity partner in Adams & Diaco, P.A., along with the Diacos. Throughout this proceeding, Respondent ADAMS refused to answer any questions in deposition, based on his right against self-incrimination. On the morning of trial, with all discovery completed and disclosed by The Florida Bar, he chose to testify.

Respondent FILTHAUT is a non-equity partner (also referred to as an "associate") in Adams & Diaco, P.A. Throughout this proceeding, Respondent FILTHAUT has refused to testify, either in deposition or at trial, based on his right against self-incrimination.

Melissa Personius is, and at all times pertinent to this matter was, a paralegal employed by Adams & Diaco, P.A. She worked primarily for Respondent ADAMS, but was subject to the direction or authority of all the partners, be they equity or non-equity. At the time of the material events, Ms. Personius lived in Brandon, a Tampa suburb, with Kristopher Personius, her ex-husband. Ms.

Personius refused to testify at trial based on her right against self-incrimination. She gave some testimony to the Pinellas County State Attorney's Office investigators and signed a short affidavit prior to these proceedings being brought, but she claimed to have no recollection of many significant portions of the events.

Sergeant Raymond Fernandez was, at all times material to these proceedings, a Sergeant with the City of Tampa, Florida Police Department. He had been with the Department for over 18 years, of which he spent the last 15 years on the Traffic Enforcement Unit. At the time of these events, he was the commander of the Traffic Enforcement Unit, otherwise known as the DUI Squad. Sergeant Fernandez was a close personal friend of Respondent FILTHAUT. Sergeant Fernandez refused to testify at trial based on his right against self-incrimination. Before these proceedings, however, he provided deposition testimony to investigators from the Pinellas County State Attorney's Office and testified at various administrative hearings regarding both the arrest of C. Philip Campbell, Jr., Esq., and his discharge from the Tampa Police Department.

Brian Motroni, Esq., was an associate attorney with the firm of Adams & Diaco, P.A. at all times material to this matter. Mr. Motroni provided some information when he spoke with an investigating attorney for the Thirteenth Judicial Circuit Grievance Committee. At trial, Mr. Motroni refused to testify based upon his right against self-incrimination.

Charles Philip Campbell, Jr., Esq., is a partner in the law firm of Shumaker, Loop, & Kendrick whose offices are also in the Bank of America Building in downtown Tampa. At the time of all relevant events, Mr. Campbell was lead counsel in the *Schnitt v. Clem* trial before Thirteenth Circuit Judge James D. Arnold, a high profile case between two radio "shock jock" personalities. Mr. Campbell represented Todd and Michele Schnitt while Adams & Diaco represented "Bubba the Love Sponge" Clem and Bubba Radio Network. Mr. Campbell testified at trial and the Referee found him to be a credible witness.

Jonathan J. Ellis, Esq., is also a partner in Shumaker, Loop, & Kendrick, and, at all times material to this matter, co-counsel with Mr. Campbell in the *Schnitt v. Clem* litigation.

I.

Respondents DIACO, ADAMS, and FILTHAUT, members of Adams & Diaco, PA, conspired among themselves and with others to deliberately and maliciously effect the arrest of Mr. Campbell, an opposing attorney.

THURSDAY, NOVEMBER 29, 2012 – FIRST ATTEMPTED ARREST

The major events that comprise this narrative occurred between the evening of January 23, 2013, and the afternoon of January 25, 2013. An earlier event, however, puts them in perspective and reveals a pattern of intentional conduct that resulted in these proceedings. The first effort to manipulate the arrest of Mr. Campbell by members of the Adams & Diaco law firm began approximately 60

days prior to January 23, 2013, and were revealed in a deposition of Sergeant Fernandez that was taken prior to the filing of these proceedings.

On the evening of November 29, 2012, Respondent FILTHAUT called his close friend Sergeant Fernandez and said: *"There's this guy that works in my building. He's an attorney. He gets drunk all the time. He goes to Malio's and drinks it up and then he drives home drunk."* Sergeant Fernandez was given the name *"Philip Campbell."* Respondent FILTHAUT did not tell Sergeant Fernandez that Mr. Campbell was the lead opposing attorney in a five-year-old high-profile civil action being defended by Adams & Diaco.

Sergeant Fernandez, based upon the information provided by Respondent FILTHAUT, ordered Officer Michael Lyon of the Tampa Police Department DUI Squad to stakeout Malio's Steakhouse in downtown Tampa, with specific instructions to look for Mr. Campbell. Officer Lyon was given Mr. Campbell's name and a vehicle description. Mr. Campbell was not observed driving that night and no arrest was made. After 45 minutes, the surveillance was discontinued. A compilation of recorded and preserved Tampa Police Mobile Data Terminal ("MDT") text communications between the officers of the DUI Squad on the evening of November 29, 2012, further confirms the effort to look for Mr. Campbell.

Respondent ADAMS admitted during trial that he learned of the November attempt to target Mr. Campbell shortly after it occurred. There was no evidence that he admonished Respondent FILTHAUT for those actions or made any effort to prohibit similar acts in the future.

WEDNESDAY, JANUARY 23, 2013 – THE SETUP AND ARREST

The evening's events played out over a five or six hour period beginning around 5:00 p.m. on January 23, 2013. Following a day in the *Schnitt v. Clem* trial, Mr. Campbell walked from his office to Malio's Steakhouse in downtown Tampa to meet his trial partner, Mr. Ellis, for dinner and drinks.

Ms. Personius had also decided to go to Malio's for drinks after work with her friend Vanessa Fykes. They arrived at Malio's around 5:00 p.m. and had a glass of wine. After a short while, they decided to drive to the Fly Bar, a few blocks away. As they were leaving Malio's, Ms. Personius noticed that Mr. Campbell was at the bar. When Ms. Personius arrived at the Fly Bar, she contacted Respondent ADAMS and informed him that Mr. Campbell was at Malio's. Respondent ADAMS, after notifying Respondent DIACO of the information received from Ms. Personius, called her back. Following the call from Respondent ADAMS, Ms. Personius returned to Malio's.

Although she refused to testify at trial, Ms. Personius previously admitted during the State Attorney's investigation: *"I offered—I believe I offered to just go*

back if they needed, you know, anything, any other–to see maybe if he's still there. I don't know. Whatever information the police or authorities needed." She also admitted knowing that*"[t]he Police have a contact."* Sergeant Fernandez, in earlier sworn testimony, admitted that the "contact" that night was his close friend, Respondent FILTHAUT.

While Ms. Personius was returning to Malio's, Respondent ADAMS, after discussions with Respondent DIACO, called Respondent FILTHAUT to alert him that Mr. Campbell was at Malio's. As he had done two months earlier, Respondent FILTHAUT called Sergeant Fernandez to again encourage him to stakeout Malio's with the intent of arresting Mr. Campbell for Driving under the Influence. Sergeant Fernandez testified that he asked Respondent FILTHAUT, *"Is that the guy you called me about before?"* Respondent FILTHAUT acknowledged that it was and told Sergeant Fernandez, *"Hey, the attorney that's in my building, he's out drinking again at night at Malio's."* He also told Sergeant Fernandez, *"He's going to drive home again tonight drunk."* Sergeant Fernandez told Respondent FILTHAUT, *"Well, we didn't get him last time. We'll sit on him again and see what he does."* Respondent FILTHAUT again failed to tell Sergeant Fernandez that Mr. Campbell was the opposing attorney in the much-publicized and ongoing *Schnitt v. Clem* trial.

Sergeant Fernandez assigned a member of his DUI Squad, Officer Joseph Sustek, to sit outside of Malio's and look for Mr. Campbell's black BMW. Shortly after 8:00 p.m. that night, Sergeant Fernandez and another member of the DUI Squad, Officer Tim McGinnis, took up the surveillance and relieved Officer Sustek. During the evening, Sergeant Fernandez received periodic updates about what Mr. Campbell was doing inside Malio's by text or voice call from Respondent FILTHAUT.

While Sergeant Fernandez was setting up his surveillance for Mr. Campbell, Ms. Personius and Ms. Fykes had returned to Malio's. Ms. Personius took a seat at the bar next to Mr. Campbell. From about 7:00 p.m. until about 9:45 p.m., she engaged in conversation with Mr. Campbell, Mr. Ellis, and attorney Michael Trentalange. She told them that she was a paralegal working for Nathan Carney, Esq., at the firm of Trenam Kemker. She openly and obviously flirted with Mr. Campbell, encouraged him to drink, and bought him drinks herself.

While the drinking and conversation were occurring that night, Ms. Personius managed to carry on a steady series of cell phone texts and calls with each of the Respondents. For example, between 6:30 p.m. and 9:30 p.m. that night Ms. Personius either sent or received approximately 19 separate communications with Respondent FILTHAUT. During that same period, she had approximately 17 communications with Respondent ADAMS, and approximately 11 with

Respondent DIACO. In the half hour between 9:30 p.m. and 10:00 p.m., the approximate time Sergeant Fernandez pulled Mr. Campbell and Ms. Personius over after they left Malio's, Ms. Personius had approximately another 12 communications with Respondent FILTHAUT, 7 with Respondent ADAMS, and 2 with Respondent DIACO. The Florida Bar's Exhibit 59 provides a minute-by-minute chart of the dozens of cell phone communications that were occurring between the Respondents and Ms. Personius, as well as those among the Respondents themselves. The actual substance of those text messages is not known. If the Respondents' phones still exist, they chose not to produce them. Ms. Personius disposed of her phone before these proceedings began, and Sergeant Fernandez previously testified that all his texts were erased when he put some new software on his phone. It was obvious, however, from the recorded and preserved Tampa Police MDT text messages between patrol vehicles that night that Ms. Personius was providing Respondent FILTHAUT with regular updates. He passed on those updates to Sergeant Fernandez, who in turn, communicated them to Officers Sustek and McGinnis. At one point, Officer Sustek sent a MDT text to Sergeant Fernandez asking if he was going to be informed when Mr. Campbell left Malio's. Sergeant Fernandez replied that he was. That exchange was around 8:17 p.m., long before Mr. Campbell had left. It confirmed not only that Sergeant

Fernandez was being updated, but also that whoever was doing the updating intended to remain at Malio's until Mr. Campbell decided to leave.

By 9:30 p.m. to 9:45 p.m., Ms. Fykes and Mr. Ellis had left Malio's. Mr. Trentalange was leaving to make a 9:45 p.m. dinner reservation. During the evening, Ms. Personius learned that Mr. Campbell had walked to Malio's, did not have a car there, and that he intended to also walk the few blocks home. That was not out of the ordinary for Mr. Campbell, as was confirmed by the testimony of bartender Denise DiPietro, restaurant manager Dina Kuchkuda, Mr. Ellis, and attorney Michael Trentalange, all of whom the Referee found credible. In fact, Mr. Trentalange had a specific conversation with Mr. Campbell that night about his plans for the evening. Mr. Campbell told Mr. Trentalange that he planned to go home and be in bed around 10:00 p.m. and get up at 2:00 a.m. to work on the next day's witness testimony for the ongoing jury trial, then in its second week. Mr. Trentalange had known Mr. Campbell professionally for a number of years and testified that this was a routine Mr. Campbell regularly followed during jury trials.

Some of the witnesses who observed Ms. Personius that evening testified that she appeared to be intoxicated. That was certainly the opinion of Ms. Fykes, who, before leaving, told her not to drive and to call a cab. Mr. Campbell also felt that she was intoxicated and, as they were leaving, offered to call her a cab. She told him that her car was in valet parking. Mr. Campbell said he would see if it

could be kept overnight in the parking garage. Ms. Personius then told Mr. Campbell that she needed to get to her car. Mr. Campbell took her valet ticket to the attendant and had the car brought up. Mr. Campbell confirmed with the attendant that the car could be left overnight.

At that point, Ms. Personius refused to leave her car and insisted that it needed to be in a secure public parking lot where she could have access to it. Mr. Campbell tried to convince her to leave the car, but she maintained that it had to be moved[1]. Out of frustration, Mr. Campbell agreed to move the car to a lot near his apartment building and to call her a cab from there. Mr. Campbell fully admitted that she never asked him directly to drive her car. He chose instead to run the risk of a two-minute drive as a favor to someone who appeared too impaired to drive safely. Mr. Campbell was unaware that the self-professed paralegal from Trenam Kemker was feigning being stranded and, at that point and throughout the evening, was plotting with the Respondents to have him arrested.

The video of the parking lot area, which Mr. Campbell narrated during his testimony, shows that these events occurred between approximately 9:40 p.m. and 9:57 p.m. The timing is noteworthy. Cell phone call and text records show that at

[1] In reality, Ms. Personius was easily able to get herself and her car home that evening without any assistance from Mr. Campbell. Later she was quickly able to arrange, through her constant contact with the Respondents, for Mr. Motroni to be dispatched for that purpose. The fact that this alternative was not exercised until after Mr. Campbell drove into the waiting police stakeout is further confirmation of their intent to effect his arrest.

9:28 p.m., Ms. Personius sent a text to Respondent DIACO. Immediately thereafter, Respondent DIACO made a phone call to Respondent FILTHAUT. Immediately following that, Respondent FILTHAUT sent a text to Sergeant Fernandez. One minute later, at 9:29 p.m., Sergeant Fernandez sent a MDT text message to Officer McGinnis, who was part of the stakeout, which read *"leaving bar now,"* referring to Mr. Campbell. Since Mr. Campbell had hardly walked out into the parking area before this whole exchange, it clearly demonstrates how diligently Ms. Personius was keeping the Respondents informed about what was happening. Her information was immediately relayed to the DUI Squad through Respondent FILTHAUT's communication with Sergeant Fernandez.

When Sergeant Fernandez informed Officer McGinnis that Mr. Campbell was leaving the bar at Malio's, both officers were under the impression that Mr. Campbell would be driving his black BMW. Officer McGinnis sent an MDT text to Sergeant Fernandez which read *"blk convertible?"* At 9:31 p.m., Sergeant Fernandez replied *"BMW_yes."* At the same time, Ms. Personius was having her own text exchanges. At 9:32 p.m., she received a text from Respondent FILTHAUT. At 9:35 p.m., she received a text from Respondent DIACO. At 9:36 p.m., she sent a text to Respondent FILTHAUT. At 9:37 p.m., she got a text back from Respondent FILTHAUT. At 9:39 p.m., she got another text from Respondent FILTHAUT. At 9:42 p.m., she got another text from Respondent FILTHAUT.

Immediately after, she made a 57 second phone call to Respondent FILTHAUT, which was followed by another text from Respondent FILTHAUT at 9:44 p.m. She immediately made another phone call to Respondent FILTHAUT, that one lasting 53 seconds. At 9:45 p.m., she sent a text to Respondent FILTHAUT. At 9:48 p.m., she got a text from Respondent ADAMS, which was immediately followed by a call to Respondent ADAMS at 9:49 p.m. that lasted 46 seconds. She then received a text from Respondent ADAMS at 9:52 p.m. At 9:53 p.m. and 9:54 p.m., she got texts from Respondent FILTHAUT. During that same minute, she got a text from Respondent DIACO and sent another to Respondent ADAMS. During these exchanges, Ms. Personius obviously informed Respondent FILTHAUT that Mr. Campbell did not plan to leave Malio's in his own vehicle, since he didn't have one there, and instead would be driving her Nissan. Some or all of this was passed on to Sergeant Fernandez who, at 9:51 p.m., sent another MDT text to Officer McGinnis that read *"dark Nissan...valet malios."* Sergeant Fernandez asked Officer McGinnis to drive by Malio's to *"see if you see it"* at 9:51 p.m. Officer McGinnis did so and reported back *"female driving"* at 9:54 p.m.

Officer McGinnis had been misled into believing a female would be driving because he had observed Ms. Personius near the driver's door of her car at Malio's valet stand. However, the Respondents knew that Mr. Campbell would be driving, because Ms. Personius had told them. It was therefore unnecessary to advise

Sergeant Fernandez about anything other than which car he was to target. As Mr. Campbell pulled out of Malio's parking lot at approximately 9:57 p.m. that night, the Respondents and their employee, Ms. Personius, knew that the trap was set.

Almost immediately after the Nissan left Malio's, Sergeant Fernandez, who was off duty and driving an unmarked car, pulled Mr. Campbell over for a traffic stop. He claimed that Mr. Campbell had made an illegal right turn from a through lane on Ashley Street across a right turn lane and into an intersecting street. No one else observed this driving. Officer McGinnis arrived immediately thereafter, and Sergeant Fernandez turned Mr. Campbell over to him for what became a typical DUI investigation. Mr. Campbell was arrested, handcuffed, and taken to the County Jail.

Although the law provides that vehicles used in a DUI be impounded, Sergeant Fernandez, as leader of the unit, was authorized to waive that requirement if a sober driver was available. He did so after more text messages with Respondent FILTHAUT. Sergeant Fernandez had already communicated to Respondent FILTHAUT that he could not release the car to Ms. Personius because her driver's license was suspended. Phone records show that Ms. Personius, after several conversations with Respondent ADAMS, called associate Mr. Motroni, who was dropped off at the scene.

Mr. Motroni drove Ms. Personius and her car to her home in Brandon. Waiting for her there, and caring for their two children, was her ex-husband and then current roommate Kristopher Personius. The Personius's marriage had been dissolved for seven years, but their relationship continued. At trial, Mr. Personius testified to the following: when Ms. Personius arrived home she admitted to him in an excited state that she had participated in setting up Mr. Campbell at the direction of her employers, specifically Respondent ADAMS and Respondent DIACO. She told him that the Respondents were looking to set Mr. Campbell up, that she had been directed to go to Malio's to spy on him and *"get him to stay longer and drink more,"* and that Respondent DIACO and Respondent ADAMS were *"going to Adam Filthaut, too, to get the cop in place."* Ms. Personius also said that she had made Mr. Campbell drive and told her ex-husband that she *"got him"* and *"made him drive my car."* Mr. Personius further testified that Ms. Personius stated that Respondent DIACO had told her that she would receive a big bonus and would be his best-paid paralegal. All of these admissions occurred in the presence of not only Mr. Personius, but also Mr. Motroni who, after driving her car home, was waiting for a cab. Mr. Motroni refused to testify at trial on Fifth Amendment grounds.

Credible support for Mr. Personius's account of the evening's events came from another witness at trial, Lyann Goudie, Esq. Ms. Goudie is a former

prosecutor and experienced criminal defense attorney in Tampa. After the arrest of Mr. Campbell and the intense media attention that followed, Mr. and Ms. Personius were still living together in Brandon when the FBI arrived on the morning of May 23, 2013, with a search warrant. Several days later, Mr. Personius was contacted by an FBI representative who wanted to discuss the events of January 23, 2013. Mr. Personius told his ex-wife about the call, and she told him not to talk to them. Immediately thereafter, Ms. Personius's attorney, Todd Foster, who was being paid by Adams & Diaco, arranged for Mr. Personius to consult with Ms. Goudie. Adams & Diaco also paid Ms. Goudie $2,500 for her representation of Mr. Personius. Mr. Personius's knowledge of events was important enough to Adams & Diaco that they paid for an attorney to represent him before the FBI. Yet, each Respondent failed to disclose Mr. Personius as a person with knowledge of the events of January 23, 2013, in response to The Florida Bar's interrogatories during discovery in this matter.

At trial, Ms. Goudie testified that Mr. Personius had waived the attorney/client privilege regarding her representation of him, and she was free to answer any questions about their privileged discussions. She then described how Mr. Personius had come to her in early June 2013, because the FBI wanted to talk with him. He told her that the publicity regarding his ex-wife's role in the Campbell matter had hurt his teenage daughters because their unusual last name

was so recognizable, and he didn't want to get drawn in further. Ms. Goudie further testified that Mr. Personius related to her the events that occurred when Mr. Motroni brought Ms. Personius home after Mr. Campbell's arrest on January 23, 2013. Her recounting of his description of the events of that night was consistent with the testimony Mr. Personius gave at trial.

During Ms. Goudie's consultation with Mr. Personius, he voiced no animosity toward his ex-wife or her employer. Essentially, he wanted to avoid any involvement and be left alone. Further, during that consultation, Mr. Personius also advised Ms. Goudie that he had recorded a video that night on his cell phone that included his wife's admissions regarding the plan to set up and arrest Mr. Campbell. Ms. Goudie told him that the recording might be considered illegal if it was done without the consent of his ex-wife, and that if he was going to share it with anyone, it should be the FBI. According to allegations contained in motions filed prior to trial, the recording that Mr. Personius made of his ex-wife on the night of January 23, 2013, is now in the possession of the FBI. It was not offered into evidence at the trial and its contents are unknown to the Referee. But the testimony that Mr. Personius gave at trial, regarding the admissions of his ex-wife on the night of Mr. Campbell's arrest, is credible not only because it was not recently fabricated, but also because it was supported by the other credible evidence and testimony in the case.

Ms. Personius's active participation in the events surrounding the set up and arrest of Mr. Campbell essentially ended when Mr. Motroni drove her home that night in her car. However, before moving on to subsequent events, there are additional facts regarding her participation that require some comment. The first fact concerns the state of Ms. Personius's sobriety that night. It was previously noted that several people commented that she appeared intoxicated during the evening. That was the impression Mr. Campbell testified he had at the time he decided to leave Malio's. Regardless of the amount of alcohol she consumed that night, the evidence clearly shows that Ms. Personius was capably providing the Respondents with a constant stream of texts and voice calls from the time she first noticed Mr. Campbell at Malio's through the events that led to his arrest and thereafter. Ms. Personius was also alert enough regarding what she had said and done that night to attempt to cover her tracks. Early the next morning, she texted Nate Carney: *"if someone calls looking for me tell them you don't know me or don't tell them who I am."* Mr. Carney, who testified at trial, was the attorney at Trenam Kemker that Ms. Personius falsely told Mr. Campbell and Mr. Ellis she worked for. The Referee found Mr. Carney's testimony to be credible. Two days later, Ms. Personius also called and left a message on Vanessa Fykes phone to let her know that an investigator for Adams & Diaco would be calling her to "prep" her regarding any questions about the evening's events that she might subsequently

be asked. Ms. Fykes, after seeing news reports the morning following the arrest, cut off any further communication with Ms. Personius. Ms. Fykes also refused to return numerous calls from the Adams & Diaco investigator and those of Respondent DIACO himself. The Referee also found her testimony regarding these events to be credible.

When called to testify at trial, Ms. Personius refused to answer every question that she was asked after giving her name. She claimed her right to remain silent under the Fifth Amendment. She had also made the same assertion of rights before Judge Arnold when she was asked about the events of the night of January 23 during the hearing on the Motion for Mistrial in the *Schnitt v. Clem* case. In doing so, she subjected herself and the Respondents to the adverse inferences that are appropriate to impose, given the nature of all the other evidence in this case. *Coquina Investments v. TD Bank, N.A.,* 760 F.3d 1300 (11th Cir. 2014); *Atlas v. Atlas,* 708 So. 2d 296, 299 (Fla. 4th DCA 1998).

Prior to this matter being filed, when Ms. Personius was interviewed by the Pinellas County State Attorney's Office regarding Mr. Campbell's DUI charge (it had been transferred from Hillsborough), she admitted her involvement. When she was questioned regarding her many phone calls and text messages with the Respondents that evening, however, she consistently denied any recollection. Given the sheer volume of texts and phone calls and the significance of the night,

that was simply not credible. In addition, the fact that she continues working for the Respondents' firm, that she received a $9,000 bonus for 2013, a $6,500 raise, and a credit card paid for by Adams & Diaco all support the conclusion that her conduct on the night of January 23, 2013, was known and approved by the Respondents.

The active participation of all of the Respondents in the effort to effect the arrest of Mr. Campbell is beyond dispute. Respondent DIACO directed Respondent ADAMS to call Respondent FILTHAUT when he first learned that Mr. Campbell was at Malio's that evening. Respondent DIACO was aware that Respondent FILTHAUT's close relationship with Sergeant Fernandez would result in the Tampa Police Department's DUI Squad making another special effort to target Mr. Campbell, as it had attempted in November. Respondent DIACO was aware that Ms. Personius was drinking with Mr. Campbell at Malio's and that she was passing on updates regarding their activities to him and the other Respondents. He was aware that her information was being shared with Sergeant Fernandez on a regular basis through Respondent FILTHAUT. He was aware that Mr. Campbell would be driving Ms. Personius's car from Malio's and that the vehicle information had been provided to Sergeant Fernandez. He maintained constant contact with the other Respondents throughout the evening as the plan progressed, and did nothing to discontinue the effort directed at Mr. Campbell's arrest.

Respondent DIACO was an attorney with supervisory authority over Respondent FILTHAUT, associate Mr. Motroni, and nonlawyer employee Ms. Personius. Respondent DIACO failed or refused to properly supervise Respondent FILTHAUT, associate attorney Mr. Motroni, and nonlawyer employee Ms. Personius that evening and thereafter.

Respondent DIACO refused to testify for a deposition and at trial on Fifth Amendment grounds. When questioned by Judge Arnold regarding the evening of January 23 during the *Schnitt v. Clem* case, he either invoked his right to the Fifth Amendment, claimed he could not recall conversations or events that occurred less than 48 hours earlier, or denied any active participation. Respondent DIACO's memory had improved by the time he filed an affidavit on March 4, 2013, in opposition to a Motion for New Trial in *Schnitt v. Clem.* Respondent DIACO swore that his involvement in the events of the night of Mr. Campbell's arrest consisted of "*respond[ing] to requests for information made by the Tampa Police Department.*" That statement is so misleading and so far from the truth regarding the known events of that night that it amounts to a deliberate falsehood. The Referee infers from Respondent DIACO's silence at trial that truthful responses

would have further demonstrated his complicity in the conspiracy proven by clear and convincing evidence to exist. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).[2]

Respondent ADAMS was also a major participant in the conspiracy to effect the arrest of Mr. Campbell. The clear and convincing evidence establishes that he was aware of the November 29, 2012 attempt to arrest Mr. Campbell. He did not advise Respondent FILTHAUT against using his friendship with Sergeant Fernandez to effect the arrest of Mr. Campbell. Instead, he called Respondent FILTHAUT early on the evening of January 23, 2013, at the request of Respondent DIACO, to accomplish a DUI Squad stakeout of Malio's with the specific intent of seeking Mr. Campbell's arrest. He was aware that Ms. Personius was drinking with Mr. Campbell at Malio's and that she was passing on updates regarding their activities to him and the other Respondents. He was aware that her information was being shared with Sergeant Fernandez on a regular basis through Respondent FILTHAUT. He was aware that Mr. Campbell would be driving Ms. Personius's car from Malio's and that the vehicle information had been provided to Sergeant Fernandez. He maintained constant contact with the other Respondents throughout the evening as the plan progressed and did nothing to discontinue the effort to

[2] The Florida Bar has also cited *The Florida Bar v. Garcia*, 31 So. 3d 782 (Fla. 2010) to support the proposition that the Referee may impose an adverse inference against the Respondents as a result of their refusal to testify on Fifth Amendment grounds. *Garcia* is an unreported case and the Referee has no access to an opinion or the record to confirm The Florida Bar's assertion.

arrest Mr. Campbell. Respondent ADAMS was an attorney with supervisory authority over Respondent FILTHAUT and nonlawyer employee Ms. Personius. Respondent ADAMS failed or refused to properly supervise Respondent FILTHAUT and nonlawyer employee Ms. Personius on that evening or thereafter.

Respondent ADAMS also twice refused to answer any questions regarding his conduct at depositions scheduled by The Florida Bar during these proceedings. His counsel maintained, until the morning of trial, that Respondent ADAMS and the other Respondents would not testify based upon their Fifth Amendment rights against self-incrimination. On the first day of trial, after Respondent DIACO had so refused, Respondent ADAMS took the witness stand and indicated that he would testify. The Florida Bar was unprepared to proceed regarding Respondent ADAMS, since he had twice before declined to answer any questions in discovery. The Referee allowed a short recess of the trial for the purpose of permitting The Florida Bar to depose Respondent ADAMS before he testified.

When he again took the witness stand, Respondent ADAM's testimony was crafted to admit those facts that he knew from discovery he could not deny and to present a set of circumstances that put him in the most favorable light possible. Much of his testimony concerned the content of text messages and phone communications during January 23-24, 2013, between himself, the other Respondents, and Ms. Personius — all of which Respondent ADAMS admitted he

had deleted. His testimony about this unverifiable content defied common sense and was inconsistent with the other evidence presented at trial. Thus, while Respondent ADAMS avoided the adverse inference that could be properly imposed for his refusal to testify, his less-than-credible testimony given at the eleventh hour did nothing to aid in his defense.

Respondent FILTHAUT's close personal relationship with Sergeant Raymond Fernandez was the single most important factor that allowed the Respondents to plot the arrest of Mr. Campbell. Without the trust and long years of friendship that existed between Respondent FILTHAUT and Sergeant Fernandez, it seems doubtful that the Tampa Police Department would have devoted the resources to spend the better part of three hours staking out a bar for one potentially impaired driver on the unverified "tip" of one citizen. The fact that the DUI Squad did this, not once, but on two separate occasions is a testament to the influence Respondent FILTHAUT was able to exert. To accomplish that, Respondent FILTHAUT betrayed the trust of Sergeant Fernandez by lying to him regarding Mr. Campbell's habit of drinking and driving. The Respondents produced no evidence at trial regarding Mr. Campbell's drinking habits. Nothing was offered to suggest, as Respondent FILTHAUT had assured his friend, that Mr. Campbell *"gets drunk all the time. He goes to Malio's and drinks it up and then he drives home drunk."* The evidence at trial was just the opposite. Both the bartender

and the manager at Malio's testified that Mr. Campbell would come in one or two times a week, have one or two drinks, and walk home to his apartment. Respondents made no attempt to prove otherwise.

The most important information that Respondent FILTHAUT knew about Mr. Campbell and the events taking place at Malio's was withheld from his friend. Sergeant Fernandez was never told that Mr. Campbell was the opposing attorney in a multi-million dollar lawsuit that Adams & Diaco, P.A. were defending. Nor was Sergeant Fernandez told that the person inside Malio's who was providing the information about Mr. Campbell's status was an Adams & Diaco employee who was buying him drinks while she passed on information to the Respondents. He learned of Mr. Campbell's position as an opposing attorney the next morning when the arrest became headline news. Sergeant Fernandez confronted his friend about failing to share that important fact. Respondent FILTHAUT responded, *"Well, Ray, what's the big deal?"* Sergeant Fernandez was later discharged from the Tampa Police Department as a result.

Respondent FILTHAUT, in addition to misleading his friend in furtherance of the conspiracy, played an active role in orchestrating the events of January 23, 2013. He maintained regular contact with the other Respondents, Ms. Personius, and Sergeant Fernandez throughout the evening as the plan progressed, and did nothing to discontinue the effort directed at Mr. Campbell's arrest. Respondent

FILTHAUT's immediate and direct connection to the commander of the Tampa Police DUI Squad allowed him to coordinate the arrest by passing on exactly where Mr. Campbell was, what he was doing, when he was doing it, and what car to target when the time came.

Respondent FILTHAUT also twice refused to be deposed regarding the events surrounding these proceedings and refused to answer any questions at trial, based upon his right against self-incrimination under the Fifth Amendment. He specifically refused at trial to respond to a question confirming that he had erased, secreted, or otherwise destroyed the actual cell phone messages that would constitute direct evidence of the nature of his communications that night. The Referee has indulged all the adverse inferences that may permissibly be imposed as a result. *Martino v. Wal-Mart Stores Inc.*, 835 So. 2d 1251 (Fla. 4th DCA 2003); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Atlas v. Atlas,* 708 So. 2d 296, 299 (Fla. 4th DCA 1998); *Fraser v. Security and Investment Corporation*, 615 So. 2d 841 (Fla. 4th DCA 1993); *New Hampshire Ins. Co., v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990). In addition, the wealth of testimony provided by Sergeant Fernandez in various forums before these proceedings were commenced further confirmed that Respondent FILTHAUT's active participation is beyond dispute.

Respondent FILTHAUT, through his counsel's opening statement and his arguments regarding the "guilt phase" and the "sanctions phase" of the trial, suggested that he was only an associate at Adams & Diaco and that his participation in the setup and arrest conspiracy was solely the result of following the orders of his superiors, presumably Respondents DIACO and ADAMS. That variation of the Nuremburg Defense is only available when the conduct ordered is *"in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."* Rule 4-5.2. The Referee finds that using a nonlawyer employee to set up the opposing attorney for arrest in a multi-million dollar, high profile jury trial doesn't conceivably fall within that exception.

II.

Respondent DIACO, following an 8:30 a.m. hearing on January 24, 2013, during which all parties agreed to a brief continuance of the ongoing jury trial, made public statements to the news media criticizing the conduct of Mr. Campbell and falsely claiming that Respondent did not agree with the recess of the trial. Respondent DIACO's comments failed to disclose his own active participation in the events that resulted in the recess or the participation of Respondents ADAMS, FILTHAUT, and others.

On the morning of January 24, 2013, Mr. Ellis, Mr. Campbell's co-counsel, asked Judge Arnold for a recess in the *Schnitt v. Clem* trial. He proposed giving the jury the day off and working on jury instructions instead. Mr. Campbell's trial bag containing all of his notes and witness preparation for that morning's testimony had been left in the back seat of Ms. Personius's car when the arrest occurred.

Judge Arnold had previously planned to recess after the morning session, even before Mr. Campbell's arrest. In light of the disruption caused by the arrest and Mr. Campbell's inability to locate his trial bag, counsel for all parties agreed to the recess as a professional courtesy. It was decided that testimony would resume the next day. While Mr. Campbell and his partner continued their search for the missing trial bag, Respondent DIACO appeared outside the courthouse and gave interviews to the media about the case. These are examples of some of the statements Respondent DIACO made that appeared later that day as sound bites on various local television news programs:

> *"Well, you know, I'm shocked that the case was continued. I feel horrible for this jury that has been sequestered and pulled from the jobs, their lives, their families. And so now we have to wait."*

> *"Well, you know, I don't know exactly what the jury has been told, and, you know, they are supposed to be sequestered and not watching the news or hearing the reports, but this is front page news now."*

> *"And this is his second time. So it's just –you know, the whole thing makes me embarrassed to be an attorney, and I'm ashamed of all this whole process has continued to be a mockery of the system. But we believe in the system. We believe in the jury, and we're going to let Bubba's peers decide this case."*

> *"We were prepared for today. We were working last night in preparation for the trial. And so now we have to wait. The jury has to wait, and we have to see how this plays out. I don't understand why his other partners who have been in there every single day of the trial, can't continue this case."*

"I hope he gets help. My partner and Greg Hearing were working on this trial last night. Phil didn't seem to be doing the same. And now we're being penalized."

"Shocked, shocked, disappointed, sad, sad for the jury having to be taken out of their lives another day that this is continued. Two other partners have been trying this case every single day. I don't understand why it was continued."

"To his advantage, now he gets a good night's sleep. Now he gets to prepare his witnesses."

"His last DUI was almost twice the legal limit. He didn't learn his lesson."

At the time those statements and others of a similar nature were made, Respondent DIACO knew that his firm and all other counsel had agreed to the short recess. He also knew, or should have reasonably anticipated, that his statements would receive a great deal of public exposure in the media. They did. The next day, partially as a result of those statements, Mr. Ellis moved for a mistrial in *Schnitt v. Clem*. Judge Arnold felt compelled to question each of the jurors to determine if they had seen or heard anything regarding Mr. Campbell's arrest. One juror had learned of Mr. Campbell's arrest, but Judge Arnold was satisfied that the trial could go forward. Respondent DIACO offered no evidence at trial to explain why he made false statements to the news media about the short stipulated recess of the trial, and there was no explanation for his public "piling on" of Mr. Campbell. Nor was there evidence presented at trial to justify Respondent DIACO's efforts to publically criticize and humiliate Mr. Campbell in

the media when Respondent had full knowledge of the part he and the other members of his firm played in the arrest. The Referee infers, from Respondent DIACO's refusal to testify regarding these issues, that his purpose in making those public statements was to potentially influence any jurors that might have heard them and to otherwise gain an advantage in the ongoing trial.

III.

On January 24, 2013, Respondents DIACO and ADAMS became aware that the trial bag belonging to Mr. Campbell had been left in the car of Adams & Diaco, P.A.'s paralegal Ms. Personius. Neither Respondent DIACO, Respondent ADAMS, nor Brian Motroni, another member of the firm who also learned this fact, made any effort to immediately return Mr. Campbell's property to him or to advise him that it was in their possession.

On the morning of January 24, 2013, testimony in the *Schnitt v. Clem* trial was scheduled to resume at 9:00 a.m. After his release from jail at approximately 6:30 a.m., Mr. Campbell and Mr. Ellis began their search for Mr. Campbell's missing trial bag. Initially, it was presumed that this would simply involve contacting Trenam Kemker and retrieving the bag from the car of their paralegal. Upon inquiring, they learned that there was no paralegal named "Melissa" at Trenam Kemker. The trial bag was still not located when Mr. Campbell and Mr. Ellis entered the courtroom for the continuation of the trial. Judge Arnold considered the circumstances of Mr. Campbell's arrest and was amenable to Mr. Ellis's Motion for Recess, delaying testimony until the next day. All counsel

agreed, out of professional courtesy to Mr. Campbell, to give the jury the day off. Counsel were to remain for a jury instruction conference that morning. After the morning session, Mr. Campbell and Mr. Ellis went back to their office to continue the search for the missing trial bag.

Between 10:00 p.m. on January 23, 2013, and approximately 5:00 p.m. on January 24, 2013, Mr. Campbell's trial bag containing his notes and witness preparation material was out of his possession. Mr. Ellis and Mr. Campbell did not discover who had possession of the bag until around 4:00 p.m. on January 24. During that 19-hour period, the bag was in the sole possession of members of the Adams & Diaco firm or their employees.

The evidence regarding who possessed the bag, for how long, and what was done with it was derived almost exclusively from four sources. First, there was testimony from Respondent DIACO, Ms. Personius, and associate Mr. Motroni at a hearing on a Motion for Mistrial before Judge Arnold on the afternoon of January 25, 2013. Secondly, there was testimony from Ms. Personius given on May 23, 2013, during the DUI investigation. Thirdly, there were statements made by Mr. Motroni before Richard Martin, Esq., the investigating member to the Thirteenth Circuit Grievance Committee on April 30, 2014. Finally, though Respondent DIACO, Ms. Personius, and Mr. Motroni each refused to testify at trial regarding this matter on Fifth Amendment grounds, there was the trial testimony of

Respondent ADAMS. His testimony, however, was given after twice refusing to answer questions at scheduled depositions and after all other discovery was completed and disclosed. In the testimony prior to trial and at the trial itself (in regard to Respondent ADAMS only), the account of the possession and activity surrounding Mr. Campbell's trial bag was consistent. Mr. Personius also confirmed some aspects of the saga involving the discovery of the bag and its eventual return, although it is difficult to ascertain whether his knowledge was first hand or as a result of what Ms. Personius told him. The following is their account, pieced together from the various sources in the record and at trial.

The morning after Mr. Campbell's arrest, Ms. Personius was told not to come into the office. Around noon, Ms. Personius claimed she discovered Mr. Campbell's briefcase on the back seat of her car and called Respondent ADAMS to tell him. Respondent ADAMS saying he was too busy to deal with it, told Respondent DIACO about it. Respondent DIACO told him that he would take care of it, and tasked Mr. Motroni with retrieving the briefcase. The pass card records for the garage indicated that Mr. Motroni's car left the Bank of America building at 1:46 p.m.

Mr. Motroni claimed that upon arriving at the Personius home, he discovered that the briefcase was a large trial bag. Mr. Motroni called Respondent DIACO at 2:07 p.m. and was instructed to bring the trial bag to the Adams &

Diaco offices. The pass card records indicate that he re-entered the building's parking garage at 2:19 p.m. The bag remained at the Bank of America building from then until Mr. Motroni and Respondent DIACO left with the bag at 3:23 p.m. There was never a logical explanation given why Respondent DIACO, or Mr. Motroni, or some other member of the firm had not simply walked the trial bag to the Shumaker, Loop & Kendrick's offices in the same building. Nor was it ever explained why Mr. Campbell, or anyone at Shumaker, Loop & Kendrick, was not notified that his trial bag was in the building and that he could come and get it. Instead, Respondent DIACO, along with Mr. Motroni, drove the bag back to Ms. Personius's residence and left it with her to return. Respondent DIACO's said he took the bag back to her residence to question her about whether she had looked in the bag. Why he could not have just questioned her over the phone was never explained. Once Respondent DIACO and Mr. Motroni had driven the bag back to Ms. Personius's home, she was instructed to transport the bag back to the Bank of America building by cab and to see that it was delivered to a security officer in the lobby. The obvious intent was to have the bag returned anonymously. The evidence suggests that Respondent DIACO believed that Mr. Campbell would not discover the true identity of Ms. Personius and, therefore, never connect Adams & Diaco to his arrest. In fact, Respondent DIACO left a telephone message for Mr. Ellis that afternoon proposing a meeting of counsel, including Mr. Campbell, to

discuss settlement. Mr. Ellis returned the call while Respondent DIACO and Mr. Motroni were driving the trial bag back to Ms. Personius's home. Respondent DIACO made no mention of his possession of the trial bag during that telephone conversation.

After leaving the trial bag with Ms. Personius, Mr. Motroni and Respondent DIACO returned to their office in the Bank of America building, re-entering the parking garage at 4:21 p.m. Shortly before that time, Ms. Personius's true identity had been discovered. While driving back to the office, Respondent DIACO received another phone call from Mr. Ellis. Mr. Ellis confronted Respondent DIACO with the information that the identity of Ms. Personius was known and that she had possession of Mr. Campbell's trial bag. Respondent DIACO then told Mr. Ellis that the trial bag would be returned to the Bank of America building lobby. Mr. Ellis insisted that it be returned directly to the offices of Shumaker, Loop & Kendrick.

Sometime later, Ms. Personius took a taxi back to the Bank of America building, brought the bag into the lobby, and had the cab driver deliver it to Shumaker, Loop & Kendrick at about 5:15 p.m. By their own account, Respondents ADAMS and DIACO were in possession of Mr. Campbell's trial bag or knew that one of their employees had possession of it for over four hours.

Neither of them made any effort to contact Mr. Campbell or his firm to advise them of that fact. It was not returned until Mr. Ellis demanded it.

IV.

The actions of the Respondents, as set out above, and subsequent efforts to cover up or otherwise destroy evidence of those actions, were intended to disrupt, unfairly influence, and/or otherwise prejudice the tribunal, the administration of justice, opposing attorney Mr. Campbell and/or opposing parties in ongoing litigation in which the Respondents' law firm was engaged.

Even before Respondents became aware that the identity of Ms. Personius had been discovered, they began to withhold, destroy, or otherwise secrete the direct evidence of their involvement in Mr. Campbell's arrest. The first indication of the Respondents' efforts to hide their participation was their refusal to notify Mr. Campbell that they were in possession of his trial bag on the day following the arrest. Another example occurred later that afternoon, when Mr. Ellis's process server was locked out of the Adams & Diaco offices, even though there were obviously people working inside. Mr. Ellis, Mr. Campbell's partner, was attempting to subpoena Respondent DIACO for a hearing before Judge Arnold the next morning, January 25, 2013. The hearing concerned Shumaker, Loop & Kendrick's motion for mistrial of the *Schnitt v. Clem* case. The motion was based upon the Respondent's possession and retention of Mr. Campbell's trial bag and the false and inflammatory comments made by Respondent DIACO to the media

the morning after Mr. Campbell's arrest. The subpoena also demanded that Respondent DIACO produce his cell phone at the hearing.

Although the process server was locked out of the Adams & Diaco offices the day before, he was able to serve the Respondent through his wife early the next morning, January 25, 2013. Regardless, Respondent DIACO failed to appear at the morning hearing on that date. He had already hired counsel to appear on his behalf and move for a protective order. Judge Arnold commented at trial that his immediate concern was the exposure the jury may have had to all the publicity surrounding Mr. Campbell's arrest, rather than Respondent DIACO's disregard of the subpoena. The Judge did, however, insist that Respondent DIACO appear for a continuation of the Motion for Mistrial in the afternoon. Respondent DIACO appeared, but without his cell phone. When questioned about whether he had any conversations with Ms. Personius or Respondent FILTHAUT on the evening of Mr. Campbell's arrest, less than 48 hours earlier, Respondent DIACO replied that he couldn't remember. When asked who his cell phone carrier was, he said he didn't know. Respondent DIACO's obvious lies to Judge Arnold demonstrate the lengths to which he was willing to go to avoid discovery of evidence of his participation in the plot, which could have led to a mistrial of *Schnitt v. Clem.* Ms. Personius appeared at the same hearing and testified regarding the trial bag saga, but when questioned about whether she had been asked to meet and buy drinks for

Mr. Campbell, she too refused to testify on Fifth Amendment grounds. By that afternoon, Ms. Personius also had her own counsel, paid for by Adams & Diaco, and Respondent DIACO was represented by two attorneys, one for civil and apparently one for criminal liability. In order to complete the trial, Judge Arnold put a moratorium on discovery regarding the Motion for Mistrial which remained in effect until February 5, 2013. As a result, Mr. Campbell and Shumaker, Loop & Kendrick were unable to take steps to obtain the cell phone records or message transcripts from the phones of all the Respondents, their employees, or Sergeant Fernandez. All the Respondents had been provided with notices to preserve that data. Since then, all of the participants in the conspiracy to arrest Mr. Campbell have destroyed or secreted the cell phones and/or the important objective evidence they contained. Respondent ADAMS, Ms. Personius, and Sergeant Fernandez have all admitted erasure or destruction directly. Respondent ADAMS admitted that all the Respondents and Ms. Personius had turned their phones over to attorney Lee Gunn, but Respondent ADAMS refused to say why, claiming attorney-client privilege. At trial, both Respondent DIACO and Respondent FILTHAUT refused to answer any questions about the destruction of their cell phone messages and are subject to the adverse inference that they too have deliberately destroyed them. The cell phone messages on the Respondents' phones from the night of Mr. Campbell's arrest are the only objective evidence that could speak to their incrimination or

exculpation. The fact that they were erased, destroyed, or that the Respondents failed to produce them, strongly infers that they did not contain anything exculpatory.

Finally, the Respondents failed to offer any credible justification for their two-month effort to have Mr. Campbell arrested. Respondents' counsel suggested that the Respondents were motivated by a strong desire to keep intoxicated drivers off the streets. Although unsupported by evidence, such motivation would seem more plausible if it had not knowingly been the Respondents' own employee buying Mr. Campbell drinks and presenting him with the automobile to drive. It would also have appeared more believable if that employee had not been funneling information about Mr. Campbell directly through Respondents to waiting police surveillance. The Referee was presented with no competent evidence that would support any credible motive, except that the Respondents sought to gain some advantage in the ongoing civil case brought by Mr. Campbell's client. Respondent DIACO's affirmative efforts to propose settlement discussions with Mr. Ellis and Mr. Campbell before the identity of Ms. Personius was discovered further supports this finding.

Another argument suggested that Respondents should not be responsible for Mr. Campbell's decision to drink and drive that night. The argument's logic being that Mr. Campbell's decision to drive was an intervening independent event that

broke the chain of causation leading from their actions to his arrest. The argument has no merit. The acts of the Respondents on January 23 were not unethical because they ultimately resulted in Mr. Campbell's arrest. They were unethical because they were prohibited acts, and the Respondents willingly committed them. Ethical violations are not necessarily dependent upon the existence of harm or injury. Damage is not an indispensable element, as it might be in a civil case. If Mr. Campbell had walked away from Malio's valet that night and left Ms. Personius to her own devices, the Respondents' actions would have been just as unethical and egregious. The unsuccessful effort to target Mr. Campbell for arrest on November 29, 2012, was just as much a violation of Rules Governing The Florida Bar as the successful effort was on January 23, 2013.

Ultimately, the Referee was presented with nothing to suggest that Respondents' intent was anything other than what the clear and convincing evidence demonstrates. It was a deliberate and malicious effort to place a heavy finger on the scale of justice for the sole benefit of the Respondents and their client. For the Respondents, the harm inflicted on Mr. Campbell, his clients' cause, Sergeant Fernandez, the legal system, the profession, and the public's confidence in justice was simply collateral damage.

Subsequent Events

The DUI arrest of Mr. Campbell was investigated by the State Attorney's Office for the Sixth Judicial Circuit, after the State Attorney for the Thirteenth Judicial Circuit recused his office from the case. On July 29, 2013, a *nolle prosequi* was filed. Mr. Campbell's arrest was subsequently expunged. Although evidence of the basis for refusing to prosecute was not adduced at trial, it appears that all of the statutory elements of a valid entrapment defense existed. Fla. Stat. §777.201.

Following the events of January 23-25, 2013, the *Schnitt v. Clem* jury trial was completed. There was a defense verdict. Following the trial, the Plaintiff's Motion for Mistrial was converted into a Motion for New Trial, and the restriction on discovery was lifted. Before an evidentiary hearing was held on the alleged misconduct of Defendant's counsel, the parties entered into mediation and agreed to a settlement.

After the settlement, the Schnitts discharged Mr. Campbell and the firm of Shumaker, Loop, & Kendrick from further representation. As of the date of trial, there was ongoing litigation between Shumaker, Loop, & Kendrick and their former clients regarding the payment of fees.

The Tampa Police Department, after an administrative personnel hearing, discharged Sergeant Raymond Fernandez from the force. Officer Tim McGinnis was removed from the DUI Squad.

Several witnesses at trial, as well as Respondent DIACO's counsel, have asserted that the United States Attorney for the Middle District of Florida is conducting a Federal grand jury investigation that is continuing. As of this date, no Federal criminal charges have been filed against the Respondents or others regarding the events described above.

III. RECOMMENDATIONS AS TO GUILT

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c); Rule 4-3.6(a); Rule 4-4.4(a); Rule 4-5.1(c); Rule 4-5.3(b);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

   The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy contrary to honesty and justice.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence or other material)**

   The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately obstructed access to or concealed the trial bag of C. Philip Campbell, Esq.; destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding; and refused to produce his cell phone or information about his cell phone provider at the January 25, 2013 hearing, which

he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing litigation.

4. **Violation: Rule 4-3.5(c) (conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

2**Violation: Rule 4-3.6(a) (prejudicial extrajudicial statements**

5. **Violation: Rule 4-3.6(a) (prejudicial extrajudicial statements prohibited)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** made statements to the media on January 24, 2013, regarding: his disagreement with the Court granting a stipulated trial recess; the arrest of C. Philip Campbell, Esq.; and the work ethic and prior history of Mr. Campbell. All statements were made with the knowledge that there was a substantial likelihood of materially prejudicing the ongoing jury trial.

6. **Violation: Rule 4-4.4(a) (means that have no substantial purpose other than to embarrass, delay, or burden)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately failed to immediately return the trial bag of C. Philip Campbell, Esq. or notify him or his firm of the bag's location in order to delay or burden Mr. Campbell in an ongoing trial.

7. **Violation: Rule 4-5.1(c) (Responsibilities of partners, Managers and Supervisory Lawyers)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** deliberately conspired with or otherwise ordered or ratified the conduct of Respondents ADAMS and FILTHAUT regarding their actions taken to improperly effect the arrest of C. Philip Campbell, Esq. and/or failed to take remedial action to avoid or mitigate the foreseeable potential results of those wrongful actions. Further Respondent DIACO ordered or ratified the conduct of associate Brian Motroni in concealing the trial bag of Mr. Campbell. As an attorney with managerial authority, Respondent DIACO was responsible for the conduct of Respondent FILTHAUT and attorney Brian Motroni.

8. **Violation: Rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with, ordered and/or ratified the conduct of his nonlawyer employee, Melissa Personius, to improperly effect the arrest of C. Philip Campbell, Esq. and conceal his trial bag; failed to take appropriate remedial action when he knew that the consequences of her conduct could be avoided; and failed to make reasonable efforts to ensure that her conduct was compatible with Respondent's professional obligations. As an attorney with managerial authority, Respondent DIACO was responsible for the conduct of Melissa Personius.

9. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **STEPHEN CHRISTOPHER DIACO** conspired with Respondents ADAMS and FILTHAUT, nonlawyer employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and covered up or otherwise destroyed evidence of his participation in that conspiracy. Respondent DIACO further engaged in fraudulent, dishonest, or

deceitful conduct by lying to Judge Arnold on January 25, 2013, regarding his knowledge of his cell phone provider and his recollection of discussions or communications with Melissa Personius and Respondent FILTHAUT on the evening of January 23, 2013. He further engaged in misleading and deceitful conduct by making public statements to the news media that were intended to embarrass and humiliate opposing counsel in regard to his arrest for DUI on the previous evening without disclosing his own active role in those events or the role played by the other Respondents, his employee Melissa Personius, and that of Sergeant Raymond Fernandez. In addition, this conduct delayed the ongoing litigation and required Judge Arnold to interview the jurors regarding this trial publicity.

B. Robert D. Adams - No. 2013-10,736 (13F)

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c); Rule 4-4.4(a); Rule 4-5.1(c); Rule 4-5.3(b);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

   The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence)**

   The clear and convincing evidence is that **ROBERT D. ADAMS** deliberately concealed the trial bag of C. Philip Campbell, Esq. and destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing civil litigation.

4. **Violation: Rule 4-3.5(c) (conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

5. **Violation: Rule 4-4.4(a) (means that have no substantial purpose other than to embarrass, delay, or burden)**

The clear and convincing evidence is that **ROBERT D. ADAMS** failed to immediately return the trial bag of C. Philip Campbell, Esq. or notify him or his firm of the bag's location in order to delay or burden Mr. Campbell in an ongoing trial.

6. **Violation: Rule 4-5.1(c) (Responsibilities of Partners, Managers, and Supervisory Lawyers)**

The clear and convincing evidence is that **ROBERT D. ADAMS** deliberately conspired with or otherwise ordered or ratified the conduct of Respondents DIACO and FILTHAUT regarding their actions taken to improperly effect the arrest of C. Philip Campbell, Esq., and/or failed to take remedial action to avoid or mitigate the foreseeable potential results of those wrongful actions. Respondent ADAMS ordered Respondent FILTHAUT to contact Sergeant Raymond Fernandez of the Tampa Police Department in furtherance of the effort to effect Mr. Campbell's arrest; Respondent ADAMS was aware of Respondent FILTHAUT's prior improper conduct and ratified it. As an attorney with managerial authority, Respondent ADAMS was responsible for the conduct of Respondent FILTHAUT.

7. **Violation: Rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with, ordered and/or ratified the conduct of his nonlawyer employee, Melissa Personius, to improperly effect the arrest of C. Philip Campbell, Esq.; failed to take appropriate remedial action when he knew that the consequences of her conduct could be avoided; and failed to make reasonable efforts to ensure that her conduct was compatible with Respondent's professional obligations. As an attorney with managerial authority, Respondent ADAMS was responsible for the conduct of Melissa Personius.

8. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **ROBERT D. ADAMS** conspired with Respondents DIACO and FILTHAUT, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to effect the arrest of C. Philip Campbell, Esq., and then covered up or otherwise destroyed evidence of his participation in that conspiracy. In addition, this conduct delayed or otherwise disrupted the ongoing litigation and required Judge Arnold to interview the jurors regarding trial publicity produced as a result of the conspiracy.

C. <u>Adam Robert Filthaut - No. 2013-10,737 (13F)</u>

I recommend that the Respondent be found guilty of violating **Rule 3-4.3** of the Rules of Discipline of The Florida Bar; and **Rule 4-3.4(a); Rule 4-3.4(g); Rule 4-3.5(c);** and **Rule 4-8.4(a), (c), and (d)** of Rules of Professional Conduct.

1. **Violation: Rule 3-4.3 (Misconduct and Minor Misconduct)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then attempted to cover-up or otherwise destroy evidence of his participation in that conspiracy.

2. **Violation: Rule 4-3.4(a) (unlawfully obstruct another party's access to evidence)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** destroyed and/or concealed his cell phone and/or its contents, which he knew or should have known were relevant to a pending or reasonably foreseeable proceeding.

3. **Violation: Rule 4-3.4(g) (present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., solely to obtain an advantage in an ongoing civil litigation.

4. **Violation: Rule 4-3.5(c) (Conduct intended to disrupt a tribunal)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., with the intent that it disrupt an ongoing civil trial.

5. **Violation: Rule 4-8.4(a), (c), and (d) (Violating or Promoting Violation of Rules of Professional Conduct; Engaging in conduct involving dishonesty, fraud or deceit; Conduct in connection with the practice of law that is prejudicial to the administration of justice)**

The clear and convincing evidence is that **ADAM ROBERT FILTHAUT** conspired with Respondents DIACO and ADAMS, employee Melissa Personius, and Sergeant Raymond Fernandez of the Tampa Police Department to improperly effect the arrest of C. Philip Campbell, Esq., and then covered up or otherwise destroyed evidence of his participation in that conspiracy. Respondent FILTHAUT further engaged in dishonesty, deceit and/or misrepresentation when he failed to disclose to Sergeant Fernandez that Mr. Campbell was the opposing attorney in a high profile civil action that was then currently being defended by the Adams & Diaco law firm. In addition, this conduct delayed the ongoing litigation and required Judge Arnold to interview the jurors regarding trial publicity produced as a result of the conspiracy.

IV. CASE LAW

Before arriving at a recommendation as to the disciplinary measures to be applied the Referee considered the following case law:

Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001); *Florida Bar v. Rotstein*, 835 So. 2d 241 (Fla. 2002); *Florida Bar v. Korones*, 752 So. 2d (Fla. 2000); *Florida Bar v. Bern,* 425 So. 2d 526 (Fla. 1982); *Florida Bar v. Swann*, 116 So. 3d 1225 (Fla. 2013); *Florida Bar v. Doherty*, 94 So. 3d 443 (Fla. 2012); *Florida Bar v. Klein*, 774 So. 2d 685 (Fla. 2000); *Florida Bar v. Gardiner*, No. SC11-2311, 2014 WL 2516419 (Fla. June 5, 2014); *Florida Bar v. Glueck*, 985 So. 2d 1052 (Fla. 2008); *Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007); *Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997); *Florida Bar v. Riggs*, 944 So. 2d 167 (Fla. 2006); *Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010).

V. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

I recommend that Respondent **STEPHEN CHRISTOPHER DIACO** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

B. Robert D. Adams - No. 2013-10,736 (13F)

I recommend that Respondent **ROBERT D. ADAMS** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

C. Adam Robert Filthaut - No. 2013-10,737 (13F)

I recommend that Respondent **ADAM ROBERT FILTHAUT** be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

1. Permanent Disbarment
2. Payment of The Florida Bar's costs in these proceedings

VI. PERSONAL HISTORY, PAST DISCIPLINARY RECORD, AND AGGRAVATING AND MITIGATING FACTORS

In recommending sanctions after finding misconduct, the Referee considered the following factors as to each Respondent:

a) the duty violated;
b) the lawyer's mental state;
c) the potential or actual injury caused by the lawyer's misconduct; and
d) the existence of aggravating or mitigating factors.

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent

a. Date of Birth - 1968
b. Date Admitted to the Bar – April 25, 1994[3]

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to Section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

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[3] Subsequent to the sanctions hearing, the Referee requested biographical information from each respondent, including education and employment information. Counsel for Respondents ADAMS and FILTHAUT responded with the information. Referee received no response from counsel for Respondent DIACO, but did obtain his year of birth and date admitted to the Bar from The Florida Bar.

a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. The Potential or Actual Injury Caused By the Respondents Misconduct

a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.;
b. Public humiliation of Mr. Campbell and damage to his professional reputation;
c. Disruption of ongoing jury trial and tainting of jury;
d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department;
e. Removal of Officer Tim McGinnis from DUI Squad;
f. Dismissal of significant number of pending DUI cases[4];
g. Public loss of confidence in lawyers and legal system; and
h. Public loss of confidence in law enforcement.

[4] Although The Florida Bar did not adduce any testimony or produce any documentation regarding the dismissals, a number of the news articles in the compilation submitted by The Bar during the penalty phase hearing contained quotations from Tampa Police officials confirming this fact.

4. The Existence of Aggravating or Mitigating Circumstances

a. Aggravation

The Referee finds the following aggravating factors pursuant to 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
d. Multiple offenses;
f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following as to mitigating factors pursuant to 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

During the two days of testimony regarding the sanctions to be recommended, there was ample testimony from multiple witnesses regarding the generosity of Respondent DIACO, his charitable efforts, public service, and loyalty to friends and employees. Virtually all of the witnesses professed to have little or no knowledge regarding the allegations of Respondent's conduct that resulted in this proceeding.

At the conclusion of the hearing, Respondent's counsel sought to introduce an affidavit from the Respondent, presumably expressing remorse and seeking to take responsibility for the events that led to this proceeding. The Referee refused to admit the affidavit, although counsel was allowed to proffer it for the record. It was not read or considered. Respondent DIACO, throughout this proceeding, has refused to testify under oath regarding anything connected to the events surrounding these proceedings. He may not shield himself from cross-examination by invocation of the Fifth Amendment while at the same time seeking to submit sworn statements supporting mitigation.

Respondent DIACO is an experienced, apparently competent attorney with 20 years in the profession. He and his firm have multiple offices and employ numerous associates and paralegal staff. Adams & Diaco have major clients and are, by all appearances, professionally and financially successful.

Against this backdrop, it is all the more disturbing that Respondent DIACO, one of the firm's managing partners, engaged in actions against a fellow attorney that were inexplicably egregious, spiteful, and malicious. While Mr. Campbell and his firm were reeling from the fallout of the Respondents' conspiracy, Respondent DIACO attempted to leverage the moment to his advantage by proposing to discuss settlement. There was no evidence presented at trial to support the suggestion that Mr. Campbell intended to drink and drive on the night of his arrest,

or that he had a habit of drinking and driving. The clear and convincing evidence was that Respondent DIACO's intent was to target Mr. Campbell for arrest because he was opposing counsel in a high-profile case and that it would benefit his firm and his client.

Respondent DIACO's efforts to exploit the situation did not cease until the identity of Ms. Personius was ultimately discovered. The inevitable attempted cover up followed these multiple offenses, including the bizarre travels of Mr. Campbell's trial briefcase. The cover up effort included false testimony before Judge Arnold, a false affidavit filed in *Schnitt v. Clem*, obstruction of service of process, destruction or secreting of known relevant evidence, and the deliberate failure to disclose a key witness, Kristopher Personius, during discovery in this proceeding.

If the cover up had succeeded, Mr. Campbell would have been the attorney answering charges from The Florida Bar, as well as the State of Florida. This malicious tampering with another person's personal life and career was not only unprofessional, it was inexcusable.

Respondent DIACO's many admittedly generous and unselfish acts do not atone for the multiple aggravated violations he committed. It is the Referee's recommendation that he be permanently disbarred.

B. Robert D. Adams - No. 2013-10,736 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent Robert D Adams:

a. Date of Birth – May 27, 1969
b. Education – University of Florida, B.A. w/Honors, 1991
Stetson College of Law, J.D. w/Honors, 1996
c. Employment – Associate, Harris, Barrett, Mann & Dew, 1996 – 1998; Shareholder Adams & Diaco, 1998 to present.
d. Date Admitted to the Bar – September 26, 1996

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

> a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
> b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. **The Potential or Actual Injury Caused By the Respondents Misconduct**

   a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.
   b. Public humiliation of Mr. Campbell and damage to his professional reputation
   c. Disruption of ongoing jury trial and tainting of jury
   d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department
   e. Removal of Officer Tim McGinnis from DUI Squad
   f. Dismissal of significant number of pending DUI cases
   g. Public loss of confidence in lawyers and legal system
   h. Public loss of confidence in law enforcement

4. **The Existence of Aggravating or Mitigating Circumstances**

   a. Aggravation

The Referee finds the following aggravating factors pursuant to 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
c. A pattern of misconduct;
d. Multiple offenses;
f. submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following mitigating factors pursuant to 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

During the hearing regarding sanctions, several witnesses testified on behalf of Respondent ADAMS. Affidavits were also introduced on his behalf. All were supportive of him as a loyal friend, a worthy mentor to young lawyers, and a generous and competent professional. The Florida Bar conceded that the Respondent had no prior disciplinary record. None of the Respondent's witnesses were aware of any specific information about the Respondent's conduct that resulted in their being called as a character witness.

The Bar did produce one witness to testify in support of an additional aggravation factor for this Respondent.

Dr. Robert Frankl, D.C. is a chiropractor from Miami Shores. During the latter part of 2009 through the first few months of 2010, Dr. Frankl was involved in litigation regarding the collection of fees against Progressive Insurance Company, represented by Respondent ADAMS. The issue in the case was the reasonableness of the doctor's fees for treatment that had been billed to Progressive.

Dr. Frankl testified that a few days prior to trial in the case, two young women appeared at his office for a consultation appointment. Both women gave what were later found to be false names, and when asked, each were unable to provide any identification. Both women claimed to have been injured and in need of chiropractic treatment. Each woman inquired whether Dr. Frankl would be willing to discount his normal rate since they each claimed a lack of applicable insurance coverage. He told them he would not reduce his fees, but was willing to accept payment over time. Dr. Frankl arranged an appointment for both women the following week. Neither woman appeared for their respective appointments and Dr. Frankl never heard from them again.

The week following the consultation with the two women, Dr. Frankl was surprised to see some blown up photographs of his office in the courtroom during the Progressive Insurance Company trial. He could not recall anyone coming in to take the photographs, although they seemed recent since they included a new freezer that had been purchased a few weeks before the trial. After the trial, Dr. Frankl remembered the two strange women who appeared at his office without identification. Using the phone number log on his phone from the women's initial call for an appointment and the internet, Dr. Frankl was able to locate a picture of one of the women and learn that she was a paralegal in the Miami office of Adams & Diaco. He believed that their purpose for visiting him was to lure him into

committing "insurance fraud" or to otherwise obtain admissions from him regarding his fee policy that might be used against him in the upcoming trial.

Dr. Frankl has a history of litigating for his fees, as he freely admitted. He also admitted that he regularly files complaints about attorneys with The Florida Bar. He did so in this instance, and got a response letter back from a Bar representative a few days later. He was advised that it was not a proper Bar matter, and that it would have to be resolved by a civil action. Dr. Frankl was not easily dissuaded. He then filed a complaint with the Division of Consumer Services of the Florida Department of Financial Services regarding the actions of Progressive Insurance Company's counsel and paralegals. In response, Dr. Frankl received a copy of a response letter from a Progressive representative that was sent to the Department responding to the complaint. The letter alleged that Respondent ADAMS did not direct his employees to *"present false information in order to secure evidence against Dr. Frankl at trial; however, it does appear that two non-attorney employees of Adams and Diaco did go to Dr. Frankl's office in order to obtain pictures of Dr. Frankl's office."*

The Division took no further action regarding Dr. Frankl's complaint. A few years later, Dr. Frankl read a newspaper account of the Campbell DUI case and recognized the Adams & Diaco law firm as the subject of one of his numerous ethics complaints. He contacted Mr. Campbell and related his experience regarding

Respondent ADAMS's paralegals that, he was convinced, had attempted to set him up. His story was picked up by a newspaper reporter and thereafter came to the attention of The Florida Bar in this matter.

Dr. Frankl's bias was admitted and his credibility regarding the 2010 incident would be suspect, were it not for the admission by Progressive that two Adams & Diaco employees did appear at his office as he testified. Respondent ADAMS, who testified at the guilt phase of this proceeding, offered no rebuttal to Dr. Frankl's serious accusations during the sanctions phase hearing. If, as the Progressive letter suggests, the only purpose of the two Adams & Diaco employees visit was to obtain photographs of Dr. Frankl's office interior, then there are provisions under the rules that provide for it. At the very least, the incident reflects a willingness to use surreptitious methods to accomplish goals that should have been addressed through an above-board discovery process.

This incident occurred a little over two years before the events that are the subject of this proceeding. No other evidence or testimony regarding it was produced except for copies of the correspondence from Progressive, the letter from The Florida Bar, and some copies of Dr. Frankl's internet search results. In the absence of some reasonable explanation, which was not forthcoming during the sanctions hearing, Dr. Frankl's experience with Respondent ADAM's unorthodox discovery methods cannot be ignored. His counsel in this matter has argued that

Respondent's actions in the events that resulted in this proceeding were "aberrant" or "atypical." Dr. Frankl's unrebutted testimony, confirmed through the correspondence, suggests otherwise. The incident displays willingness to engage in a pattern of conduct employing non-lawyer personnel to deliberately misrepresent their identity to accomplish purposes beyond normal discovery.

The Referee will not reiterate the comments regarding Respondent ADAMS that were previously set out in the narrative of the events of January 23 – 25, 2013. Respondent ADAMS' involvement in those events, as demonstrated by the cell phone call and text records, was extensive. Respondent ADAMS was the first person Ms. Personius called when she spotted Mr. Campbell at Malio's that night, and Respondent ADAMS was the last person she spoke to immediately preceding getting into her car with Mr. Campbell, less than ten minutes before his arrest. She received a text from Respondent ADAMS less than seven minutes before his arrest and sent a text back to Respondent ADAMS two minutes later.

Respondent ADAMS, like his co-Respondents, is an experienced, competent attorney and litigator. His counsel has argued that Respondent suffered a 3-½ hour "lapse in judgment" and that his "mistakes were spontaneous" and "unplanned." The record reflects otherwise. The evidence was clear and convincing that Respondent ADAM's participation in the effort to effect the arrest of Mr. Campbell was calculated and had no other purpose than to gain some advantage in

the ongoing *Schnitt v. Clem* jury trial. Respondent ADAMS had weeks to contemplate the failed attempt to arrest Mr. Campbell on November 29, 2012, and the legal, ethical, and moral implications of that attempt. He had weeks to discuss that effort with the co-Respondents and to exercise his experienced judgment regarding the propriety and advisability of any similar future efforts. When the next opportunity arrived, he didn't caution, he didn't object, he didn't "mentor," and he didn't hesitate.

The next day, Respondent ADAMS was again the first person Ms. Personius called when she discovered Mr. Campbell's trial briefcase in her car. Respondent claimed he was "too busy" to deal with it. When the opportunity came to again exercise some ethical and moral judgment, he declined and passed it off to Respondent DIACO.

The cover up followed. He erased his cell phone text messages and for months refused to testify under oath regarding the events. He too failed to list Kristopher Personius as a person with knowledge of the events of that night in response to The Florida Bar's interrogatories. On the morning of trial, he claimed to have finally realized that his license to practice law might be in jeopardy and chose to testify.

The Referee recommends that Respondent ADAMS be permanently disbarred.

C. Adam Robert Filthaut - No. 2013-10,737 (13F)

Prior to recommending discipline pursuant Rule 3-7.6 (m)(1), I considered the following:

1. Personal History of Respondent Adam Robert Filthaut

a. Date of Birth – June 16, 1974
b. Education – University of Detroit, B.S., 1996
Thomas M. Cooley Law School, J.D., 2000
c. Employment – Hillsborough County Public Defender's Office, 2001 – 2003; Adams & Diaco, P.A., 2003 to present.
d. Date Admitted to the Bar – September 14, 2000

2. Duties Violated

The following Florida Standards for Imposing Lawyer Sanctions (Standards) support the sanction of disbarment:

a. Violations of Duties Owed to the Public

Pursuant to section 5.11, disbarment is appropriate when:

> f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

b. Violations of Duties Owed to the Legal System

Pursuant to section 6.11, disbarment is appropriate when a lawyer:

> a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
> b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

c. Violations of Other Duties Owed as a Professional

Pursuant to section 7.1, disbarment is appropriate when "a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

3. The Potential or Actual Injury Caused By the Respondents Misconduct

a. Wrongful arrest and incarceration of C. Philip Campbell, Esq.
b. Public humiliation of Mr. Campbell and damage to his professional reputation
c. Disruption of ongoing jury trial and tainting of jury
d. Discharge of Sergeant Raymond Fernandez from the Tampa Police Department
e. Removal of Officer Tim McGinnis from DUI Squad
f. Dismissal of significant number of pending DUI cases
g. Public loss of confidence in lawyers and legal system
h. Public loss of confidence in law enforcement

4. The Existence of Aggravating or Mitigating Circumstances

a. Aggravation

The Referee finds the following aggravating factors pursuant to section 9.22 of Standard 9.2:

b. Dishonest or Selfish Motive;
c. A pattern of misconduct;
d. Multiple offenses;
f. Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
i. Substantial experience in the practice of law.

b. Mitigation

The Referee finds the following as to mitigating factors pursuant to section 9.32 of Standard 9.3:

a. Absence of prior disciplinary record; and
g. Character or reputation.

Commentary

Several witnesses testified on behalf of Respondent FILTHAUT during the sanctions hearing. He was described as a competent professional and a loyal friend. Respondent has no prior disciplinary record and his character and reputation were considered excellent.

Respondent's counsel, in his written argument following the hearing on penalties, argues a number of mitigation factors, but the Referee may not find that they exist based only upon counsel's argument.

The record does not support the remaining mitigating factors urged by Respondent's counsel. There was nothing to suggest the absence of a dishonest or selfish motive. There was no evidence of personal or emotional problems. Negotiating with The Florida Bar for an agreed-upon sanction did not constitute a display of a cooperative attitude toward these proceedings, especially in light of the Respondent's refusal to testify and his failure to retain or produce his cell phone text messages. He certainly has a right to rely on the Fifth Amendment, but doing so did not amount to cooperation. Likewise, the failure to disclose Kristopher

Personius as a person with knowledge of the events that led to these proceedings in response to The Florida Bar interrogatory certainly constitutes the opposite of cooperation.

As the Referee previously indicated in the narrative of the events of January 23 – 25, 2013, the entire two-month effort to accomplish the arrest of C. Philip Campbell, Jr., Esq. was dependent upon the unique relationship of trust and friendship that Respondent FILTHAUT enjoyed with Sergeant Raymond Fernandez. Without Respondent FILTHAUT's participation, which is amply confirmed by the record, the plot had virtually no chance of success. His relationship with Sergeant Fernandez gave him instant access to the efforts of the entire Tampa Police Department DUI Squad. Respondent FILTHAUT acted as the conduit for Sergeant Fernandez regarding the updating of events happening inside Malio's. Respondent FILTHAUT, through his communication with Ms. Personius, became the eyes and ears of the Tampa DUI Squad. He kept the officers immediately informed of what was happening inside Malio's, when Mr. Campbell was leaving, where he was before he left, and what kind of car he would be driving. For over 3 ½ hours, Respondent FILTHAUT essentially presided over a police stakeout of his own creation that was totally dependent upon the information he provided them. That information did not include the fact that Mr. Campbell was an opposing attorney in the *Schnitt v. Clem* case, or that an Adams & Diaco

paralegal, operating under a false identity, was buying him drinks and getting him to drive when he otherwise would not have.

Respondent's willingness to betray a 15-year friendship and sacrifice the career and personal freedom of a fellow attorney for the sake of some potential advantage in an ongoing trial remains stunning. Yet the clear and convincing evidence leaves no doubt that Mr. Campbell was deliberately targeted solely to gain that advantage.

Respondent FILTHAUT also had many weeks to contemplate the professional and ethical propriety of his actions following his first attempt to have Mr. Campbell arrested on November 29, 2012. He was an experienced lawyer with 13 years in the practice. During any stage of the 3 ½ hours that the Respondents remained engaged in the effort to improperly effect Mr. Campbell's arrest, any one of them, including particularly Respondent FILTHAUT, could have called a halt to it.

As was previously suggested in the narrative, following orders is not a legal or ethical basis for avoiding personal and professional responsibility for the many serious violations that the Referee found by clear and convincing evidence were committed.

The Referee recommends that Respondent FILTHAUT be permanently disbarred.

VII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

A. Stephen Christopher Diaco - No. 2013-10,735 (13F)

The following costs regarding Respondent DIACO were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,108.18
3. Bar Counsel Expenses.....$620.27
4. Investigative Costs.....$819.47
5. Copy Costs.....$1,350.75
6. Witness Expenses.....$1,029.61

Total $14,178.28

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

B. Robert D. Adams - No. 2013-10,736 (13F)

The following costs regarding were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,488.56

3. Bar Counsel Expenses.....$620.27
4. Investigative Costs.....$819.47
5. Copy Costs.....$1,350.75
6. Witness Expenses.....$1,029.61

Total $14,558.66

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

C. <u>Adam Robert Filthaut - No. 2013-10,737 (13F)</u>

The following costs regarding Respondent FILTHAUT were submitted to the Court in the form of an Affidavit by The Florida Bar and the Respondent has not objected:

1. Administrative costs (Rule 3-7.6(q)(1)(I)) $1,250.00
2. Court Reporter's Fees $9,108.18
3. Bar Counsel Expenses.....$620.27
4. Investigative Costs.....$819.47
5. Copy Costs.....$1,350.75
6. Witness Expenses.....$1,029.61

Total $14,178.28

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment has become final unless a waiver is granted by the Board of Governors of The Florida Bar.

/s/ W. Douglas Baird
Honorable W. Douglas Baird, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been sent by U.S. Mail to THE HONORABLE JOHN A. TOMASINO, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399; and sent by email to: THE HONORABLE JOHN A. TOMASINO, Clerk, Supreme Court of Florida, e-file@flcourts.org; Gregory W. Kehoe, Esq., kehoeg@gtlaw.com, attorney for Respondent Diaco; Joseph A. Corsmeier, Esq., jcorsmeier@jac-law.com, attorney for Respondent Diaco; Mark J. O'Brien, Esq., mjo@markjobrien.com, attorney for Respondent Filthaut; William F. Jung, Esq., wjung@jungandsisco.com, attorney for Respondent Adams; and Jodi Anderson Thompson, Esq., JThompso@flabar.org, Bar Counsel, The Florida Bar, this 27th day of August, 2015.

/s/ W. Douglas Baird
Honorable W. Douglas Baird, Referee

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-2472

In re: FRANCIS MALOFIY,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-14-mc-00139)
District Judge: Honorable Petrese B. Tucker

Submitted Under Third Circuit LAR 34.1(a)
June 13, 2016

Before: AMBRO, JORDAN, and GREENBERG, Circuit Judges

(Opinion filed: June 30, 2016)

OPINION*

AMBRO, Circuit Judge

Attorney Francis Malofiy appeals his suspension from practicing law in the U.S. District Court for the Eastern District of Pennsylvania. A three-judge panel of that Court, after determining that Malofiy violated various rules of conduct by engaging in

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

unprofessional contact with an unrepresented defendant, recommended a suspension of three months and one day. Chief Judge Tucker adopted that recommendation and entered an order from which Malofiy appeals. He argues that he complied with the rules and that, even if he did not, the punishment is overly harsh. We disagree on both counts and affirm the suspension.[1]

I. Background

Malofiy filed a copyright infringement lawsuit in the Eastern District of Pennsylvania in 2011 against the performing artist Usher, as well as other defendants, over the song "Bad Girl." Malofiy's client, Daniel Marino, alleged that he was one of the writers of the song but did not receive credit or proceeds. One of the other defendants was lyricist William Guice, who also worked on the song. Guice, who was unrepresented and previously had never been a defendant in a civil lawsuit, called Malofiy after receiving the complaint to find out what it was about. The core of the allegations is that, in this conversation and subsequent communications, Malofiy misled Guice into thinking he was a witness rather than a defendant who stood to face financial liability.

[1] The District Court's jurisdiction stems from its "inherent authority to set requirements for admission to its bar and to discipline attorneys who appear before it." *In re Surrick*, 338 F.3d 224, 229 (3d Cir. 2003). We have appellate jurisdiction per 28 U.S.C. § 1291. "We review district courts' decisions regarding the regulation of attorneys who appear before them for abuse of discretion." *Surrick*, 338 F.3d at 229. Here the exercise of discretion turned on factual findings, which we review for clear error. *See* Fed. R. Civ. P. 52(a)(6). Meanwhile, our "review of the District Court's interpretation of legal precepts is plenary." *Surrick*, 338 F.3d at 229.

There is no transcript of this first conversation, but the District Court[2] developed the facts in some detail. As a result, we know that during the call Malofiy learned that Guice was unrepresented. Malofiy explained that he represented Marino and that Guice did not need to talk to him. Malofiy said that Guice was a defendant in the lawsuit, but he did not explain that this meant Marino and Guice had an adversarial relationship.

Malofiy wanted to get an affidavit from Guice, but he was unsure how to proceed given that Guice did not have a lawyer. He put Guice on hold and spoke with James Beasley, Jr., an attorney with whom he shared office space and sometimes consulted. Beasley's advice was to tell Guice to get a lawyer and, if he did not want one, to make sure he understood that his interests were adverse to Marino's. Malofiy represents that he followed this first piece of advice and told Guice about the advisability of getting counsel. Guice disputes this, and the District Court credited his testimony; it found that Malofiy never advised Guice during this first conversation to hire a lawyer.

In any event, after placing Guice on hold, Malofiy returned to the call and questioned him about "Bad Girl." Guice said that Marino was involved in writing the song and that he was unaware that Marino had not been credited or paid. Malofiy responded that he would prepare an affidavit for Guice to review. Guice later said that he thought he was helping Malofiy and that he did not believe that he was defending himself against personal liability.

[2] "District Court" in this opinion refers to the Chief Judge and, by extension, to the panel whose findings and recommendations she approved.

Based on this conversation, Malofiy drafted an affidavit and called Guice back. This second call was recorded. Malofiy called Guice "bud" and told him repeatedly that he was going to "hold tight" or "sit tight" with respect to claims against Guice. Appendix ("App.") 28–29 (internal quotation marks omitted). Malofiy also said that he was "not going to do anything" with Guice in the case and that Marino "d[id]n't really want to point the finger at" him. App. 29 (internal quotation marks omitted) (alteration in original). Malofiy added that Marino thought Guice was "pretty cool" and "probably didn't know" that he had not received credit or payment. *Id.* (internal quotation marks omitted). Malofiy even offered to investigate whether Guice should have gotten more money for his role in the song. Without advising him to get a lawyer, Malofiy secured Guice's agreement to sign the affidavit. He then sent Guice the affidavit in an e-mail whose subject line mentioned Usher, but not Guice, as a defendant.

Either before Malofiy e-mailed the affidavit or shortly after, Beasley advised him that the document should memorialize that Guice had been advised to get a lawyer but had chosen not to do so. Malofiy sent a follow-up e-mail to Guice saying that if he wanted "to review [the affidavit] with a lawyer, that's fine too." App. 32 (internal quotation marks omitted) (alternation in original). Within the next week, Guice signed and returned the affidavit without having consulted an attorney.

Guice never filed an answer to Marino's lawsuit. As he later explained, he thought that his affidavit was the only response that was needed. Without notifying Guice in advance, Malofiy sought and obtained a default judgment against him in June 2012 based

on his failure to file a responsive pleading. Guice received a copy of the request for a default judgment but did not understand what it meant and never responded to it.

In the spring of 2013, Malofiy set up a deposition with Guice. They had two calls, but Malofiy never mentioned the default or advised Guice to get counsel. During the deposition, Guice realized for the first time that Marino was seeking money damages from him. He explained that he thought he was a witness in the case. When he learned that a judgment had been entered against him, Guice said that his understanding of his role had been "turned on its head" and that he felt "played" by Malofiy. App. 35 (internal quotation marks omitted).

Later that year, a group of defendants filed a motion for sanctions against Malofiy based on his conduct during discovery. As relevant here, Judge Diamond, who was presiding over the Marino lawsuit, determined that Malofiy had violated Pennsylvania Rule of Professional Conduct 4.3 by obtaining an affidavit and deposition testimony from Guice without first advising him to get a lawyer or correcting his perception that he was merely a witness. That rule, titled "Dealing with Unrepresented Person," provides:

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
>
> (b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.
>
> (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

The first comment to the rule notes that an "unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client." It goes on to say that, "[i]n order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."

As a sanction for the violation, Judge Diamond undid the default judgment and struck Guice's affidavit and deposition testimony. He also ordered Malofiy to pay approximately $28,000 in fees and costs. Finally, Judge Diamond, to determine whether Malofiy should face further sanctions, referred the matter to Chief Judge Tucker, who in turn appointed the three-judge panel discussed above.

Although recognizing the possibility that Judge Diamond's conclusion that Malofiy violated Rule 4.3 might be entitled to preclusive effect, the District Court (through the panel appointed by Chief Judge Tucker) opted to hear testimony and review the record *de novo*. It, like Judge Diamond, concluded that Malofiy violated Rule 4.3. It also found that he violated Pennsylvania Rules of Professional Conduct 4.1(a) (a lawyer "shall not knowingly . . . make a false statement of material fact or law to a third person"), 8.4(c) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation"), and 8.4(d) (same for "conduct that is prejudicial to the administration of justice"). The basis for these three additional violations was Malofiy's representation that he would not take any action against Guice. The Office of Disciplinary Counsel of the Disciplinary Board of the Supreme Court of Pennsylvania,

which was appointed by the District Court to investigate and prosecute the case, recommended a reprimand, but the Court instead imposed a suspension of three months and a day.

II. Discussion

Malofiy challenges the conclusion that he violated Rules 4.3, 4.1(a), 8.4(c), and 8.4(d). He also argues that, even if he did engage in misconduct, the sanction is overly severe. We address each argument in turn.

A. Violation of rules

Like the District Court, we begin with Rule 4.3. Malofiy contends that he complied with the rule by 1) saying during the first conversation that Guice could secure counsel, 2) including a similar statement in an e-mail regarding the affidavit, and 3) informing Guice that he was a defendant. As to the first of these considerations, the District Court rejected Malofiy's testimony that he told Guice during the first call that he could get a lawyer. Instead, it credited Guice's testimony to the contrary. Such "[c]redibility determinations are the unique province of a fact finder," and we reject them only in "rare circumstances." *Dardovitch v. Haltzman*, 190 F.3d 125, 140 (3d Cir. 1999) (internal quotation marks omitted). Malofiy has given us no compelling reason to do so here.

As such, we must determine whether Malofiy's warning in the e-mail and his acknowledgment of Guice's status as a defendant satisfy Rule 4.3. The District Court determined that Malofiy's actions "failed to adequately convey the adversity of interests between [his] client and Mr. Guice." App. 40–41. We agree. Per Rule 4.3(c), Malofiy

"kn[ew] or reasonably should [have] know[n] that the unrepresented person misunderst[ood] the lawyer's role in the matter." Rather than correct the misunderstanding, Malofiy continued to foster the impression that Guice was a witness rather than a person who stood personally to lose money. As the first comment to the rule makes clear, Malofiy should have remedied the confusion by explaining that Guice's interests were adverse to Marino's. However, he consistently suggested that the opposite was true.

We next consider Rule 4.1(a), which prohibits false statements that are made knowingly and are material. Here Malofiy told Guice several times that he was going to "hold tight" or "sit tight" and also said that he was "not going to do anything" with the claims against Guice. App. 29 (internal quotation marks omitted). Instead, Malofiy filed a motion for default judgment against Guice. As such, we agree with the District Court that Malofiy made a false statement. It determined that he did so knowingly, and we have no reason to disturb that finding. Additionally, it correctly concluded that the materiality requirement of Rule 4.1(a) was satisfied because the conduct led to an entry of default judgment, which was only undone through judicial intervention. *See Office of Disciplinary Counsel v. DiAngelus*, 907 A.2d 452, 456 (Pa. 2006) (materiality standard met where "violation affected the outcome of the proceedings").

Finally, the conclusion that Malofiy knowingly made a false statement of material fact is sufficient also to demonstrate a violation of Rules 8.4(c) and 8.4(d). *Id.* As a result, we affirm each of the District Court's conclusions about Malofiy's violations of the Pennsylvania Rules of Professional Conduct.

B. Appropriateness of sanction

Malofiy also argues that, even if he violated the rules, it was due to "youth and inexperience." Appellant's Br. at 56. He describes the suspension as overly punitive and "off the charts." *Id.* He also cites the testimony of various character witnesses who described him as a hard-working and diligent lawyer. His arguments, however, miss the mark.

The American Bar Association publishes a guide that serves "as a model for determining the appropriate sanctions for lawyer misconduct." *In re Mitchell*, 901 F.2d 1179, 1184 (3d Cir. 1990). For violations involving improper communications with individuals in the legal system, the guide provides that a suspension "is generally appropriate . . . when the lawyer knows that [a] communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding." *ABA Standards for Imposing Lawyer Sanctions* § 6.32 (1992) [hereinafter *ABA Standards*].

Here the District Court made findings of both knowing conduct and harm. It determined that Malofiy knew his conduct violated the rules because, after being advised by Beasley of the need to be clear about the adverse relationship between Guice and Marino, Malofiy "led Mr. Guice to believe Mr. Marino was not pursuing claims against him and that he was only a witness in the case." App. 46. As for harm, the Court noted that, "[b]ut for Judge Diamond's intervention, Mr. Guice was at risk of having a default judgment entered against him." App. 47. Malofiy has not demonstrated any fault with these findings.

Moreover, one of the factors courts should consider in imposing sanctions is the "existence of aggravating or mitigating factors." *ABA Standards* § 3.0(d). Here the District Court properly concluded that the aggravating factors outweigh the mitigating ones. As mitigating factors, the Court acknowledged that Malofiy is a relatively young lawyer, he sought advice from Beasley, he had no prior disciplinary record, and he had numerous character witnesses who testified on his behalf. As aggravating factors, it listed his "refusal to acknowledge that his conduct toward Mr. Guice was in any way inappropriate," App. 49, and his tardiness in turning over a full transcript of the recorded call with Guice. The Court was "most troubled" by Malofiy's failure to take responsibility for his actions even when confronted with the transcript. *Id.*

It also noted that, even apart from Malofiy's communications with Guice, "his litigation conduct in this District gives us cause for concern about his professionalism." App. 48. For instance, the following are examples of comments Malofiy made during depositions: "I'm tired of your clap trap and hogwash"; "You're like a little kid with your little mouth"; "This is bullshit"; "This is nauseating—wait. This is nauseating"; and "I never seen [sic] any lawyer do this so bad ever." App. 36 (internal quotation marks omitted). Additionally, Judge Diamond found that Malofiy made 65 "speaking" objections (whereby counsel improperly testifies rather than merely stating the reason for the objection) during a single deposition. Malofiy has since conceded that his behavior during discovery was unprofessional and uncivil.

In light of the District Court's determinations, we find no abuse of discretion in imposing the suspension.

* * * * *

In this context, we affirm both the conclusion that Malofiy violated the Pennsylvania Rules of Professional Conduct and the imposition of a suspension of three months and one day.[3]

[3] The Eastern District of Pennsylvania is an intervenor in this case and has asked us to affirm. Malofiy argues both in his brief and in a motion to strike the Eastern District of Pennsylvania's brief that the intervention was improper. This position is foreclosed by our decision on January 15, 2016 granting the Eastern District of Pennsylvania's motion to intervene. As such, we reject the argument and deny the motion to strike.

Matter of Agola
2015 NY Slip Op 02864 [128 AD3d 78]
March 31, 2015
Per Curiam
Appellate Division, Fourth Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, June 17, 2015

[*1]

In the Matter of Christina A. Agola, a Suspended Attorney, Respondent. Grievance Committee of the Seventh Judicial District, Petitioner.

Fourth Department, March 31, 2015

APPEARANCES OF COUNSEL

Daniel A. Drake, *Principal Counsel*, *Seventh Judicial District Grievance Committee*, Rochester, for petitioner.

Melvin Bressler, Pittsford, for respondent.

{**128 AD3d at 79} OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law by this Court on July 13, 1994, and formerly maintained offices for the practice of law in Buffalo and Rochester. By order entered September 10, 2013, this Court suspended respondent, pursuant to 22 NYCRR 1022.20 (e), for failing to comply with a subpoena issued by this Court and making misrepresentations to the Grievance Committee and this Court regarding her handling of funds received from several clients (*Matter of Agola*, 109 AD3d 1216 [2013]). In February 2014, the Grievance Committee filed a petition containing seven charges of misconduct against respondent, including misappropriating client funds, failing to produce records

concerning funds received from clients, making false statements and submitting false evidence to the Grievance Committee and this Court regarding her handling of funds received from several clients, and making false statements and filing frivolous pleadings in federal court that resulted in monetary sanctions against respondent. Respondent filed an answer denying material allegations of the petition, and this Court appointed a referee to conduct a hearing. The Referee filed a report sustaining the charges of misconduct and making an advisory finding that respondent owes restitution to eight clients in the total amount of $28,028.15. The Referee additionally made an advisory finding that the doctrine of collateral estoppel precludes respondent from relitigating in this proceeding certain factual determinations made in federal court that were adverse to respondent and gave rise to the sanctions imposed against her.

The Grievance Committee moves to confirm the findings of the Referee, and respondent cross-moves to dismiss on legal grounds the charges alleging misappropriation and other trust account violations, to disaffirm certain factual findings of the Referee, and to disaffirm the Referee's advisory finding concerning the doctrine of collateral estoppel. The parties appeared before this Court for argument of the motion and cross motion, and respondent has submitted matters in mitigation.

With respect to charge one, the Referee found that, from October 2008 through December 2009, respondent was retained on a contingent fee basis in 10 client matters and received from those clients funds in the total amount of $76,605, which were to be used for disbursements. The Referee found, however, {**128 AD3d at 80} that respondent thereafter failed to maintain the funds in her trust account and used a substantial portion of them for personal purposes. The Referee further found that, although respondent incurred disbursements on behalf of the clients in question in the total amount of $1,016.40 and refunded to certain clients unused disbursement funds, she failed to account for funds in the total amount of $28,028.15 that she received from eight clients.

With respect to charge two, the Referee found that, from April 2009 through July 2013, respondent failed to maintain a balance in her trust account sufficient to satisfy her financial obligations to numerous clients; issued 30 trust account checks in the total amount of $34,982.23 payable to cash, rather than a named payee; issued 24 trust account checks in the

total amount of $73,273 payable to herself without recording the purpose of the payment; withdrew from her trust account via bank transfers funds in the total amount of $278,874.24 without making or keeping records sufficient to explain the purpose of the transactions; and issued trust account checks to pay law office expenses such as mortgage payments, advertising expense, and postage. The Referee further found that, in November 2009, respondent received settlement funds in the amount of $75,000 on behalf of a client and, although respondent immediately disbursed $5,000 to the client and $15,000 to herself in payment of her legal fee, she thereafter failed to maintain a balance in her trust account sufficient to satisfy her obligation to the client and did not remit the balance of the funds to the client until March 2010.

With respect to charge three, the Referee found that, during the Grievance Committee's investigation and the proceedings before this Court that resulted in respondent's suspension in [*2]September 2013, respondent made numerous false statements under oath and submitted false evidence to the Grievance Committee and this Court regarding her handling of funds received from several clients. For instance, the Referee found that, during an examination under oath conducted by the Grievance Committee in April 2013, respondent falsely testified that the funds she received from her clients for disbursements, as set forth in charge one, had been deposited into her trust account when, in fact, a substantial portion of the funds had been deposited into her law firm operating account. The Referee additionally found that, during the proceedings that resulted in her suspension in September 2013, respondent filed with this{**128 AD3d at 81} Court papers containing numerous false statements of fact, including that she had received certain of the funds at issue in charge one for legal fees and had deposited certain funds into her law firm operating account, rather than her trust account, owing to the "immediacy" of the expenses she incurred on behalf of certain clients. The Referee found, however, that respondent received all of the funds at issue in charge one for anticipated disbursements, not legal fees, and that certain of the purportedly "immediate" expenses cited by respondent in papers filed with this Court were never incurred. The Referee additionally found that respondent during the suspension proceedings submitted to this Court falsified documents, including a retainer agreement and payment receipt wherein payments that respondent had received for disbursements were falsely characterized as payments for legal fees.

With respect to charges four and five, the Referee found that, from March 2008 though April 2013, respondent filed frivolous pleadings and made false statements in relation to five federal court matters, which resulted in the United States District Court for the Western District of New York imposing monetary sanctions against respondent. With respect to four of those matters, the Referee made an advisory finding that the doctrine of collateral estoppel precludes respondent from relitigating in this proceeding District Court's determination that respondent made misrepresentations and filed frivolous pleadings with that Court and intentionally failed to pay one of its sanctions in a timely manner.

With respect to charge six, the Referee found that respondent throughout this proceeding has refused to produce to the Grievance Committee financial and other records regarding funds received from numerous clients, despite her legal obligation to do so. The Referee further found that respondent purposefully failed to comply with a subpoena issued by this Court, which was returnable August 2, 2013, directing her to appear for an examination under oath and to produce to the Grievance Committee records concerning certain client matters. Notably, respondent testified at the hearing before the Referee that she possesses the records specified in the subpoena and has purposefully failed to produce them. The Referee additionally found that, beginning in November 2012, after respondent became aware that the Grievance Committee had commenced the instant investigation, respondent met with at least four clients and arranged for each of them to execute a{**128 AD3d at 82} "replacement" retainer agreement wherein payments respondent had received for anticipated disbursements were mischaracterized as payments for legal fees. The Referee found that respondent backdated the altered retainer agreements and provided the clients with backdated engagement letters that similarly mischaracterized the prior payments to respondent. Although respondent testified during the hearing that the purpose of the backdated and altered retainer agreements was to prepare for certain alternative dispute resolution proceedings in federal court, the Referee found that respondent's testimony on that point was false and that the true purpose was to conceal respondent's misappropriation of client funds. Finally, the Referee found that respondent or someone acting at her direction forged the signature of a client on a fabricated retainer agreement and, in March 2013, used the forged document in an effort to collect from the client a 40% contingency fee in a matter that respondent had previously agreed to handle on a pro bono basis.

With respect to charge seven, the Referee found that, after respondent was personally served with this Court's order of suspension in September 2013, she failed to comply with that order, as well as this Court's rule governing the conduct of suspended attorneys (*see* 22 NYCRR 1022.27 [b]), by meeting with clients and prospective clients to discuss their legal matters and failing to notify clients and opposing counsel in all pending matters that she had been suspended [*3]from the practice of law. The Referee additionally found that respondent in October 2013 filed with this Court an affidavit wherein she falsely stated that she had complied with section 1022.27. Finally, the Referee found that respondent sought to circumvent this Court's order of suspension and section 1022.27 in several respects, including forging the signature of an attorney who was associated with her law firm on certain business forms in an effort to remove respondent's name from the name of the firm, to make the associate attorney the "public face" of the firm, and to allow respondent to continue practicing law in the "background." The Referee further found that respondent or someone acting at her direction forged the signature of the associate attorney on correspondence with certain courts in connection with at least two client matters.

The Referee found in mitigation that respondent has received several awards for providing pro bono service to clients. In aggravation of the charges, however, the Referee found that respondent{**128 AD3d at 83} has an extensive disciplinary history that includes a public censure imposed by this Court (*Matter of Agola*, 99 AD3d 251 [2012]), and numerous reprimands and sanctions imposed in federal court for making false statements and filing frivolous proceedings. The Referee further found that respondent has not expressed any remorse and, during the hearing, she gave false and evasive testimony on several points.

We confirm the factual findings of the Referee, except with respect to one federal court matter to which the Referee applied the doctrine of collateral estoppel. In that matter, although District Court had entered an order finding that respondent made misrepresentations to the Court and imposing monetary sanctions against respondent, the United States Court of Appeals for the Second Circuit, without directly addressing the factual findings of District Court, reversed and vacated that order on the ground that the Court had applied an incorrect legal standard in determining that sanctions were warranted (*see Muhammad v Walmart Stores E., L.P.*, 732 F3d 104, 109 [2013]). We conclude that,

under the circumstances of that matter and upon the record before this Court, it would be unjust to apply the doctrine of collateral estoppel to the factual findings that served as the basis for the monetary sanctions that were vacated by the Second Circuit (*see Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 200 [2008]). In addition, because the Grievance Committee in this proceeding relied solely on the doctrine of collateral estoppel to prove those allegations, which are contained in paragraph No. 46 of the petition, we decline to sustain the Referee's findings concerning them.

With respect to respondent's motion to dismiss charges one and two, we reject her contention that the funds she received from clients for anticipated disbursements were not subject to any of the disciplinary rules concerning trust account funds and required records. As found by the Referee, the retainer agreements between respondent and the clients in question provide that the funds at issue were to be used for disbursements, precluding respondent's contention that the funds became property of her law firm upon receipt. Although respondent relies on a prior decision of this Court, *Matter of Aquilio* (162 AD2d 58 [1990]), in support of her contention that the disciplinary rules governing trust accounts do not apply to funds received for disbursements, that decision was based on a prior version of the disciplinary rules. That version explicitly{**128 AD3d at 84} provided that "advances for costs and expenses" were not required to be deposited in a segregated account (*see* former Code of Professional Responsibility DR 9-102 [a] [22 NYCRR 1200.46 (a)] [1978 ed]). The relevant rule was amended in 1990 (*see* former Code of Professional Responsibility DR 9-102 [a], [b] [1] [22 NYCRR 1200.46 (a), (b) (1)] [eff Sept. 1, 1990]), and any general exception to the trust account rules for advances for costs and expenses no longer applies (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.15 [a], [b] [1]). In any event, respondent's conduct in this proceeding belies any suggestion that she believed in good faith that the disbursement funds became the property of her law firm upon receipt. When respondent was initially confronted by the Grievance Committee, she falsely asserted that the funds had been deposited into her trust account. When it became apparent that was untrue, she falsified documents in an effort to mischaracterize the payments she received from clients and made false statements regarding the disposition of the funds. Even assuming, arguendo, that respondent was not required to maintain the disbursement funds in her trust account, that would not excuse her failure to account to clients and maintain required records pursuant to the disciplinary rules (*see* Rules of Professional Conduct [22

NYCRR [*4]1200.0] rule 1.15 [c], [d]).

We have considered the remaining contentions set forth in respondent's cross motion, which primarily challenge the sufficiency of the evidence and credibility determinations of the Referee, and conclude that they lack merit. Except as noted above, the Referee's findings are supported by the record, and we therefore decline to disturb them.

We conclude that respondent has violated the following former Disciplinary Rules of the Code of Professional Responsibility and the following Rules of Professional Conduct:

DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4]) and rule 8.4 (c) of the Rules of Professional Conduct (22 NYCRR 1200.0)—engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

DR 1-102 (a) (5) (22 NYCRR 1200.3 [a] [5]) and rule 8.4 (d) of the Rules of Professional Conduct (22 NYCRR 1200.0)—engaging in conduct that is prejudicial to the administration of justice;

DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]) and rule 8.4 (h) of the Rules of Professional Conduct (22 NYCRR 1200.0)—engaging in conduct that adversely reflects on her fitness as a lawyer;{**128 AD3d at 85}

DR 7-102 (a) (2) (22 NYCRR 1200.33 [a] [2]) and rule 3.1 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0)—bringing or defending a proceeding, or asserting or controverting an issue therein, by knowingly advancing a claim or defense that is unwarranted under existing law that cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or engaging in conduct that has no reasonable purpose other than to delay or prolong the resolution of litigation, or serves merely to harass or maliciously injure another, or knowingly asserting material factual statements that are false;

DR 9-102 (a) (22 NYCRR 1200.46 [a]) and rule 1.15 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0)—misappropriating client funds and commingling client funds with personal funds;

DR 9-102 (b) (1) (22 NYCRR 1200.46 [b] [1]) and rule 1.15 (b) (1) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain client funds in a special account separate from her business or personal accounts;

DR 9-102 (c) (3) (22 NYCRR 1200.46 [c] [3]) and rule 1.15 (c) (3) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain complete records of all funds of a client coming into her possession and to render appropriate accounts regarding them;

DR 9-102 (d) (1) (22 NYCRR 1200.46 [d] [1]) and rule 1.15 (d) (1) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain required bookkeeping and other records concerning her practice of law; and

DR 9-102 (d) (2) (22 NYCRR 1200.46 [d] [2]) and rule 1.15 (d) (2) of the Rules of Professional Conduct (22 NYCRR 1200.0)—failing to maintain a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed.

In addition, pertaining to conduct that occurred after April 1, 2009, we conclude that respondent has violated the following Rules of Professional Conduct:

rule 1.8 (a) (22 NYCRR 1200.0)—entering into a business transaction with a client if they have differing interests therein and if the client expects her to exercise professional judgment therein for the protection of the client, unless the transaction{**128 AD3d at 86} is fair and reasonable to the client, the terms of the transaction are fully disclosed to the client in writing, the client is advised in writing of the desirability of seeking the advice of independent legal counsel on the transaction and is given the opportunity to do so, and the client gives informed consent in writing to the terms of the transaction and the lawyer's role in the transaction;

rule 1.15 (c) (4) (22 NYCRR 1200.0)—failing to pay or deliver to a client in a prompt manner as requested by the client the funds, securities or other properties in her possession that the client is entitled to receive;

rule 1.15 (e) (22 NYCRR 1200.0)—making withdrawals from a special account payable to cash and not to a named payee;

[*5]

rule 1.15 (i) (22 NYCRR 1200.0)—failing to make available to the Grievance Committee financial records required by the rules to be maintained;

rule 3.3 (a) (1) (22 NYCRR 1200.0)—knowingly making a false statement of fact or law to a tribunal and failing to correct a false statement of material fact or law previously made to the tribunal;

rule 4.1 (22 NYCRR 1200.0)—knowingly making a false statement of fact or law to a third person in the course of representing a client; and

rule 5.5 (a) (22 NYCRR 1200.0)—engaging in the unauthorized practice of law.

In determining an appropriate sanction, we have considered respondent's submissions in mitigation, including that she has received five awards for providing pro bono legal services. We have considered in aggravation of the charges, however, that respondent has a substantial disciplinary history and the misconduct herein includes an extensive course of deceitful conduct for personal gain that resulted in harm to numerous clients. We have additionally considered that respondent throughout this proceeding has demonstrated a shocking disregard for the truth and her professional obligations to clients, the courts and our system of administration of justice as a whole. Accordingly, based upon all the factors in this matter, we conclude that respondent is unfit to practice law and should be disbarred. In addition, we grant the request of the Grievance Committee for an order, pursuant to Judiciary Law § 90 (6-a), directing respondent to make restitution to eight former clients in the total amount of $28,028.15.{**128 AD3d at 87}

Centra, J.P., Peradotto, Lindley, Whalen and DeJoseph, JJ., concur.

Order of disbarment entered.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D28742
O/prt

_____AD3d_____

A. GAIL PRUDENTI, P.J.
WILLIAM F. MASTRO
REINALDO E. RIVERA
PETER B. SKELOS
ARIEL E. BELEN, JJ.

2009-03291 OPINION & ORDER

In the Matter of Craig Steven Heller,
an attorney and counselor-at-law.

Grievance Committee for the Tenth
Judicial District, petitioner;
Craig Steven Heller, respondent.

(Attorney Registration No. 2104909)

Motion by the Grievance Committee for the Tenth Judicial District to strike the respondent's name from the roll of attorneys and counselors-at-law, pursuant to Judiciary Law § 90(4), upon his conviction of a felony. The respondent was admitted to the bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on February 4, 1987.

Robert A. Green, Haupppauge, N.Y. (Michele Filosa of counsel), for petitioner.

Craig Steven Heller, East Meadow, N.Y., respondent pro se.

PER CURIAM. On June 4, 2010, the respondent pleaded guilty before the Honorable Francis Ricigliano, in County Court, Nassau County, to grand larceny in the second degree, in violation of Penal Law § 155.40, a class C felony. He executed a waiver of indictment and

consented to be prosecuted by Superior Court Information. As revealed in the plea minutes, between April 18, 2008, and June 11, 2008, the respondent stole currency in excess of $50,000 from Alfonso Miranda. He was sentenced to a determinate term of imprisonment of 30 days, five years' probation, restitution in the amount of $104,108, and a DNA fee of $50.

Due to his felony conviction, the respondent ceased to be an attorney and counselor-at-law pursuant to Judiciary Law § 90(4)(a) and was automatically disbarred.

Accordingly, the Grievance Committee's motion to strike the respondent's name from the roll of attorneys pursuant to Judiciary Law § 90(4)(b) is granted to reflect the respondent's disbarment as of June 4, 2010.

PRUDENTI, P.J., MASTRO, RIVERA, SKELOS and BELEN, JJ., concur.

ORDERED that pursuant to Judiciary Law § 90(4)(a), the respondent, Craig Steven Heller, is disbarred, effective June 4, 2010, and his name is stricken from the roll of attorneys and counselors-at-law, pursuant to Judiciary Law § 90(4)(b); and it is further,

ORDERED that the respondent, Craig Steven Heller, shall comply with this Court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, the respondent, Craig Steven Heller, is commanded to desist and refrain from (l) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and its is further,

ORDERED that if the respondent, Craig Steven Heller, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10(f); and it is further,

ENTER:

Matthew G. Kiernan

Matthew G. Kiernan
Clerk of the Court

Matter of Jaffe

2010 NY Slip Op 06717 [78 AD3d 152]

September 28, 2010

Per Curiam

Appellate Division, First Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, January 12, 2011

[*1]

In the Matter of Karen Jaffe (Admitted as Karen Jaffe-Nierenberg), an Attorney, Respondent. Departmental Disciplinary Committee for the First Judicial Department, Petitioner.

First Department, September 28, 2010

APPEARANCES OF COUNSEL

Alan W. Friedberg, Chief Counsel, Departmental Disciplinary Committee, New York City (*Stephen P. McGoldrick* of counsel), for petitioner.

Linda F. Fedrizzi, for respondent.

{**78 AD3d at 153} OPINION OF THE COURT

Per Curiam.

Respondent Karen Jaffe was admitted to the practice of law in the State of New York by the Fourth Judicial Department on June 24, 1982 under the name Karen Jaffe-Nierenberg. At all times relevant to this proceeding, she has maintained an office for the practice of law within this Department.

The Departmental Disciplinary Committee now seeks an order, pursuant to 22 NYCRR 603.3, imposing reciprocal discipline on respondent, predicated on an order of the United States Court of Appeals for the Second Circuit (585 F3d 118 [2009]) publicly reprimanding and removing her (disbarring her), or in the alternative sanctioning her as this Court deems appropriate. Respondent seeks dismissal of the petition, or in the alternative a hearing on liability, or at least on sanctions.

This is the second time that respondent has been the subject of reciprocal disciplinary proceedings before this Court. The first proceeding followed the Second Circuit's suspension of respondent in May 2006 for 30 days for having falsely advised the Court, on two occasions, that she was too ill to attend oral arguments, when in fact she was attending hearings in another court. Based on that order, the Board of Immigration Appeals suspended her for 30 days from practice before that court, the Immigration Courts, and the Department of Homeland Security, and this Court publicly censured her (40 AD3d 96 [2007]).

During respondent's federal suspension, the Second Circuit, in an effort to assist her in planning to manage her caseload of pending matters, assigned the former chair of the immigration law committee of the New York City Bar Association to help her. Second Circuit staff also met with her. Nevertheless, in what the Second Circuit termed a "remedial order," dated July 13, 2006, the court relieved respondent from all cases before that court in which she had not yet submitted a brief, and limited her to no more than 30 cases at any one time, due to her "chronic failure to meet briefing deadlines, often despite numerous extensions, and her frequent submission of briefs that do not conform to the Rules of Appellate Procedure and that are of minimal competence." That order also directed respondent to provide the names and addresses of clients in cases identified by the court, so that they could be notified respondent was no longer representing them.{**78 AD3d at 154}

In December 2006, the Second Circuit referred for a hearing the issue of the suspicious filing of briefs in three cases on which respondent had been relieved as counsel. A special master determined that two other people were responsible for the fraudulent briefs, but not respondent. The Second Circuit accepted that conclusion in an August 2007 order.

By order dated April 2, 2008, the Second Circuit referred respondent to its Committee on Admissions and Grievances (CAG) to investigate and report on whether she should be subject to disciplinary measures. The order was based on: (1) the dismissal of 12 of her appeals for failure to comply with briefing schedules; (2) orders in 14 of her appeals warning that continued failure to comply with the Federal Rules of Appellate Procedure could result in sanctions; (3) her continued submission of deficient briefs in two appeals, despite repeated warnings, and her failure to attempt to file revised briefs; and (4) her failure to timely respond to Court orders pertaining to the previous "remedial order."

After conducting a hearing at which respondent and her counsel appeared, and accepting all of

her submissions, the CAG, in a December 2008 report, found her guilty by clear and convincing evidence of misconduct and recommended disbarment if she failed to resign within [*2]60 days.

Respondent conceded that the 12 dismissed appeals identified in the order of referral had been dismissed due to her failure to comply with court briefing schedules, which constituted neglect and conduct prejudicial to the administration of justice. With respect to the quality of her work, the CAG reviewed her submissions in three matters and found them "to be of very poor quality." Specifically:

> "Facts are asserted without citations to the record. The argument section is paltry. The petition is sloppily presented, replete with typographical errors. The table of authorities for each of the three different cases is the same, all containing the same errors . . . , and none matches the presentation of cases in the petition. In one petition, none of the cases listed in the table appear in the petition; in another, fewer than half the cases and decisions listed appear in the petition."

As an excuse, respondent maintained that law students had written many of the briefs she signed and filed, without reading them.{**78 AD3d at 155}

The CAG further determined that respondent had not offered an adequate excuse for her failure, despite numerous extensions, to fully comply with court directives to provide information for the purpose of notifying clients that she had been relieved from representation by the July 2006 "remedial order." The CAG also made a finding that respondent had made false statements to the court (the subject of the prior disciplinary proceeding), and treated her prior sanction (suspension of 30 days) as a mitigating factor. The CAG expressed its concern that respondent:

> "did not take heed of the Court's warnings concerning her deficient briefs. Nor did she attempt to file corrected briefs even after acknowledging that many of the briefs she filed were drafted by law students without her supervision. [Respondent] did not seek permission to file briefs out of time on behalf of the clients whose cases were dismissed because of defaults on the scheduling orders. While she could not keep up with the cases she had on her docket, she continued to take on new matters."

Aggravating factors identified by the CAG were: "(1) the prior disciplinary offenses; (2) a pattern of misconduct involving non-compliance with the Court's briefing schedules, orders, and defective briefing; (3) the multiple offenses; (4) the vulnerability of [respondent's] immigrant clients, many of whom do not speak English; and (5) [respondent's] substantial experience in the practice of law." Mitigating factors were respondent's remorse and cooperation in the proceedings, as well as "personal problems with her own illness and a family member's illness around the time of

the March 22, 2007 order," issued upon her failure to provide all the information requested in the July 2006 "remedial order."

In light of respondent's pattern of neglect, repeated failure to follow court orders, the aggravating and mitigating factors, and her assertion that she no longer wished to practice before the Second Circuit, the CAG recommended that she be given the opportunity to resign from the Second Circuit bar, along with a public reprimand; however, if she failed to withdraw, then the CAG recommended disbarment. [*3]

By order dated October 19, 2009, the Second Circuit adopted the factual findings of misconduct and the aggravating and mitigating circumstances, but declined to permit a resignation, and ordered respondent publicly reprimanded and removed (disbarred) (585 F3d 118 [2009]). {**78 AD3d at 156}

The Court acknowledged that "most of [respondent's] briefs were filed within a limited period of time," but noted that

> "she did not request leave to file amended briefs after being put on notice, and, after being advised of her briefing deficiencies as early as December 1, 2005 . . . , she filed at least three deficient briefs after that date . . . . Furthermore, her related argument that her briefs were not deficient . . . renders doubtful the suggestion that she might have improved her briefing in later cases had she been given earlier notice of the deficiencies." (*Id.* at 123.)

With respect to a brief respondent proffered in support of her argument that her work was not deficient, the court observed: "Fully half of the Statement of the Case is irrelevant since its last three paragraphs are duplicated verbatim from an entirely different case concerning a different petitioner and different facts." (*Id.*)

The Second Circuit also rejected respondent's argument that she had already been disciplined for the same conduct and therefore new sanctions were precluded by res judicata or double jeopardy. First, the court noted, she had never been disciplined for some of the conduct, such as filing briefs written by law students without reviewing them. Even though respondent had been criticized for deficient performance in orders issued during the course of particular cases, those orders, the court observed, "did not suggest that the criticism (or other adverse action) was a final 'sanction' for that misconduct." (*Id.* at 121.) The court also stated that, "even if an attorney already has received . . . a final sanction for each of several instances of misconduct, we may nonetheless

impose further discipline if the individual instances of misconduct are found to be part of a sanctionable pattern that has not itself been addressed." (*Id.*) The court specifically stated that it was not disciplining respondent again for discrete misconduct for which she had already been sanctioned. The court further stated, "even if the previously sanctioned misconduct were ignored entirely, or treated as aberrational, [it] would nonetheless find that [disbarment was] warranted by the remaining misconduct." (*Id.* at 122.)

Finally, the court:

> "ma[d]e it clear that the deficiencies of [respondent's] conduct, in the aggregate, bespeak of something far more serious than a lack of competence or{**78 AD3d at 157} ability. They exhibit an indifference to the rights and legal well-being of her clients, and to her professional obligations, including the obligation of candor, to this Court." (*Id.* at 123.)

In a proceeding seeking reciprocal discipline pursuant to 22 NYCRR 603.3 (c), an attorney is precluded from raising any defenses except: (1) a lack of notice or opportunity to be heard constituting a deprivation of due process; (2) an infirmity of the proof presented to the foreign jurisdiction; or (3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this state.

Here, respondent, represented by counsel, actively participated in the Second Circuit disciplinary proceedings, and thus there was no deprivation of due process. Both the CAG and [*4]the Second Circuit cited to specific New York disciplinary rules, thereby satisfying the third prong of the test. Indeed, respondent concedes the sufficiency of the proof, with the exception of the charge relating to her failure to comply with court directives, which she claims was an unintentional consequence of her involvement in a car accident and her responsibilities in connection with her ailing father. However, she was not found guilty of willfully disobeying a court order, but only neglect, based on her own admission that the matter slipped her mind, and her injuries and father's illness were acknowledged as mitigating circumstances. In any event, that charge was not the most serious one, and respondent's principal argument is that the Second Circuit had previously disciplined her for all of the same misconduct, and she should not be sanctioned twice.

As to this argument, we note that the Second Circuit observed that the issue of respondent's submission of law student briefs without reading them had never been addressed in any prior disciplinary order. Indeed, rather than stating that respondent's disciplinary record of a prior suspension for making false statements to the court was an aggravating factor, the Second Circuit

found her guilty of making the false statements, but credited her with a mitigating circumstance for the sanctions previously imposed for those statements. Notwithstanding this, the Second Circuit expressly declared that it was not disciplining respondent "again . . . for that discrete misconduct" (585 F3d at 122).

The balance of respondent's misconduct as found in the order at issue, dismissal of 12 appeals for failure to comply with briefing schedules and the filing of at least 16 grossly inadequate briefs, does appear to have been considered in the Second{**78 AD3d at 158} Circuit's July 2006 order. The Court referred to that order as "remedial," rather than disciplinary. The order was not the result of a formal disciplinary proceeding, and apparently respondent was not given an opportunity to contest the findings therein. The conditions imposed by that order were certainly intended as remedial, and not a sanction. However, the only pertinent factor is that *this* Court has never previously sanctioned respondent for the misconduct outlined in the instant petition. Accordingly, the Second Circuit's October 2009 order, considered alone or in conjunction with the July 2006 "remedial order," provides a predicate for reciprocal discipline.

Insofar as respondent asserts that the Second Circuit punished her because it "was disappointed Judge Keenan could not implicate [her] in any wrongdoing" with respect to the unproven allegation that respondent filed fraudulent briefs, the court specifically stated that her "cooperation and affirmative efforts to expose fraudulent conduct [by the two attorneys who were responsible] were commendable, and are considered mitigating factors" (585 F3d at 122).

As a general rule, this Court accords significant weight to the discipline imposed by the jurisdiction where the charges were originally brought, even if greater or lesser sanctions have been imposed in New York for similar conduct (*Matter of Jarblum*, 51 AD3d 68, 71 [2008]). This Court departs from that principle only with "reluctance" (*Matter of Lowell*, 14 AD3d 41, 48 [2004], *lv denied* 5 NY3d 708 [2005]), primarily where the sanction in the originating jurisdiction deviates materially from this Court's precedent (*Matter of Whitehead*, 37 AD3d 86 [2006]).

This Court has previously held that, where an attorney has "engaged in a pattern of neglect of client matters and failed to comply with court orders, disbarment is warranted" (*Matter of Hatton*, 44 AD3d 49, 52 [2007] [reciprocal disbarment based on Southern District of New York disbarment]). Here, respondent neglected numerous client matters, and failed to even [*5]attempt to address her deficiencies, despite warnings and opportunities to do so. At least as late as the most recent Second Circuit disciplinary proceeding, respondent even maintained that her work was competent. She has not evinced any insight into the impropriety, and resultant harm, of submitting

law student work product without review, and even tries to invoke that misconduct as a mitigating factor. The pervasiveness of respondent's neglect is compounded by the vulnerability of her immigrant clients. Her prior disciplinary history (of making{**78 AD3d at 159} false statements) and her accusations of base motives by the Second Circuit are further aggravating circumstances. Because the sanction of disbarment imposed by the Court of Appeals for the Second Circuit is in accord with this Court's precedents involving similar misconduct, we adopt that sanction.

Accordingly, the Committee's petition should be granted, respondent's request for a hearing should be denied, and respondent should be disbarred and her name stricken from the roll of attorneys and counselors-at-law in the State of New York.

Mazzarelli, J.P., Andrias, Nardelli, Catterson and McGuire, JJ., concur.

Respondent disbarred, and her name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective the date hereof.

Matter of Shapiro

2004 NY Slip Op 03488 [7 AD3d 120]

April 30, 2004

Appellate Division, Fourth Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Thursday, November 18, 2004

[*1]

In the Matter of James J. Shapiro, an Attorney, Respondent. Grievance Committee of the Seventh Judicial District, Petitioner.

Fourth Department, June 30, 2004

APPEARANCES OF COUNSEL

Daniel A. Drake, *Principal Counsel*, *Seventh Judicial District Grievance Committee*, Rochester, for petitioner.

Harter, Secrest & Emery LLP (*Thomas G. Smith* of counsel), Rochester, for respondent.

Bruce S. Rogow, Ft. Lauderdale, Florida, for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law by this Court on February 15, 1983, and, prior to December 2003, maintained an office for the practice of law in Rochester. The Grievance Committee filed a petition charging respondent with violations of the disciplinary rules arising from his conduct in sending a letter to a hospitalized accident victim and in airing certain television commercials in the western New York area. Respondent filed an answer denying material allegations of the petition, and a referee was appointed to conduct a hearing. After the hearing, the Referee submitted a report, which the Grievance Committee now moves to confirm and respondent cross-moves to disaffirm.

The Referee found that a letter sent by respondent to a hospitalized accident victim was an

impermissible solicitation of legal employment. The Referee found further that respondent aired television commercials that contained false and misleading statements and that a client had retained respondent based upon the false information contained in the commercials. In addition, the Referee found that, although the client believed, based upon the commercials, that respondent would personally take action on his behalf, respondent never met the client and did not review his file or take any action on his behalf. Finally, the Referee rejected respondent's affirmative defense that the television commercials were constitutionally protected hyperbole pursuant to a prior decision of this Court.

We agree with the finding of the Referee that the letter sent by respondent to a hospitalized accident victim was an impermissible solicitation of legal employment in violation of Code of Professional Responsibility DR 2-103 (a) (2) (iv) (22 NYCRR 1200.8). That rule prohibits a lawyer from soliciting professional employment from a prospective client by written communication when "the lawyer knows or reasonably should know that the . . . physical, emotional or mental state of the recipient make it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney . . ." (DR 2-103 [a] [2] [iv]).

The letter sent by respondent states, in pertinent part, "We are holding a letter containing valuable information regarding your legal rights . . . When you are well enough to exercise such judgment, please call me." We conclude that the letter, sent to a comatose patient in the intensive care unit of a hospital three days after her automobile collided with a train, was a solicitation of legal employment sent at a time when respondent, who acknowledged that he had read newspaper articles reporting the accident and the condition of the victim, knew or reasonably should have known that the recipient was unable to exercise reasonable judgment in retaining counsel. Despite language in the letter acknowledging the likelihood that the recipient was then unable to exercise reasonable judgment in retaining counsel, we are not persuaded by the explanation of respondent that he sent his letter to a stranger under these circumstances in order to educate her regarding her legal rights.

In the alternative, respondent contends that DR 2-103 (a) (2) (iv) is overly broad and vague and therefore unconstitutional. We reject that contention.

A state has a compelling interest in and broad power to regulate the practice of law (*see Goldfarb v Virginia State Bar*, 421 US 773, 792 [1975], *reh denied* 423 US 886 [1975]; *Matter of von Wiegen*, 63 NY2d 163, 170-171 [1984]). Although lawyer advertising is commercial speech and is accorded the [*2]protection of the First Amendment (*see Florida Bar v Went for It, Inc.*, 515

US 618, 623 [1995]; *Shapero v Kentucky Bar Assn.*, 486 US 466, 472 [1988]; *Bates v State Bar of Ariz.*, 433 US 350 [1977], *reh denied* 434 US 881 [1977]), it is now familiar law that commercial speech may be regulated to advance a substantial interest provided that the regulation goes no further than necessary to advance that interest (*see Went for It, Inc.*, 515 US at 625-635; *Central Hudson Gas & Elec. Corp. v Public Serv. Commn.*, 447 US 557, 566 [1980]; *von Wiegen*, 63 NY2d at 173-175).

Contrary to respondent's contention, the disciplinary rule at issue is not overbroad. The substantial interests of a state in protecting the privacy of vulnerable prospective clients and in preventing the erosion of confidence in the legal profession have been recognized (*see Went for It, Inc.*, 515 US at 635; *Matter of Anis*, 126 NJ 448, 457, 599 A2d 1265, 1269 [1992], *cert denied sub nom. Anis v New Jersey Comm. on Attorney Adv.,* 504 US 956 [1992]) and DR 2-103 (a) (2) (iv) prohibits lawyers from soliciting prospective clients at a time when the clients are unable to exercise reasonable judgment with regard to the retention of counsel. The disciplinary rule does not impose an absolute bar on contact by lawyers with prospective clients for a specified period (*cf. Went for It, Inc.*, 515 US at 620-621), nor does it proscribe a particular type of solicitation (*cf. Matter of Koffler*, 51 NY2d 140 [1980], *cert denied* 450 US 1026 [1981]) or solicitations directed to a particular group (*cf. von Wiegen*, 63 NY2d at 168-170). Instead, the disciplinary rule strikes a balance between the interests of vulnerable prospective clients in being free from unwanted intrusions at a time when they are unable to exercise reasonable judgment and the interests of prospective clients in receiving information regarding available legal services and of lawyers in advertising their services. Consequently, it cannot be said that the rule is overbroad.

Nor do we find the disciplinary rule to be unconstitutionally vague. The Supreme Court of New Jersey, in upholding a nearly identical rule, concluded that, in the days immediately following the tragic Lockerbie crash, any reasonable lawyer would have known that the families of the victims would be weak and vulnerable, and that "any reasonable lawyer would conclude that an obsequious letter of solicitation delivered the day after a death notice would reach people when they 'could not exercise reasonable judgment in employing a lawyer' " (*Anis*, 126 NJ at 458, 599 A2d at 1270).

We reach a similar conclusion here. Applying the standard articulated by the court in *Anis*, we conclude that any reasonable attorney would know that a solicitation letter sent to a hospitalized comatose patient in the days immediately following a collision between her automobile and a train would reach the patient and her family at a time when they were unable to exercise reasonable

judgment in retaining an attorney. Respondent, who had actual knowledge of the condition of the accident victim, will not be heard to argue that the disciplinary rule required him to be a "mind and body reader" in order to determine whether his solicitation letter could be sent.

We also agree with the finding of the Referee that the television commercials aired by respondent contained false and misleading statements. The commercials depicted respondent as an experienced, aggressive personal injury lawyer who was prepared to take and had taken personal action on behalf of clients. The evidence presented at the hearing, however, supports the finding of the Referee that respondent has not been actively engaged in the practice of law in this state since 1995. Respondent has conceded that he has continuously resided in the State of Florida since 1991. The daily operations of the Rochester firm of Shapiro and Shapiro have been entrusted to one or two attorneys and several paralegals. Respondent's role has been limited to acting as spokesperson, providing funding and responding to questions. In contrast to the image [*3]of respondent depicted in the commercials, respondent has never tried a case to its conclusion and has conducted approximately 10 depositions.

The record also supports the finding of the Referee that a severely injured accident victim retained respondent based upon those commercials, which grossly exaggerated and falsely depicted his skill and experience and failed to inform viewers that he does not reside in New York and has not engaged in the practice of law here since 1995. Respondent took no personal action on behalf of that client and did not even review his file.

We reject the contention of respondent that his television commercials consist of constitutionally protected hyperbole. The statements in the television commercials aired by respondent are false; they do not consist of hyperbole. In the commercials, respondent, or an actor speaking on his behalf, makes statements regarding actions that respondent has taken or will take on behalf of clients when, in fact, respondent has not practiced law in a number of years and intended to take no action on behalf of any client. The Constitution does not protect the dissemination of false or misleading information (*see Zauderer v Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 US 626, 637 [1985]; *Central Hudson Gas & Elec. Corp.*, 447 US at 563-564; *Matter of Zang*, 154 Ariz 134, 141, 741 P2d 267, 274 [1987], *cert denied sub nom. Whitmer v State Bar of Ariz.*, 484 US 1067 [1988]). In our view, the depiction of respondent in the commercials as a tough, aggressive advocate who has recovered and will recover all that clients are entitled to recover was "flattering past the point of deception" (*Zang*, 154 Ariz at 145, 741 P2d at 278).

We therefore confirm the findings of fact made by the Referee and conclude that respondent

has violated the following Disciplinary Rules of the Code of Professional Responsibility:

DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4])—engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7])—engaging in conduct that adversely reflects on his fitness as a lawyer;

DR 2-101 (a) (22 NYCRR 1200.6 [a])—disseminating a public communication to a prospective client containing statements or claims that are false, deceptive or misleading; and

DR 2-103 (a) (2) (iv) (22 NYCRR 1200.8 [a] [2] [iv])—soliciting professional employment from a prospective client by written communication when he knew or reasonably should have known that the age or the physical, emotional or mental state of the recipient made it unlikely that the recipient would be able to exercise reasonable judgment in retaining an attorney.

We have considered, in determining an appropriate sanction, the mitigating factors found by the Referee, i.e., that respondent consulted counsel concerning the language in his solicitation letters and that he retained outside counsel to assist with some of the cases handled by his firm. Respondent, however, was previously censured by this Court for a misleading advertisement placed in the yellow pages of the telephone directory (*Matter of Shapiro*, 225 AD2d 215 [1996]). Additionally, on two prior occasions, respondent received letters of caution for sending letters to clients containing misleading language regarding legal costs. Finally, respondent has received a letter of caution for sending a solicitation letter to a hospitalized accident victim. Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended for one year and until further order of the Court.

Pigott, Jr., P.J., Green, Hurlbutt, Kehoe and Hayes, JJ., concur.

Order of suspension entered.

Matter of Weber
2013 NY Slip Op 05535 [110 AD3d 24]
July 31, 2013
Per Curiam.
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, October 30, 2013

[*1]

In the Matter of Dean Weber (Admitted as Dean Gary Weber), an Attorney, Respondent. Grievance Committee for the Tenth Judicial District, Petitioner.

Second Department, July 31, 2013

APPEARANCES OF COUNSEL

Robert A. Green, Hauppauge (*Leslie B. Anderson* of counsel), for petitioner.

{**110 AD3d at 24} OPINION OF THE COURT

Per Curiam.

The instant matter emanates from an opinion and order of the United States District Court for the Southern District of New York dated August 3, 2012, which suspended the respondent from the practice of law before that Court for a period of one year. The suspension is predicated upon a finding that the respondent violated Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.1 (competence), 1.3 (diligence), 1.4 (communication) and 8.4 (d) (conduct prejudicial to the administration of justice) in connection with, inter alia, his mishandling of a bankruptcy matter.

On October 19, 2012, the respondent was personally served with notice pursuant to Rules of the Appellate Division, Second Department (22 NYCRR) § 691.3, which advised him of his right

to file, within 20 days, a verified statement setting forth any of the defenses to the imposition of reciprocal discipline enumerated in 22 NYCRR 691.3 (c).

The respondent submitted a verified statement in which he admitted that he mishandled the subject bankruptcy matter, described numerous mitigating circumstances, and requested leniency. Inasmuch as he failed to set forth any of the defenses enumerated in 22 NYCRR 691.3, and did not request a hearing before this Court, there is no impediment to the imposition of reciprocal discipline.

Under the totality of the circumstances, the application of the Grievance Committee for the Tenth Judicial District is granted, and the respondent is publicly censured.

Eng, P.J., Rivera, Skelos, Dillon and Leventhal, JJ., concur.

Ordered that the petitioner's application to impose reciprocal discipline is granted; and it is further,

Ordered that the respondent is publicly censured.

Matter of Weber
2015 NY Slip Op 07674 [134 AD3d 13]
October 21, 2015
Per Curiam.
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, January 7, 2015

[*1]

In the Matter of Dean Gary Weber, an Attorney, Respondent. Grievance Committee for the Tenth Judicial District, Petitioner.

Second Department, October 21, 2015 On the Court's own motion, it is ordered that the opinion and order of this Court dated July 1, 2015 (131 AD3d 38 [2015]), in the above-entitled matter is recalled and vacated, and the following opinion and order is substituted therefor:

APPEARANCES OF COUNSEL

Mitchell T. Borkowsky, Hauppauge (*Daniel M. Mitola* of counsel), for petitioner.

McDonough & McDonough, LLP, Garden City (*Chris McDonough* of [*2]counsel), for respondent.

{**134 AD3d at 14} OPINION OF THE COURT
Per Curiam.

The Grievance Committee for the Tenth Judicial District served the respondent with a petition dated July 25, 2013,{**134 AD3d at 15} containing four charges of professional misconduct, arising from the respondent's employment of a disbarred attorney, Craig Heller, as a "legal assistant." After hearings conducted on October 24, 2013 and November 20, 2013, both parties were notified by the Court that the Honorable Charles F. Cacciabaudo, who had been

assigned as Special Referee to hear and report, recused himself in this matter. By decision and order on motion of this Court dated March 24, 2014, the matter was reassigned to John P. Clarke, Esq., as Special Referee, to hear and report. Prior to reading the record, on April 16, 2014, the Special Referee held a conference and afforded the parties the opportunity to present further evidence and argument. The petitioner and the respondent declined to do so.

After a review of the record, the Special Referee issued a report dated May 15, 2014, which sustained all charges. The Grievance Committee now moves to confirm the Special Referee's report and to impose such discipline upon the respondent as this Court deems appropriate. The respondent, by his counsel, submitted an affirmation in opposition seeking to disaffirm the report of the

Special Referee and to dismiss the proceeding. Alternatively, in the event that the report of the Special Referee is confirmed, the respondent requests that this matter be returned to the petitioner for a private sanction or that this Court issue no sanction greater than a censure. Additionally, counsel for the respondent seeks to file a sur-reply.

Charge one alleges that the respondent assisted a nonlawyer in the unauthorized practice of law, in violation of rule 5.5 (b) of the Rules of Professional Conduct (22 NYCRR 1200.0), as follows:

> "1. At all relevant times, the respondent's law firm provided legal services to clients with respect to loan modification and bankruptcy applications.

"2. In or about the Spring of 2010, the respondent hired Craig Heller to assist him with his loan modification and bankruptcy practice.

"3. The respondent knew at the time he hired Craig Heller that Heller was facing criminal charges, which would likely result in his disbarment.

"4. The respondent knew or learned that on or about June 4, 2010, Craig Heller pleaded guilty to{**134 AD3d at 16} grand larceny in the second degree, a felony, and that, as a result, Craig Heller was disbarred as an attorney in the State of New York.

"5. At all relevant times, from June 4, 2010, through the present, the respondent knew or should have known that, as a disbarred attorney, Craig Heller was forbidden from practicing law, holding himself out as an attorney-at-law, and soliciting clients on his own behalf or on behalf of the firm.

"6. At all relevant times, from June 4, 2010, through the present, the respondent knew, or should have known that, as an attorney, he was prohibited from employing Craig Heller, a disbarred attorney, to solicit clients on his own behalf or on behalf of his firm, and provide legal services to clients.

"7. At all relevant times, from June 4, 2010, through the present, the respondent utilized Craig Heller to, among other things, solicit clients on behalf of the firm, handle and manage loan modification and bankruptcy files, communicate with clients and lenders, and collect executed retainer agreements and fees from clients on behalf of the firm.

[*3]

"8. At all relevant times, from June 4, 2010, through the present, the respondent knew that Craig Heller used the assumed name of 'Craig

Miller' when communicating with clients of the firm and others."

Based upon the factual specifications of charge one, charge two alleges that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of rule 8.4 (c) of the Rules of Professional Conduct (22 NYCRR 1200.0); charge three alleges that the respondent engaged in conduct prejudicial to the administration of justice, in violation of rule 8.4 (d) of the Rules of Professional Conduct (22 NYCRR 1200.0); and charge four alleges that the respondent engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of rule 8.4 (h) of the Rules of Professional Conduct (22 NYCRR 1200.0).

Notwithstanding the respondent's claim that Heller merely performed work as a "legal assistant," the Special Referee found that Heller continued to practice law while in the respondent's {**134 AD3d at 17} employ and that, by permitting Heller to do so, the respondent assisted a nonlawyer in the unauthorized practice of law. Although the respondent's counsel urges this Court to give no weight to the findings of the Special Referee with respect to credibility, since he did not preside over the hearings, we note that, after this matter was reassigned to that Special Referee, the respondent chose not to present further evidence and argument when given the opportunity to do so. Nevertheless, upon review, we conclude that the evidence supported the Special Referee's findings. The respondent testified at the hearing that he hired Heller because Heller knew everything about the respondent's law practice, given his prior legal

experience with real estate matters, and as a bankruptcy lawyer. Indeed, the respondent relied upon Heller's legal knowledge and expertise to allow Heller great autonomy in the performance of his work on clients' legal matters, and to delegate to him responsibility to act as the principal contact with clients with little or no supervision. Further, evidence of the respondent's complicity in Heller's deceptive conduct is found in his endorsement of Heller's use of a false identity, "Craig Miller," when communicating with the firm's clients and others. We find that the respondent authorized Heller to use an assumed name, in part, to conceal and deceive others concerning Heller's status as a disbarred attorney, and that Heller misled the respondent's clients to believe that he was an attorney named "Craig Miller." The record also reflects that the respondent authorized Heller to improperly solicit clients on behalf of the

respondent's firm in violation of 22 NYCRR 691.10 (a).

In view of the respondent's admissions, and the credible evidence adduced, we conclude that the Special Referee properly sustained all charges. Accordingly, the Grievance Committee's motion to confirm the Special Referee's report is granted. The respondent's counsel's request to file a sur-reply is granted, and the sur-reply was considered in reaching this determination.

In determining an appropriate measure of discipline to impose, this Court has considered the respondent's lack of remorse and the absence of character evidence, as well as the respondent's disciplinary history, which consists of a public censure by opinion and order of this Court dated July 31, 2013, following his suspension before the

United States District Court for the Southern District of New York for a period of one{**134 AD3d at 18} year (*see Matter of Weber*, 110 AD3d 24 [2013]), and a letter of admonition. Under the totality of the circumstances, we find that the respondent's conduct warrants his suspension from the practice of law for a period of two years.

Eng, P.J., Mastro, Rivera, Dillon and Leventhal, JJ., concur.

Ordered that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further,

Ordered that the respondent, Dean Gary Weber, is suspended from the practice of law for a period of two years, commencing November 20, 2015, and continuing until further order of this

Court. The respondent shall not apply for reinstatement earlier than May 20, 2017. In such application, the respondent shall furnish satisfactory proof that during said period he: (1) refrained from practicing or attempting to practice law, (2) fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10), (3) complied with the applicable continuing legal education requirements (*see* 22 NYCRR 691.11 [c] [2]), and (4) otherwise properly conducted himself ; and it is further,

[*4]

Ordered that pursuant to Judiciary Law § 90, during the period of suspension, and until the further order of this Court, the respondent, Dean

Gary Weber, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law ; and it is further,

Ordered that if the respondent, Dean Gary Weber, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10 (f).

Matter of Zweig
2014 NY Slip Op 03040 [117 AD3d 96]
May 1, 2014
Per Curiam
Appellate Division, First Department
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As corrected through Wednesday, June 18, 2014

[*1]

In the Matter of Richard H. Zweig (Admitted as Richard Henry Zweig), an Attorney, Respondent. Departmental Disciplinary Committee for the First Judicial Department, Petitioner.

First Department, May 1, 2014

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (*Stephen P. McGoldrick* of counsel), for petitioner.

Scalise & Hamilton, LLP (*Beverly M. Ma* of counsel), for respondent.

{**117 AD3d at 97} OPINION OF THE COURT

Per Curiam.

Respondent Richard H. Zweig was admitted to the practice of law in the State of New York by the First Judicial Department on July 9, 1984 as Richard Henry Zweig. At all times relevant to this proceeding, he maintained an office for the practice of law within the First Judicial Department.

The Departmental Disciplinary Committee initiated a sua sponte investigation against respondent after he testified as a mitigation witness in a disciplinary proceeding concerning attorney Mac Truong (*Matter of Truong*, 22 AD3d 62 [1st Dept 2005], *appeal dismissed* 6

NY3d 799 [2006]).

The Committee's investigation focused on respondent's participation, between 2000 and 2007, in various state and federal actions in which he purportedly represented the government of Vietnam at Truong's direction. Specifically, the litigation concerned assets that had been frozen in the United States when Vietnam nationalized 10 shipping companies that were doing business collectively under the name Vishipco. After Vishipco was nationalized, Vietnam changed the name to Vitranschart.

On or about July 15, 2009, the Disciplinary Committee served respondent with a notice and statement of charges alleging{**117 AD3d at 98} that: by commencing and prosecuting unauthorized and fraudulent litigation in New York state and federal court, purportedly on behalf of the government of Vietnam, he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Code of Professional Responsibility DR 1-102 (a) (4) (22 NYCRR 1200.3 [a]; [4]) (charge one) and in conduct that was prejudicial to the administration of justice in violation of DR 1-102 (a) (5) (22 NYCRR 1200.3 [a]; [5]) (charge two); by giving false testimony in the disciplinary proceeding *Matter of Mac Truong* on May 20, 2004, respondent violated DR 1-102 (a) (4) (22 NYCRR 1200.3 [a]; [4]) (charge three) and DR 1-102 (a) (5) (22 NYCRR 1200.3 [a]; [5]) (charge four); by giving false testimony at his sworn deposition before the Committee in September 2008 and February 2009, he violated DR 1-102 (a) (4) (22 NYCRR 1200.3 [a]; [4]) (charge five) and DR 1-102 (a) (5) (22 NYCRR 1200.3 [a]; [5]) (charge six); by failing to make an application before Judge Crotty to dismiss Truong's counterclaims against respondent's purported client, he intentionally prejudiced or damaged his client in violation of DR 7-101 (a) (3) (22 NYCRR 1200.32 [a]; [3]) (charge seven); by commencing unauthorized and fraudulent legal actions against Charles Schwab, former Vishipco shareholders, and their counsel, respondent took legal action intended solely to harass and/or maliciously injure another in violation of DR 7-102 (a) (1) (22 NYCRR 1200.33 [a]; [1]) (charge eight); and by engaging in the above misconduct, respondent engaged in conduct that adversely reflected on his fitness as a lawyer in violation of DR 1-102 (a) (7) (22 NYCRR 1200.3 [a]; [7]) (charge nine).

In August 2009, respondent served an answer denying the charges. During October and

November 2009, a referee held seven days of hearings on the charges. On January 6, 2010, the Referee issued a 43-page report of his "Initial Findings of Facts" wherein he found, among other things, that respondent testified falsely and conspired with Truong to use litigation improperly, and that respondent was "a puppet and Mac Truong was his puppeteer" who directed various fraudulent conduct along the way.

Following the parties' submissions of memoranda, wherein respondent requested reconsideration of the Referee's findings on the charges, the Referee issued a report on March [*2]15, 2010 denoted "Notice of Charges Sustained," in which he sustained eight out of nine charges, having not sustained charge seven (intentionally prejudicing or damaging his client in violation of{**117 AD3d at 99} DR 7-101 [a]; [3]; [22 NYCRR 1200.32 (a) (3)]). Respondent admitted only to charge nine, that he engaged in conduct that adversely reflects on his fitness as a lawyer (DR 1-102 [a]; [7]; [22 NYCRR 1200.3 (a) (7)]). A sanction hearing was held on March 22 and on April 19, 2010, the Referee issued his final report and recommended disbarment.

After hearing oral argument, a Hearing Panel issued a report dated October 20, 2010, where it agreed with the Referee's findings and recommendation of disbarment.

The Disciplinary Committee now moves for an order pursuant to Rules of the Appellate Division, First Department (22 NYCRR) §§ 603.4 (d) and 605.15 (e) (2) confirming the report of the Referee and the determination of the Hearing Panel, and disbarring respondent from the practice of law. Respondent argues that disbarment is disproportionate to the non-venal conduct involved and requests a sanction between a censure and a one-year suspension.

In finding respondent guilty of commencing and prosecuting unauthorized and fraudulent litigation in state and federal court purportedly on behalf of the government of Vietnam (charges one and two), the Referee held that respondent

> "engaged over many years in an intentional course of conduct involving repeated instances of dishonesty, fraud, deceit and misrepresentation, lying both to the Court and to his putative client about the true nature of the litigation brought at the instance of, and primarily for the benefit of, Mac Truong . . . [S];uch conduct is prejudicial to the administration of justice."

In sustaining charges three through six, the Referee found that respondent testified falsely at Truong's 2004 disciplinary proceeding, and testified falsely in his own deposition before the Committee in 2008 and 2009, when he denied that he colluded with Truong in connection with the Vitranschart litigation.

The Referee did not sustain charge seven (intentionally prejudicing or damaging his client in violation of DR 7-101 [a]; [3]; [22 NYCRR 1200.32 (a) (3)]), having determined that although respondent did intentionally fail to move to dismiss the counterclaims against Vitranschart when invited to do so by the federal court, "because [respondent]; was still working with Mac Truong to use that litigation for improper purposes," he did not believe that failure established that respondent intentionally or actually prejudiced or damaged his client. In sustaining charge{**117 AD3d at 100} eight, the Referee found that respondent's conduct "served merely to harass or maliciously injure Charles Schwab and the Vishipco Entities and their lawyer" in violation of DR 7-102 (a) (1) (22 NYCRR 1200.33 [a]; [1]). And, as noted above, respondent admitted to charge nine, a violation of DR 1-102 (a) (7) (22 NYCRR 1200.3 [a]; [7]).

The Referee summarized respondent's conduct as follows:[FN*]

> "Respondent engaged in an intentional fraud on multiple state and federal courts over a multiyear period in order to help Mac Truong pursue vexatious litigation against the Vishipco Entities and Charles Schwab. He then lied in his testimony at Mac Truong's disciplinary hearing, and when deposed by the Disciplinary Committee Staff as part of their investigation of Respondent himself, regarding the true nature of his representation of Vietnam. . . .

[*3]

> "In order to assist Mac Truong's goal of holding on to Vishipco's assets, Respondent filed an unnecessary federal lawsuit (Federal Action #2) without the permission of his putative client, the government of Vietnam. He did so, he claims, in reliance on the vague instructions of an unnamed employee of a Vietnamese shipping company to 'protect our interests' until the Embassy could decide whether to retain him. . . .
>
> "The real reason for the rush to start a new lawsuit was to try to help Mac Truong delay the long-form accounting ordered by Justice Cozier. Mac Truong's own

federal lawsuit (Federal Action #1) had been stayed pending the outcome of the state case, and so Mac Truong required another mechanism by which to avoid discovery and delay Justice Cozier. The fact that Respondent did not file a related case statement with Federal Action #2 is consistent with the picture of forum shopping at the direction of Mac Truong . . . The fact that one of Respondent's first acts after filing Federal Action #2 was to ask U.S. District Judge Stein to enjoin the state action—a motion which solely benefitted Mac Truong—is further {**117 AD3d at 101}proof that the real purpose was to assist Mac Truong in pursuing vexatious litigation, rather than to represent Vietnam honestly."

Additional examples of respondent's handling of the litigations in a manner that assisted Truong but was not in the best interest of his putative client include that: the language of the complaint in federal action No. 2 (and most other documents) was consistent with Mac Truong's own writing and entirely inconsistent with respondent's; he made an incomprehensible summary judgment motion asking the federal court to "certify facts" which were drafted to benefit Truong to stave off the state court; he joined in baseless attacks on Vishipco's attorney, David Levy, including moving for his disqualification, which was consistent with Truong's long-running "vendetta" against Levy; and he "consistently failed to fully and accurately inform his client of the true nature of the litigation."

With respect to whether respondent had in fact been authorized to represent Vietnam, the Referee concluded as relevant:

"[i];n the absence of a witness from Vietnam to contradict his testimony, I find that Mac Truong and Respondent in fact met with the Ambassador [of Vietnam]; . . . and that Respondent obtained some measure of authority to appear in court on behalf o[f]; Vietnam. However, in light of Respondent's subsequent actions and the way his correspondence is crafted to avoid fully and accurately informing the Vietnamese government of the salient facts, I find that this meeting was part of Respondent's agreement with Mac Truong to use Vitranschart as a pawn in Mac Truong's battles with the Vishipco entities."

In mitigation respondent offered, among other things, his lack of a disciplinary history; the absence of a venal motive and, in fact, that he lost money insofar as he took the case on a [*4]one-third contingency basis and failed to obtain any recovery; his client was not harmed; his good reputation in the legal community as testified to by two character

witnesses (one who skimmed the voluminous record and the other who declined counsel's offer to do so before the hearing); that a suspension or disbarment would irreparably harm his low-income immigrant clients; and that "judgment should be tempered with mercy"—detailing the significant effects disbarment would have on his family.{**117 AD3d at 102}

The Referee recommended disbarment. The Hearing Panel agreed with the Referee as to the charges sustained and the recommended sanction of disbarment, with one minor exception regarding the Referee's finding that hardship to respondent's family, particularly his two "young" sons (ages 15 and 18 at the time of the hearing), was a mitigating factor. The Panel noted that respondent's wife is a teacher and respondent testified that she would like to go back to work.

This Court confirms the findings of fact and conclusions of law of the Referee and Hearing Panel as to liability and to impose the sanction of disbarment (*see Matter of Alejandro*, 65 AD3d 63 [1st Dept 2009], *appeal dismissed* 13 NY3d 788 [2009], *lv denied* 13 NY3d 714 [2009]; [disbarment for conduct that included testifying falsely during deposition before DDC]; *Matter of Fagan*, 58 AD3d 260 [1st Dept 2008], *lv denied* 12 NY3d 813 [2009]; *Matter of Truong*, 22 AD3d 62 [2005]; *Matter of Gadye*, 283 AD2d 1 [1st Dept 2001]; [disbarment for, inter alia, bad faith court filings, failure to advise of conflict of interest issues and participation in a fraud upon bankruptcy court]; *Matter of Gelbwaks*, 260 AD2d 47 [1st Dept 1999]; [disbarment for collusion with client in bogus transfer of assets to evade creditor, bad faith bankruptcy filings, unauthorized disbursement of client funds, impermissible conflict of interest with client in a financial transaction]; *Matter of Kramer*, 247 AD2d 81 [1st Dept 1998], *lv denied* 93 NY3d 883 [1999], *cert denied* 528 US 869 [1999]; [disbarment for pattern over several years of, inter alia, willful disobedience of discovery orders, and filing an unauthorized appeal and petition for rehearing after his discharge by client; disciplinary history and no remorse]).

Respondent's contention that he has been unfairly blamed for the misconduct committed by disbarred attorney Mac Truong, and that disbarment is too severe of a sanction for whatever misconduct he engaged in as a result of his inexperience and lack of legal sophistication minimizes his misconduct. Respondent testified to his active participation in litigation that stretched over seven years in multiple courts. While he is

correct that the Committee failed to produce a witness to testify that he conspired or colluded with Truong in the frivolous litigation, the record is replete with pleadings, motions and other filings which were drafted for the benefit of Truong and potentially disadvantaged his own client. Moreover, while the Referee determined that respondent was given some measure of authority to appear on behalf of the government of Vietnam, he{**117 AD3d at 103} found respondent failed to inform his client clearly and completely of various actions he was taking on its behalf. Additionally, respondent testified falsely and did not express remorse for his misconduct. Contrary to respondent's assertion that the Referee did not consider his evidence in mitigation, the Referee concluded that those factors did not "adequately mitigate" respondent's intentional wrongdoing.

Accordingly, the Committee's motion to confirm should be granted and respondent disbarred and his name stricken from the roll of attorneys and counselors-at-law in the State of New York.

[*5]

Mazzarelli, J.P., Friedman, Sweeny, Acosta and Andrias, JJ., concur.

Respondent disbarred, and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective the date hereof.

Footnotes

Footnote *:The Referee issued three reports due to the lengthy nature of the findings of misconduct.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

FORMAL OPINION 1998-1

TOPIC:Attorney employing disbarred or suspended attorney to work in law office; aiding unauthorized practice of law.

DIGEST:Attorney may not aid non-lawyer, including disbarred or suspended attorney, in unauthorized practice of law. It is improper for lawyer or law firm to employ disbarred or suspended attorney in any capacity related to practice of law. What acts constitute unauthorized practice is question of law for Appellate Division.

CODE:DR3-101(A); DR1-102(A)(4); EC3-6.

QUESTION

Under what circumstances, if any, may an attorney in good standing employ a disbarred or suspended attorney to work in a law office?

OPINION

An attorney in good standing is contemplating hiring a disbarred lawyer to work in her law office, and is concerned that his activities might result in her violation of the disciplinary rules. She asks what work, if any, it is permissible for him to perform in a law office.

This question poses issues of both ethics and law, ultimately involving the application of DR3-101(A): "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." See Matter of Mason, 208 A.D.2d 1, 621 N.Y.S.2d 582 (1st Dep't 1995) (attorney violated "DR3-101 [aiding a nonlawyer in the unauthorized practice of law]"). See also, DR1-102(A)(4): "A lawyer or law firm shall not: ... Engage in conduct that is prejudicial to the administration of justice...." And see, Annotation, "Disciplinary Action Against Attorney for Aiding or Assisting Another Person in Unauthorized Practice of Law," 41 A.L.R.4th 361 (1985).

Matter of Rosenbluth, 36 A.D.2d 383, 320 N.Y.S.2d 839 (1st Dep't 1971), observes that "[a] suspended or disbarred attorney holds approximately the same status as one who has never been admitted...." This holding is consonant with Judiciary Law §486, which makes it a misdemeanor for any disbarred or suspended attorney to do "any act forbidden by the provisions of this article to be done by any person not regularly admitted to practice law in the courts of record of this state...." Another part of the same article, Judiciary Law §478, makes it unlawful for anyone not duly licensed and admitted in New York to practice or appear in court other than pro se or to act in any manner that would give the impression he is an attorney.

Consistently with these statutes, in Matter of Gajewski, 217 A.D.2d 90, 634 N.Y.S.2d 704 (1st Dep't 1995), an attorney was disciplined for allowing a disbarred attorney to affix her name to affirmations included in court papers; and in Matter of Riely, 101 A.D.2d 351, 475 N.Y.S.2d 473 (2d Dep't 1984), an attorney was punished for "aiding a suspended attorney in the unauthorized practice of law." See also, Matter of Mainiere, 274 A.D. 17, 80 N.Y.S.2d 31 (1st Dep't 1948): "Any member of the bar who lends assistance to a disbarred attorney which enables the latter to keep up the appearance of continuing professional standing subjects himself to discipline." Indeed, in Matter of Takvorian, 240 A.D. 95, 670 N.Y.S.2d 211(2d Dep't 1998), the court held that even inadvertently aiding a non-lawyer in the practice of law can warrant professional discipline.

Judiciary Law §90(2) requires the Appellate Division to insert in every order of suspension or disbarment that the attorney must "thereafter ... desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee." Additionally, the order must specifically "forbid ... [t]he appearance as an attorney ... before any court, judge, justice, board, commission, or other public authority" and "[t]he giving to another of an opinion as to the law or its application, or of any advice in relation thereto."

By §§603.13(a), 691.10(a), 806.9(a) and 1022.26(a) of the Rules of the Appellate Division, all four Departments also explicitly require disbarred, suspended and resigned attorneys to comply fully with Judiciary Law §§478 and 486, as well as §§479 and 484. The Rules of the First (§603.13) and Second (§691.10) Departments contain additional language requiring such attorneys to "comply fully and completely with the letter and spirit" of the statutes "relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony."

In order to opine whether a lawyer would violate DR3-101 and DR1-102 by aiding a non-lawyer -- including a disbarred or suspended attorney -- in "the unauthorized practice of law," it is first necessary to determine whether the disbarred attorney's contemplated conduct would constitute "unauthorized practice." See, generally, Annotation, "Nature of Legal Services or Law-Related Services Which May be Performed for Others by Disbarred or Suspended Attorneys," 87 A.L.R.3d 279 (1978). At least two of our sister bar associations have already dealt with these issues at some length.

In Opinion #92-15, the Committee on Professional Ethics of the Bar Association of Nassau County considered the question of whether an attorney in good standing may employ a disbarred attorney, in the capacity of a paralegal, to handle document drafting, research and organization of files. The Nassau County Opinion noted that notwithstanding Judiciary Law §§478, 486 and 90(2) and DR3-101(A), EC3-6 contemplates that it is permissible for lawyers to "delegate[] tasks to clerks, secretaries and other lay persons" acting under the attorneys' supervision.

The Committee went on, however, to cite ABA Opinion 1434, unpublished Opinion 7 of the ABA Ethics Committee, and Opinion 666 of the New York County Lawyers' Association for the proposition that "the statutory and code provisions ... impliedly place greater restrictions upon the ability of a disbarred lawyer from earning a living by use of his or her training and talent and experience than are encountered by non-lawyers generally." According to the Nassau County Opinion, however, the determination of what paralegals may do is more properly a matter of law beyond the purview of an ethics committee.

N.Y. County 666 (1985) is not as deferential, holding that an attorney may not employ a disbarred lawyer as a law clerk whose functions would include the conduct of pre-trial depositions and the attendance at real estate closings on behalf of the inquiring attorney. The New York County Opinion adhered to the view that "it is clear that the employment by a lawyer or law firm of a disbarred lawyer, in any capacity related to the practice of law is improper.... The danger that an unsuspecting member of the public or even other lawyers may be misled as [to] the status of a disbarred lawyer who is employed by a law firm is too grave to ignore." The Committee added, however, that it expressed "no opinion as to whether a disbarred lawyer may be employed in some other capacity such as a process server, messenger, secretary, investigator, etc."

While concurring in the Nassau County Bar Association's general view that what constitutes the unauthorized practice of law is itself a question of law and thus beyond this Committee's jurisdiction, we also agree with the conclusion of the New York County Lawyers' Association that it is clearly impermissible for an attorney to employ a disbarred lawyer to conduct depositions or attend closings on the attorney's behalf. We would add, moreover, that the employment of a disbarred lawyer is fraught with ethical peril even with respect to activities that nonlawyers may properly engage in. Courts may reasonably scrutinize such activities and conclude that their performance by a disbarred lawyer poses greater risk to the public than their performance by a nonlawyer.

Indeed, in Matter of Parker 241 A.D.2d 208, 670 N.Y.S.2d 414(1st Dep't 1998), the Appellate Division recently held that an attorney had "certainly" violated DR3-101(A) by aiding a non-lawyer in the practice of law "by allowing ... a resigned attorney ... to prepare a contract of sale and appear on the seller's behalf in order to postpone a foreclosure sale." Noting that "[w]e are certainly loath to have attorneys improperly delegating their responsibilities as attorneys to non-lawyers and, depending on the circumstances of each case, severe

penalties are warranted," the First Department cited with approval the hearing panel's analysis of the relevant issues:

In sustaining Charge One, the Panel found that, by authorizing Butler, a resigned attorney, to negotiate, draft and finalize Mrs. Hunter's contract of sale and affidavit on Oct. 22, 1994, and to appear on her behalf and negotiate and execute the forbearance agreement on Oct. 24, 1994, respondent aided a non-lawyer in the unauthorized practice of law in violation of DR3-101(A). It noted the proliferation of the use of legal assistants in the last two decades and found generally that the appropriate use of legal assistants facilitates the delivery of legal services at reasonable cost in fulfillment of the obligation of lawyers to make legal counsel available to the public. Recognizing that there is no clear cut definition of the unauthorized "practice of law" and the nature and scope of activities appropriately permissible to legal assistants, the Panel found, nevertheless, that "it is clear that delegation of tasks to legal assistants cannot substitute for the personal availability of the lawyer's experience and judgment to the client." While surmising that respondent may have been influenced by Butler's experience as a former lawyer and not doubting that respondent believed he was acting in good faith and appropriately, the Panel did not think that a reasonable lawyer under the circumstances would have been justified in the level of delegation which occurred, even if the ultimate advice would not have been different, and found that respondent "crossed the line between appropriate reliance on an assistant and abdication to a non-lawyer of the lawyer's responsibility to the client."

Guidance as to other activities that have been determined to constitute "unauthorized practice" can be found in prior opinions of the Appellate Division. These would include the following **1**:
Matter of Emmanuel, 157 A.D.2d 134, 555 N.Y.S.2d 174 (2d Dep't 1990): Attorney disciplined who "permitted a nonlawyer to appear as her associate counsel."

Matter of Caracas, 171 A.D.2d 358, 576 N.Y.S.2d 293 (2d Dep't 1991): Attorney disciplined who "allowed an employee," not admitted anywhere as an attorney, "to consult with a client and to prepare legal papers for the client," who "was unaware ... that the employee was not admitted to the practice of law."

Matter of Mason, supra: Attorney "improperly facilitated the practice of law" by allowing non-lawyer to try Housing Court case and another non-lawyer to draft court complaints.

Matter of Mainiere, supra: Attorney disciplined for permitting use of name as counsel in litigation in which disbarred attorney was interested, thereby enabling disbarred attorney to maintain appearance of being engaged in legal practice.

Matter of Nadelweiss, 260 A.D. 89, 20 N.Y.S.2d 773 (1st Dep't 1940): Attorney disciplined for aiding his uncle, in whose law office he was employed, in permitting a disbarred attorney to hold himself out as the uncle and practice under the latter's name.

Matter of Lerner, 270 A.D. 602, 61 N.Y.S.2d 661 (1st Dep't 1946): Attorney disciplined for allowing disbarred attorney to use office, to hold himself out as entitled to practice law, to interview witnesses and, in certain particular cases, to practice law, and for allowing another disbarred attorney to use his office and his facsimile signature stamp.

Matter of Sutherland, 252 A.D. 620, 300 N.Y.S. 667 (1st Dep't 1937): Attorney disciplined who "permitted and requested" disbarred attorney "to perform the duties of a law clerk on numerous occasions."

Matter of Olitt, 145 A.D.2d 273, 538 N.Y.S.2d 537 (1st Dep't), cert. denied, 493 U.S. 937, 110 S. Ct. 333, 107 L. Ed. 2d 322 (1989): Suspended attorney may not serve as "house counsel" for company in which he has controlling interest, appear in court for brokerage firm while filing papers in his name, draft contracts for brokerage house, or appear in arbitration proceedings before stock exchange allegedly pro se on behalf of company in which he has interest.

Matter of Stahl, 200 A.D.2d 285, 613 N.Y.S.2d 437 (2d Dep't 1994): While employed in law office, disbarred attorney improperly made "determinations to initiate actions at law and settle collection claims and actions."

Matter of Abbott, 175 A.D.2d 396, 572 N.Y.S.2d 467 (3d Dep't 1991): Suspended attorney may not "maintain an office ... giving at least the appearance of a law office," with the building directory and office door designating

him as an attorney; may not use letterhead and envelopes designating him an attorney; may not continue to represent clients or attempt to do so; and may not continue to hold clients' funds in escrow.

Matter of Koffler, 236 A.D. 240, 258 N.Y.S. 611 (1st Dep't 1932): Disbarred attorney held in contempt for representing to trial court that he was an attorney entitled to practice, examining witnesses in case, and testifying as an expert in case while identifying himself as an attorney without revealing disbarment.

Matter of Markowitz, 28 A.D.2d 262, 284 N.Y.S.2d 463 (1st Dep't 1967): Suspended attorney may not represent "sellers, as clients, in two real estate or purchase and sale transactions."

Proopis v. Equitable Life Assur. Soc. of the U.S., 183 Misc. 378, 48 N.Y.S.2d 50 (Kings Sup. Ct. 1944): Disbarred attorney may not "associate himself with counsel in an examination before trial or any other legal proceeding in which he actively participates in planning and executing the progress of the litigation" by his "presence ... so that he may assist and take part in a legal proceeding" as an "actuarial expert" "by giving advice to counsel as the facts, upon which he is an expert, are developed." **2**

Matter of Israel, 230 A.D.2d 293, 655 N.Y.S.2d 538 (1st Dep't 1997): Suspended attorney disbarred for "continuing to represent clients and practice law."

Matter of Ratafia, 268 A.D. 987, 51 N.Y.S.2d 558 (2d Dep't 1944): Disbarred attorney may not serve as senior law clerk in State Labor Department, examining and preparing contested cases for hearings before referees, disposing of applications for adjournments, initiating investigations, and issuing subpoenas.

Matter of Katz, 35 A.D.2d 159, 315 N.Y.S.2d 97 (1st Dep't 1970): Suspended attorney may not be employed by a City Marshal, a public official whose work is closely allied with courts and judicial proceedings and whose duties include enforcing court orders.

Matter of Spar, 100 A.D.2d 71, 473 N.Y.S.2d 192 (1st Dep't 1984): Disbarred attorney guilty of misdemeanor and contempt for unauthorized practice of law.

Matter of Glick, 126 A.D.2d 5, 512 N.Y.S.2d 413 (2d Dep't 1987): Suspended attorney guilty of misdemeanor for unauthorized practice of law.

On the other hand, in Matter of Rosenbluth, supra, a divided court held it permissible for a disbarred attorney to run a calendar watching service. According to the First Department majority, citing various Opinions of the A.B.A. and this Association, among the other "law related activities" that suspended or disbarred attorneys "have been permitted to engage in" are: aiding an attorney in preparing a law book (in which event disbarred lawyer's name may be used); soliciting lawyers for process serving business to be turned over to a process serving firm; and acting as an investigator or adjuster for an insurance company.

The Court of Appeals has analyzed these issues in Matter of Rowe, 80 N.Y.2d 366, 590 N.Y.S.2d 179, 604 N.E.2d 728 (1992). In discussing the right of a suspended lawyer to publish "a law-related article" on the right to refuse treatment, the court confined "[t]he practice of law" to "the rendering of legal advice and opinions to particular clients" and held the article permissible as an exercise of the First Amendment because it "sought only to present the state of the law to any reader interested in the subject" and "neither rendered advice to a particular person nor was intended to respond to known needs and circumstances of a larger group." The Court of Appeals cited Matter of Rosenbluth, supra, approvingly for the proposition that the Appellate Division in Rowe had "improperly 'prohibit[ed] him from engaging in endeavors which he could have undertaken had he never been admitted to the Bar in the first place'...." The Court of Appeals also held that the suspended attorney could properly use "the letters J.D. following his name," as "[t]he letters identified him as one who had successfully completed a law school curriculum, not as a member of the Bar licensed to practice law."

Citing the Second Department's order in Matter of Wolfram, **3** Nass. Co. 92-15 suggested that an adjudication of the question of what a disbarred or suspended attorney may do in a specific instance might be obtained by motion in the Appellate Division. While Rosenbluth won relief in precisely that fashion to enable him to run a calendar watching service, it is noteworthy that, without elucidation, the Second Department denied Wolfram's motion to allow him "to be employed in a law office as a paralegal, law clerk or legal research assistant." It is worth repeating that N.Y. County 666 declined to opine on whether a disbarred lawyer might properly be

employed by a law firm as a process server, messenger, secretary or investigator; and we concur that only the Appellate Division, on proper application, can decide such an issue or, for that matter, whether there are circumstances in which a disbarred attorney might be able to act as a paralegal while "desist[ing] and refrain[ing] from the practice of law in any form."

CONCLUSION

It is clearly improper for a lawyer or law firm to employ a disbarred or suspended attorney in any capacity related to the practice of law. What acts constitute the unauthorized practice of law is a question of law for the Appellate Division.

Issued: December 21, 1998

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1 One lower-court opinion is also cited.

2 This case is cited approvingly in N.Y. County 666 for the proposition: "Certain it is that our law rigidly excludes those who have been disbarred from the slightest participation in the work of a lawyer or of his office, to which employment, as a layman, there could not be the slightest objection, were it not for the fact of disbarment."

3 The correct citation of the order is 11/27/89 N.Y.L.J. 6.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:	CHAPTER 7
Mac Truong and Maryse Mac-Truong,	Case No.: 03-40283 (NLW)
Debtor.	
Steven P. Kartzman,	Adv. No.: 03-2681
Plaintiff,	
v.	**MEMORANDUM DECISION**
Mac Truong and Maryse Mac-Truong, Sylvaine Decrouy and Hugh Mac-Truong,	
Defendants.	

Before: HON. NOVALYN L. WINFIELD

A P P E A R A N C E S :

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Steven P. Kartzman ("Trustee") as Chapter 7 Trustee for Mac Truong and Maryse Mac

Truong ("Debtors") has moved for an injunction to limit the Debtors' effort to repeatedly litigate matters decided adversely to them. As set forth below, with some modifications, the relief requested is granted.

This court has jurisdiction to hear and determine this matter pursuant to 28 U.S.C. § 1334 and § 157(a) and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984. This motion is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A). The following constitutes the findings of fact and conclusions of law required by Fed. R. Bankruptcy P. 7052.[1]

I.

The instant motion is not the Trustee's first request for a filing injunction. At the Trustee's request, on March 20, 2006 this court entered an order that enjoined the Debtors from filing "any pleadings, motions or cross motions" in bankruptcy case 03-40283 or adversary proceeding 03-2681 without first obtaining leave of the court. This filing injunction was necessitated by the unnecessarily litigious manner in which the Debtors defended the adversary proceeding and attempted to thwart the Trustee's ability to administer the bankruptcy estate.

The adversary proceeding litigation actually began in April, 2004 in the Superior Court of the State of New Jersey, Bergen County, Chancery Division ("State Court Action") on a complaint

[1] Typically, a request for injunctive relief requires commencement of an adversary proceeding under Bankruptcy Rule 7001(7). However, under Bankruptcy Rule 1001 the court may construe the Bankruptcy Rules so as "to secure the just, speedy, and inexpensive determination of every case or proceeding." Because of the excessive litigation history of this case, the concomitant expense to all parties from the protracted litigation that has marked this case, and the fact that the Debtors have had the opportunity to fully respond to this motion, the Court will not require the Trustee to file an adversary proceeding.

filed by Broadwhite Associates ("Broadwhite") to set aside the Debtors' transfer of their property at 327 Demott Avenue, Teaneck, New Jersey (the "Property"). The complaint was premised on the New Jersey fraudulent transfer statute. The complaint alleged that in 1999 the Debtors transferred the Property to Sylvaine Decrouy ("Decrouy"), the sister of Maryse Mac Truong, and that the deed was recorded on January 10, 2000. The complaint further alleged that in June 2001, Decrouy transferred the Property to the Debtors' son, Hugh MacTruong. The Debtors, Decrouy and Hugh MacTruong were named as defendants in Broadwhite's complaint.

Several months after the State Court Action was filed, the Debtors filed their Chapter 7 petition on September 15, 2003. Because of the bankruptcy filing the state court entered an order on September 23, 2003 which (i) dismissed the action as to the Debtors only, and (ii) provided a procedure for restoring the matter to the active trial calendar if relief from the automatic stay was obtained. Six days later, on September 29, 2003, the Debtors removed the State Court Action to the United States District Court for the District of New Jersey. By order of the Hon. William G. Bassler dated October 6, 2003 the litigation was referred to the bankruptcy court and was assigned adversary proceeding number 03-2681.

In January 2004 the Debtors moved before this court to dismiss the complaint. Among the grounds for dismissal the Debtors alleged (i) the matter had been dismissed by the state court and the Rooker-Feldman doctrine precluded continuation of the litigation in bankruptcy court, (ii) the fraudulent conveyance cause of action was barred by the applicable New Jersey statute of limitations, and (iii) the cause of action, if any, belonged to the bankruptcy estate. Opposition to the Debtors' motion was filed by Broadwhite and the Trustee. The court found that the cause of action belonged to the bankruptcy estate, and that the complaint stated a fraudulent conveyance cause of

action. It also determined that the Debtors' grounds for dismissing the complaint were without foundation and entered an order dated May 5, 2004 denying the Debtors' motion to dismiss the complaint.

While the Debtors' motion was pending, the Trustee moved to be added as the party plaintiff and to amend the complaint to allege bankruptcy jurisdictional provisions, to add Bankruptcy Code §§ 544 and 550 as grounds for recovery of the Property, and to clarify the relief sought against Decrouy. The Debtors cross-moved for denial of the Trustee's motion, asserting the following grounds for denial:

a) Not all parties were properly served in the State Court Action, and no summons from the Bankruptcy Court had been served;

b) The State Court Action was dismissed with regard to the Debtors;

c) The discharge order precluded the Trustee from proceeding;

d) The Debtors were not insolvent at the time of the transfers;

e) The New Jersey statute of limitations barred the Trustee from proceeding; and

f) The Trustee failed to serve the Debtors with the application to retain counsel to the Trustee.

On August 27, 2004 the court issued an opinion and order granting the relief sought by the Trustee and denying the Debtors' cross-motion. The court's decision is attached hereto as Exhibit 1.

The Debtors' subsequent motion for reconsideration was denied by Letter Opinion and Order dated November 18, 2004. The court's Letter Opinion is attached hereto as Exhibit 2. Rather than appeal the ruling, the Debtor's filed a new motion for dismissal that repeated their earlier assertions for dismissal. This was denied as well. Undeterred, the Debtors recycled their allegations into a

"Motion for an Order Dismissing Amended Complaint Under Rule 7012(b), and/or For Summary Judgment Under Rule 7056 and/or To Renew Under F.R.Cv.P. 60(b) Defense Motion to Vacate This Court's August 27, 2004 Order Authorizing Substitution of Trustee As Party Plaintiff and Amending Complaint." Because all of these matters had been previously addressed, the court denied this motion as well. Indeed, up to entry of the filing injunction in March 2006 the Debtors repeatedly filed motions which simply restated each of the arguments that the court found meritless. Additionally, in the main case, 03-40283, the Debtors opposed the Trustee's retention of counsel by merely repeating the very same arguments they advanced in adversary proceeding 03-2681. When their objections were overruled by the court, they simply retooled their objections into motions to remove the Trustee. A comprehensive recitation of each motion and its disposition would unreasonably burden this opinion. However, attached to this opinion as Exhibit 3 are the court dockets for the adversary proceeding and main case, which reveal the repetitive and voluminous nature of the filings by the Debtors.

It was also necessary to enter a filing injunction with regard to pleadings filed by Hugh MacTruong. In the adversary proceeding 03-2681, Hugh MacTruong repeatedly advanced arguments identical to those advanced by the Debtors; these were likewise found to be without merit. Additionally in February 2006 Hugh MacTruong filed an action in the Superior Court of the State of New Jersey, Bergen County, Law Division, against the Trustee and his counsel claiming abuse of process. Hugh MacTruong's complaint essentially asserted that the trustee lacked authority to seek recovery of the Property from him and that all of the Trustee's actions were undertaken with the intention to cause harm to him and the Debtors. After the Trustee removed the matter to this court pursuant to 28 U.S.C. § 1452 and Bankruptcy Rule 9027, the Trustee moved to dismiss the

complaint. On April 12, 2006, the Court dismissed the complaint with prejudice inasmuch as the Trustee's prosecution of adversary proceeding 03-2681 is well within the scope of his duties under Bankruptcy Code § 704. Thereafter, at the request of the Trustee, and because Hugh MacTruong's claims were devoid of legal or factual support, the Court entered an order on May 18, 2006 that prevented Hugh MacTruong from filing any papers in any state or federal forum without first obtaining leave of this Court.

Beginning in 2006, the Debtors focused much of their efforts on the appellate process - appealing various decisions rendered in the main bankruptcy case and in the adversary proceeding. As has been true with regard to the Debtors' various motions, the appeals have also been found to be either procedurally or substantively deficient. Since 2006, the Debtors have filed eleven appeals, nine of which have been either dismissed or determined adversely to the Debtors. The two most recent appeals have not yet been considered by the district court.

However, the litigation in the bankruptcy courts did not abate. In October 2006 the court granted the Trustee's motion for summary judgment, avoiding the transfer of the Property from the Debtors to Decrouy, and the transfer from Decrouy to Hugh Mac Truong.

Approximately one month later the Trustee was before the court again to request amendment of the summary judgment orders to include subsequent transferees. It appears that just before the Trustee filed his summary judgment motion Hugh MacTruong deeded the property to an entity known as MT-EARS LLP.[2] The existence of this entity was never revealed to the Trustee or the court either while the motion was pending or at the hearing. Further, several days after the hearing on the summary judgment motion, on October 16, 2006, MT-EARS LLP conveyed title to the

[2]According to formation documents the Trustee obtained from the State of New Jersey the general partners of MT-EARS LLP are Mac Truong and Maryse MacTruong.

Property to an entity known as To-Viet-Dao LLP. Mac Truong executed the deed as the general partner for MT-EARS LLP. The deed to To-Viet-Dao was recorded on October 27, 2006. The Trustee only learned of these transfers as a result of a title search. On December 7, 2006, based on the record before it, the court entered a supplemental order granting summary judgment avoiding the transfer to MT-EARS LLP and the subsequent transfer to To-Viet-Dao LLP. Additionally, in order to foreclose any further transfers of the Property, the court entered an order enjoining the Debtors, the adversary defendants, or any entity acting on their behalf from further transferring the Property.[3]

Because of the surreptitious transfer of the Property to To-Viet-Dao, and to ensure the Debtors' cooperation with the Trustee, the court entered an order on December 7, 2006 that required the Debtors to provide the Trustee, his representatives, and any prospective purchaser with access to the Property. Regrettably, the Debtors' cooperation was not forthcoming and on February 15, 2007, the Court entered an order that (i) required the Debtors to vacate the Property by April 1, 2007 and (ii) authorized the Trustee, with the assistance of the U.S. Marshal, if necessary, to take possession of the Property.

Presumably because (i) the Debtors were not finding the courts in the District of New Jersey to be hospitable and (ii) they sought to delay their removal from the Property, the Debtors caused To-Viet Dao LLP ("To-Viet-Dao")to file a Chapter 13 petition in the Bankruptcy Court for the Southern District of New York on March 15, 2007.[4] Despite this court's avoidance of the transfer

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[3]The December 7th order, as well as the earlier orders granting summary judgment were appealed by the Debtors. The summary judgment orders were affirmed by the Hon. Garrett Brown on July 5, 2007.

[4]The Chapter 13 Case was subsequently converted to a Chapter 11 case because a limited liability company is not eligible for Chapter 13 relief.

of the Property, the To-Viet-Dao petition scheduled the Property as an estate asset. Based on the To-Viet-Dao bankruptcy, the Debtors informed the Trustee that the automatic stay in the To-Viet-Dao bankruptcy prevented the Trustee from continuing his efforts to sell the Property. Further, in July 2007, on an affirmation of Maryse Mac Truong, To-Viet-Dao obtained entry of an Order to Show Cause for the Trustee to demonstrate why he should not be stayed from proceeding against the Property, and for a determination of the ownership of the Property. The Trustee filed extensive papers in opposition, including Judge Brown's opinion, which upheld the bankruptcy court's orders that avoided the transfers of the Property. After reviewing the Trustee's papers and relying in significant measure on Judge Brown's opinion, the Hon. James M. Peck found that To-Viet Dao had no interest in the Property. Judge Peck specifically noted that Judge Brown's affirmance of the bankruptcy court's orders setting aside the transfers of the Property occurred eight days before To-Viet Dao filed its request for an Order to Show Cause. *See* Ex. 4 *infra* at 8. Judge Peck was understandably concerned that the affirmation in support of the Order to Show Cause did not fully set out the proceedings that occurred in the New Jersey case. He stated:

> At the time that the affirmation in support of order to show cause was presented to this Court on Friday, July 13th, the affirmation, which speaks for itself, made no reference to the various court orders including the memorandum decision of Chief Judge Brown relating to this property. As a result, this Court was misled and based upon the history of this litigation, this Court believes intentionally misled by an affirmation that failed to include material information that was necessary in order to make the affirmation clear and understandable.
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> The relief requested is not obtainable as a matter of law. It is apparent based upon this record that at the time To-Viet-Dao, LLP commenced a Chapter 13 case in March of 2007, the transfer of 327 Demott Avenue, Teaneck, New Jersey to this debtor had already been avoided and set aside by final orders of the bankruptcy court for the District of New Jersey. Those orders, to the extent appealed to the District Court, have now been affirmed.

> There are serious questions of misconduct here; misconduct, misrepresentation, and bankruptcy abuse for which the individual responsible should be held accountable.

Ex. 4 at 11. At the conclusion of the hearing, the To-Viet Dao bankruptcy case was dismissed with prejudice and a one-year nationwide injunction against further filings was entered. *Id.* at 19.

Just one day after the hearing before Judge Peck, on July 19, 2007, Mac Truong filed an individual Chapter 13 petition in the Bankruptcy Court for the Southern District of New York.[5] The case was assigned to Judge Peck, who scheduled a Case Management Conference, at which Mac Truong was required to appear and give testimony as to whether his Chapter 13 case was filed in good faith. After consideration of Mac Truong's testimony, the papers filed by the Trustee and the United States Trustee, Judge Peck dismissed Mac Truong's Chapter 13 case with prejudice and with a one-year nationwide injunction prohibiting further filings by Mac Truong and Maryse MacTruong. *See* Ex. 5 *infra* at 34, 38.

Thereafter, at the Trustee's request, this court issued an order on July 30, 2007, which confirmed that the summary judgment orders as well as the order directing the removal of the Debtors from the Property remained in effect. This court deemed it necessary to issue such an order because of the Debtors' contentions that (i) Judge Peck's dismissal of Mac Truong's Chapter 13 case also resulted in a dismissal of the Chapter 7 case pending before this court and (ii) the purported dismissal of the Chapter 7 case nullified the order which directed the removal of the Debtors from the Property.

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[5]On the same date that Mac Truong filed his Chapter 13 case in New York, he filed in the New Jersey bankruptcy court a document captioned "Notice of Withdrawal of Joint Chapter 7 Petition," which contained language purporting to make the withdrawal effective immediately. By correspondence dated July 20, 2007 this court informed Mr. Truong that a motion on notice to all parties was required for dismissal of the Debtors' case and that his notice was deficient and would not be acted upon by the court.

Despite all of the Debtors' legal maneuvering the removal of the Debtors took place without incident on August 3, 2007. On the morning of August 3rd, the U.S. Marshals, accompanied by members of the Teaneck Police Department, entered and secured the Property after Mac Truong left the premises.

However, the Trustee's removal of the Debtors from the Property did not end the Debtors' litigation efforts. Rather, it appears to have triggered the Debtors' most recent spate of litigation in non-bankruptcy court venues. Just five days after the Debtors were removed from the Property, Mac Truong filed a complaint in the United States District Court for the Southern District of New York requesting a declaratory judgment that the Trustee lacked authority to administer the Property and requesting $5,000,000 in damages for robbery or conversion of assets. On August 20, 2007 the Debtor's complaint was dismissed by the Hon. Laura Taylor Swain based on Mac Truong's failure to obtain leave of court to file the complaint, as required by an order of the Hon. Shira Scheindlin dated June 27, 2006. *See, Ex.6 infra.*

Judge Scheindlin's order was a product of a suit commenced by Mac Truong against the Departmental Disciplinary Committee for the First Judicial Department ("Committee") and others for the alleged violation of his rights to due process and freedom, as well as defamation and libel. Judge Scheindlin not only dismissed the complaint but also enjoined Mac Truong from filing another complaint because of his "history of vexatious and frivolous litigations. *Ex. 6 at 17.*

Even this disciplinary matter has a history in this court before it reached Judge Scheindlin. Just prior to the Debtor's filing bankruptcy case 03-40283, Truong was suspended from the practice of law, as reflected in an order issued by the Appellate Division, First Department. *See, In Re Truong*, 2 A.D. 3d 27, 768, N.Y.S. 2d 450 (1st Dept. 2003)(per curiam). In November 2003 Truong

removed the disciplinary proceeding to the bankruptcy court purportedly pursuant to 28 U.S.C § 1452. However, on a motion for remand brought by counsel for the Committee this court remanded the disciplinary proceeding by order dated February 18, 2004. The court's decision was grounded in the fact that the plain language of 28 U.S.C. § 1452 excepts from removal a governmental unit's action to enforce its police or regulatory power. Ultimately, Truong was disbarred as set forth in a 2005 opinion and order from the Appellate Division, First Department. *See, In re Truong*, 22 A.D. 3d 62, 800 N.Y.S. 2d 12 (1st Dept. 2005).

Searching for another venue in which to press his arguments regarding the Trustee's administration of the bankruptcy case, on September 7, 2007 Mac Truong filed criminal complaints against the Trustee and Barbara Ostroth ("Ms. Ostroth") with the Teaneck Police Department. The complaints focused on the alleged misconduct by the Trustee and Ms. Ostroth with regard to the Property. It accused the Trustee and Ms. Ostroth of illegal possession of the Property, theft of personal property and unlawful breaking and entering. After conducting a probable cause hearing on September 19, 2007 the Teaneck Municipal Court dismissed the complaint for lack of probable cause.

Undeterred by the dismissal of the above described complaint, Mac Truong again filed a criminal complaint against the Trustee, this time adding Adam Brief ("Mr. Brief"), the Trustee's counsel, as a defendant. The primary claim in this complaint was that the Trustee and Mr. Brief offered "a false instrument for filing". The allegedly false instrument was the Trustee's motion to dismiss the September 2007 complaint, which stated that Mac Truong left the property of his own accord, and that no forcible entry onto the Property was required. On November 28, 2007 the

Teaneck Municipal Court once again dismissed all charges for lack of probable cause.[6]

Unbowed by his lack of success in Teaneck Municipal Court, Mac Truong filed criminal charges against the Trustee in the Municipal Court of Newark and the Municipal Court of Parsippany-Troy Hills. The complaint in the Newark court also named as a defendant Bruce Etterman ("Mr. Etterman"), special counsel for the Trustee. The Trustee moved to dismiss the charges in both courts, but as of the hearing date on the Trustee's motion to enlarge the filing injunction, the matters had not been heard.

The frivolous and vexatious nature of the criminal charges cannot be overstated. The charges against the Trustee and Mr. Etterman are emblematic of Mac Truong's cavalier approach to both the facts and the law. As part of his submission to the Third Circuit in connection with one of the Debtors' appeals, Mr. Etterman included as an exhibit the schedule of unsecured creditors that the Debtors filed with their bankruptcy petition. Mac Truong asserts that the schedule is a false statement because he and his wife have received their Chapter 7 discharge. By his analysis the elimination of personal liability for their debts thereby eliminates their creditors and there is no basis for the Trustee to continue his efforts to sell the Property. This analysis of the Bankruptcy Code is flawed and his motions and cross-motions to dismiss his case or remove the Trustee on this basis have been rejected by this court on various occasions.[7] Accordingly, Mac Truong's criminal charges

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[6]The Trustee advises that Mac Truong also filed a second complaint against Ms. Ostroth which was likewise dismissed by the Teaneck Municipal Court for lack of probable cause.

[7]Bankruptcy Code § 101(10)(A) defines a creditor as an entity that has a claim against the debtor that arose at or before the order for relief. By the Debtors own admission on their schedules they had creditors when they filed for bankruptcy. Additionally the court's claim register of filed proofs of claim reveal claims amounting to $785,096.25. Finally, Bankruptcy Code § 727(b) makes it plain that the discharge merely discharges a debtor from personal liability on claims that arose before the petition date it does not eliminate the existence of creditors, whose claims can be satisfied from funds in the bankruptcy estate if the Trustee finds

lack foundation.

It is important to understand that the litigation history just recited is only the most recent history. The litigation that precipitated both the present case and the Debtors' prior Chapter 11 case, 00-37093, actually began in the 1990's. In approximately 1997 Mac Truong filed suit against several defendants over the ownership of various investment accounts maintained at Charles Schwab & Co. The matter was fully litigated in the Supreme Court of the State of New York, County of New York and determined adversely to Mac Truong. Mac Truong's efforts to relitigate the matter in the United States District Court for the Southern District of New York were also unsuccessful. In 2003, Judge Sidney Stein enjoined the Debtors from further litigation against these defendants due to the Debtors harassing and vexatious litigation tactics. *See* Ex. 7, 8 *infra*. Debtors' efforts to further relitigate these matters in this bankruptcy court were also rejected by the court. *See* Ex. 9 *infra*.

Truong followed the same pattern with regard to his landlord/tenant dispute with Broadwhite. In 1995 Broadwhite commenced an action in the Supreme Court of the State of New York, County of New York, against both Debtors essentially for breach of lease and nonpayment of rent. Eventually a bench trial was held before the Justice Harold Tompkins. On January 6, 2000, Justice Tompkins rendered an oral decision granting judgment in favor of Broadwhite, and on January 20, 2000 an order was entered against the Debtors in the amount of $356,509.83.[8] Debtors appealed Justice Tompkins's decision and on May 7, 2002 the trial court's decision was affirmed by the Appellate Division. The Debtors thereupon moved for reargument, or alternatively, leave to appeal

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assets.

[8]The Judgment in this case caused Broadwhite to institute the suit for fraudulent transfer that was removed to this court by the Debtors.

to the Court of Appeals for the State of New York. That motion was denied in October 2002. However, even before the appeal of Justice Tompkins's decision could be decided by the Appellate Division, the Debtors sought to overturn the state court judgment by commencing suit against Justice Tompkins and others in the United States District Court for the Southern District of New York. Both that complaint and the amended complaint were dismissed for lack of subject matter jurisdiction. As part of the order dismissing the amended complaint, the Hon. Shira A. Scheindlin directed that the Debtors were enjoined from filing any new lawsuits related to the Broadwhite state court action without prior leave of court. *See* Ex. 10 *infra*. Regrettably, Judge Scheindlin's injunction only temporarily ended Mac Truong's litigation. As we know, once Broadwhite began its efforts to enforce its judgment the Debtors filed for bankruptcy in the District of New Jersey and all of the events described above began to unfold.

II.

The authority of a district court to restrict the activity of abusive litigants is well recognized. *Abdul-Akbar v. Watson*, 901 F.2d 329, 332-33 (3d Cir. 1990); *Tripati v. Beaman*, 878 F.2d 351, 352 (10th Cir. 1989); *Procup v. Strickland*, 792 F.2d 1069, 1073 (11th Cir. 1986)(en banc); *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984); *In re Green*, 669 F.2d 779, 785 (D.C. Cir. 1981)(the right of access to the courts is neither absolute nor unconditional).

This ability to restrict a litigant's access to the court is frequently grounded in the court's inherent authority to manage its jurisdiction and in the All Writs Act. That statute provides in pertinent part that "the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and

principles of law." 28 U.S.C. § 1651(a). The Third Circuit has succinctly summarized the reasoning for reliance on the All Writs Act as follows:

> It is well within the broad scope of the All Writs Act for a district court to issue an order restricting the filing of meritless cases by a litigant whose manifold complaints raise claims identical or similar to those that already have been adjudicated. The interests of repose, finality of judgements, protection of defendants from unwarranted harassment, and concern for maintaining order in the court's dockets have been deemed sufficient by a number of courts to warrant such prohibition against relitigation of claims. (citations omitted).

In re Oliver, 682 F.2d 443, 445 (3d Cir. 1982). Thus, in *Oliver* the court agreed with the First and District of Columbia Circuits that "a continuous patterns of groundless and vexatious litigation can, at some point, support an order against further filings of complaints without permission of the Court." *Id.* at 446.

Oliver was also quick to point out that (i) litigiousness alone is not an adequate basis for an injunction that restricts access to the court, and (ii) since such an order is an extreme remedy it should be used only in extreme circumstances. *Id.* At 445-46. Thus, the court must be careful to tailor the remedy so that access to the court is not unreasonably burdened.

In determining whether to issue a filing injunction the court must determine "if a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." *Safir v. U.S. Lines, Inc.*, 792 F. 2d 19, 24 (2d Cir. 1986). Plainly, the Debtors have demonstrated an inclination for repetitive and vexatious litigation and it is doubtful that they will desist. They have repeatedly attempted to relitigate in this bankruptcy court and in the District Court for the Southern District of New York matters that were commenced in the mid 1990's and fully litigated in the state courts of New York. When faced with rulings that displeased them, they peppered this court with repeated motions for reconsideration or renewed motions for summary

judgment, all without setting forth any new facts or law to support them. Likewise, the District Court for the District of New Jersey has been barraged with appeals. Some of the appeals have been dismissed due to procedural failures by the Debtors, and others have been decided adversely to the Debtors. Their litigiousness has cause Judges Scheindlin and Stein of the Southern District of New York, and this court to issue filing injunctions designed to prevent the flow of frivolous pleadings produced by the Debtors.

Moreover, the Debtors' filings have been characterized by misstatements of fact and mischaracterizations of law as amply demonstrated in the exhibits attached to this opinion. The Debtors' most recent filings with the Teaneck Municipal Court alleging that the Trustee and Ms. Ostroth were acting unlawfully in marketing and entering onto the Property demonstrate that in all likelihood the Debtors will continue to cast about for new venues to relitigate matters. They are also illustrative of the lack of foundation for the Debtors' court filings. As is readily evident in the record of this bankruptcy case, this court unwound the fraudulent transfers and revested the property in the bankruptcy estate. This ruling was affirmed, the Trustee was empowered by this court to take possession of the Property after the Debtors' refusal to cooperate with the Trustee, Ms. Ostroth was retained by court order to market the Property, and in selling the Property the Trustee was fulfilling his obligations under Bankruptcy Code § 704. The Debtors, as participants in each and every matter before this court have full knowledge of these facts. Moreover, the unfounded allegations in Teaneck Municipal Court are particularly egregious given the fact that Mac Truong is an attorney by training, though now disbarred.

All of this endless litigation has produced needless expense and delay to the bankruptcy estate. Additionally the allegations against the Trustee and his professionals have unnecessarily

forced them to incur the cost of personally defending themselves. Seeing no end in sight, the Trustee now asks the court to expand the filing injunction it entered on March 20, 2006. Under the terms of that filing injunction the Debtors were enjoined from any filings in the main bankruptcy case or adversary proceeding 03-2681 without first obtaining leave of court. The filing injunction required the Debtors to submit their proposed document together with a certification stating that (i) the document contained new claims, issues and/or facts that had never before been raised and disposed on the merits by any federal court, (ii) the Debtors believed the facts to be true, (iii) that they had no reason to believe that the claims were foreclosed by controlling law, and (iv) the Debtors acknowledge that they may be held in contempt of court if anything in the certification was willfully false. The order also provided that it will remain in effect until both the bankruptcy case and the adversary proceeding are closed. The court believes that this filing injunction comports with the requirements of Abdul-Akbar v. Watson, Matter of Packer Avenue Associates, 884 F.2d 745, 748 (3d Cir. 1989) and In re Oliver.

The Trustee now seeks to enlarge the filing injunction to enjoin the following:

> Mac Truong, Maryse Mac-Truong and any individual or entity acting on their behalf shall be and hereby are permanently enjoined from filing any pleadings, motion, cross-motion, complaint, application, or any other paper in any administrative agency, municipal, state or federal court nationwide related to the bankruptcy case bearing Case No. 03-40283; the adversary proceeding bearing Adversary Proceeding No. 03-2681; or any appeal from either matter, or which seeks the imposition of liability, whether administrative, civil or criminal, against Steven P. Kartzman, Esq., Adam G. Brief, Esq., the firm of Mellinger, Sanders & Kartzman, LLC, any present, past or future employee of Mellinger, Sanders & Kartzman, LLC, Richard B. Honig, Esq., Bruce S. Etterman, Esq., the firm of Hellring, Lindeman Goldstein & Siegel, LLP, and any present, past or future employee of Hellring, Lindeman Goldstein & Siegel, LLP, Barbara Ostroth, Coldwell Banker, and any present, past or future employee of Coldwell Banker, or any other professional retained by the Trustee

> in the main bankruptcy case or the adversary proceeding, without leave of this Court.

As with the current filing injunction, the proposed filing injunction requires that a written certification be submitted with the proposed document. The Trustee requests that the certification include statements that (i) the new claims, issues or facts are not barred by principles of claim or issue preclusion, (ii) the requesting party believes that the claims can withstand a motion to dismiss, and that the claims are not violative of a court order. Further, the Trustee asks that "[i]f papers are filed in the absence of leave from this court, the clerk of the respective court is authorized and directed to immediately and summarily strike the filing upon receipt of a copy of this Order." Finally, the Trustee proposes that this court retain jurisdiction to enforce the injunction and impose sanctions.

For the most part, the factual record supports the expanded filing injunction requested by the Trustee. In particular, the court finds it appropriate to require the Debtors, whether acting individually, jointly or by proxies, to seek leave of this court prior to commencing any new actions in any tribunal that arise out of or relate to bankruptcy case 03-40283 or 03-2681, that seek relief against the Trustee and his court authorized professionals who have assisted him in the administration of this case. Notably, this relief is not without precedent. The Second Circuit in *In re Anthony R. Martin-Trigona v. Lavien, et al. (In re Martin-Trigona),* 737 F.2d 1254, 1263 (2d Cir. 1984) found that to protect federal jurisdiction it was appropriate to "shield federal litigants, their counsel, court personnel, their families and professional associates from Martin-Trigona's vexatious litigation in all courts, state or federal." As in the *Martin-Trigona* case, these Debtors have engaged in meritless litigation and have forced the Trustee and his professionals to defend themselves in various fora. Accordingly, to protect the bankruptcy court's jurisdiction, it is essential to shelter

from harassment those individuals whose services are essential to the functioning of the bankruptcy system.

To the extent the Trustee proposes to require the Debtors and their proxies to obtain leave of this court before they file any further pleadings, motions of other papers in matters currently pending in other courts or agencies, this court believes that it lacks the authority to grant such relief. Such an injunction exceeds the gatekeeping function of a filing injunction and actually impinges on the authority and jurisdiction of other courts. However, to the extent that a motion is pending in any non-bankruptcy forum, the Debtors must submit the expanded filing injunction and this opinion with all of its exhibits, along with any motion or pleading it files.

Similarly, this court finds that the Debtors cannot be required to seek leave of this court prior to filing an appeal. Particularly if an appeal is taken from an order of this court, it is inappropriate for it to decide whether the appeal has sufficient merit. Likewise, it would be an unwarranted intrusion for this bankruptcy court to interfere with the appellate process of another court. However, the Debtors shall be required to submit with the appeal a copy of the expanded filing injunction and this opinion with all of its exhibits.

The court has taken the unusual step of appending exhibits to its opinion in order to evidence the Debtors' practice of relitigating matters. The requirement that the Debtors submit the expanded filing injunction and the opinion in connection with a motion for reconsideration or an appeal is intended to provide the other tribunals with the Debtors' litigation history, and thus a greater context for consideration of the specific issue before them.

CONCLUSION

The factual record before the court reveals that the Debtors have engaged in duplicative and vexatious litigation, and that they are likely to persist in such conduct. As a result, enlargement of the March 20, 2006 filing injunction is warranted.

Matter of Wachtler; Grievance Committee for the Tenth
Motion No: 1993-04807
Slip Opinion No: 2007 NYSlipOp 62640(U)
Decided on February 6, 2007
Appellate Division, Second Department, Motion Decision
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This motion is uncorrected and is not subject to publication in the Official Reports.

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

M50484

K/nl

A. GAIL PRUDENTI, P.J.

HOWARD MILLER

ROBERT W. SCHMIDT

STEPHEN G. CRANE

DAVID S. RITTER, JJ.

1993-04807

In the Matter of Sol Wachtler, admitted

as Solomon Wachtler, a disbarred attorney.

(Attorney Registration No. 1189752)

DECISION & ORDER ON MOTION FOR REINSTATEMENT

Motion by the respondent, Sol Wachtler, for an order reinstating him as an attorney and counselor-at-law or, in the alternative, referring this matter to the Committee on Character and Fitness for a hearing and report. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on April 4, 1956, under the name Solomon Wachtler. By opinion and order of this court dated August 2, 1993, the respondent was disbarred upon his submission of a resignation, dated July 20, 1993, which followed his plea of guilty in the United States District Court in Trenton, New Jersey, on March 31, 1993, to a violation of 18 USC § 875(c), a Federal felony. The respondent's first application for reinstatement was denied by decision and order on application of this court dated April 14, 2003.

Upon the papers filed in support of the motion and the papers filed in response thereto, it is

ORDERED that the motion is granted to the extent that the matter is referred to the Committee on Character and Fitness to investigate and report on the respondent's current fitness to be an attorney, including but not limited to an updated report from his treating physician, and the motion is otherwise held in abeyance in the interim.

PRUDENTI, P.J., MILLER, SCHMIDT, CRANE and RITTER, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court

Matter of Wachtler; Grievance Committee for the Tenth Judic
Motion No: 1993-04807
Slip Opinion No: 2007 NYSlipOp 79678(U)
Decided on October 1, 2007
Appellate Division, Second Department, Motion Decision
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This motion is uncorrected and is not subject to publication in the Official Reports.

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

M60621

K/nl

A. GAIL PRUDENTI, P.J.

HOWARD MILLER

ROBERT W. SCHMIDT

STEPHEN G. CRANE

DAVID S. RITTER, JJ.

1993-04807

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(Attorney Registration No. 1189752)

DECISION & ORDER ON MOTION FOR REINSTATEMENT

Motion by the respondent, Sol Wachtler, for an order reinstating him as an attorney and counselor-at-law or, in the alternative, referring this matter to the Committee on Character and Fitness for a hearing and report. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on April 4, 1956, under the name Solomon Wachtler. By opinion and order of this court dated August 2, 1993, the respondent was disbarred upon his submission of a resignation, dated July 20, 1993, which followed his plea of guilty in the United States District Court in Trenton, New Jersey, on March 31, 1993, to a violation of 18 USC § 875(c), a Federal felony. The respondent's first application for reinstatement was denied by decision and order on application of this court dated April 14, 2003. By decision and order on motion of this court dated February 6, 2007, the respondent's motion was granted to the extent that the matter was referred to the Committee on Character and Fitness to investigate and report on the respondent 's current fitness to be an attorney, including but not limited to an updated report from his treating physician, and the motion was otherwise held in abeyance in the interim.

Upon the report of the Committee on Character and Fitness and the exhibits annexed thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that, effective immediately, the respondent, Sol Wachtler, admitted as Solomon Wachtler, is reinstated as an attorney and counselor-at-law and the Clerk of the Court is directed to restore the name of Sol

Wachtler, admitted as Solomon Wachtler, to the roll of attorneys and counselors-at-law.

PRUDENTI, P.J., MILLER, SCHMIDT, CRANE and RITTER, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court

Artificial Turf

PRESENTED BY:
George A. Rusk, Esq.
Cheryl P. Vollweiler, Esq.

Health Effects of Crumb Rubber Surfaces

George A. Rusk
grusk@ene.com

New York State Bar Association
Environmental Section Annual Meeting
October 14-16, 2016
Cooperstown, New York

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Overview

- Crumb Rubber and Crumb Rubber Surfaces
- History
  - Concerns Raised About Health Effects
- Alleged Health Impacts / Injuries
- Agency Reponses / Research / Findings
- Conclusion

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What is Crumb Rubber?

- Crumb rubber is recycled rubber from scrap tires that is mechanically derived or reduced to smaller particles using cryogenics.
- The tires crumb rubber is made made from natural and synthetic rubber, carbon black, oil and chemical additives that give the tires their unique characteristics (e.g. adhesion rolling resistance, ozone resistance etc.)

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What Are Crumb Rubber Surfaces

- Surfaces made from or with crumb rubber include:
  - Artificial Turf / Astroturf
    - crumb rubber, sometimes called “astro-dirt”, is used for cushioning
  - Rubberized Asphalt
    - ground cover for playground equipment
    - surface material for running tracks

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History of Concerns and Responses

- There are concerns about potential chemical releases from artificial surfaces made using or containing crumb rubber and the safety / health, and environmental implications.
- The EPA and U.S. Consumer Product Safety Commission (CPSC): examined crumb rubber and determined there are not any elevated health risks.
  - The EPA acknowledges ***existing "studies do not comprehensively evaluate" all concerns***. It has not indicated that it is safe or unsafe.

2008
- **EPA:** Scoping-Level Field Monitoring Study of Synthetic Turf Field and Playgrounds, designed to measure possible emissions, not to assess potential health risks
- **CPSC:** stated "artificial turf fields were safe to play on", based on limited tests for lead on artificial grass on turf fields.
- **NYC Park Department:** stopped using crumb rubber in new fields.

2009
- **Los Angeles Unified School District:** stopped using recycled infill.

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History of Concerns and Response – Continued

Lawsuits

2008
- Chicago Protect Our Parks (POP) lawsuit alleging that safety warnings regarding actions to limit exposure to contaminants in the dust emitted from artificial turf fields, were disregarded by the Parks District and Latin School.
  - Another lawsuit alleges a violation of Chicago Lead Bearing Substances Ordinance.

2009
- California Attorney General's Office: sued manufacturers for violating state law by failing to provide "clear and reasonable warnings" about lead content in turf fibers and crumb rubber.

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History of Concerns and Response (Cont.)

Current Federal actions include the following:

2015

- October 23, 2015: The House Energy and Commerce Committee sent a letter to U.S. EPA Administrator, Gina McCarthy asking about the safety of recycled rubber tire "crumbs" used in synthetic turf fields in the US.

- The EPA has compiled an extensive list of literature pertaining to Tire Crumb and Synthetic Turf Fields from the past 12 years (EPA 2015).

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Concerns about Health Implications / Injuries

- Illness from Chemical Exposure (including Carcinogens / Lead)
  - Exposure Pathways
    - Ingestion
    - Inhalation of particulates or vapors/gases
    - Direct skin contact/trans-dermal absorption (e.g. latex)
    - Ocular exposure (via one's eyes)
- Exposure to Disease Vectors / Pathogens
  - Infection
  - Potential Exposures: mold, solid waste, bodily fluids, etc.
- Heat Exposure / Stress / Injury

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Artificial Turf Maintenance / Hygiene

Video Example of Turf Cleaning

Ways to address foreign materials / substances from the surrounding environment and from individuals on or near artificial turf fields:

- **Rake**
- **Sweep**
- **Brush**
- **Aerate**
- **Disinfect**

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Elements of a Conceptual Site Model

SOURCES

- Contaminants
- Concentrations
- Time
- Location

PATHWAYS

- Media
- Rates of Mitigation
- Time
- Loss and Gain Functions

RECEPTORS

- Types
- Sensitivities
- Concentrations
- Numbers

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Chemicals of Potential Concern

Compounds potentially found in crumb rubber:

- Organic Compounds
  - Semi-volatile organic compounds (SVOCs)
  - Benzene
  - Polycyclic aromatic hydrocarbons (PAHs)
- Heavy Metals
  - Lead
  - Zinc
  - Chromium
  - Arsenic
  - Cadmium
  - Mercury

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Factors Influencing Exposure

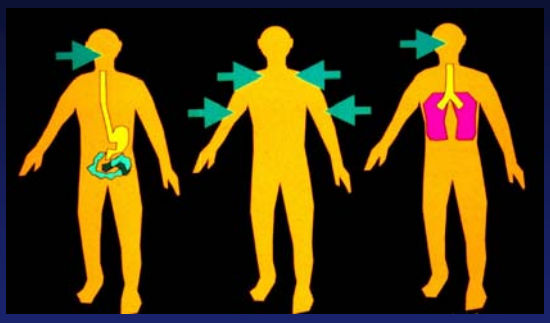
Exposure Pathway / Frequency / Duration

Crumb Rubber:

- Particle size
- Material composition
- Age / deterioration

Environmental:

- Indoor (Ventilation) / Outdoor
- Temperature
- Moisture
- pH



Ingestion Dermal Inhalation

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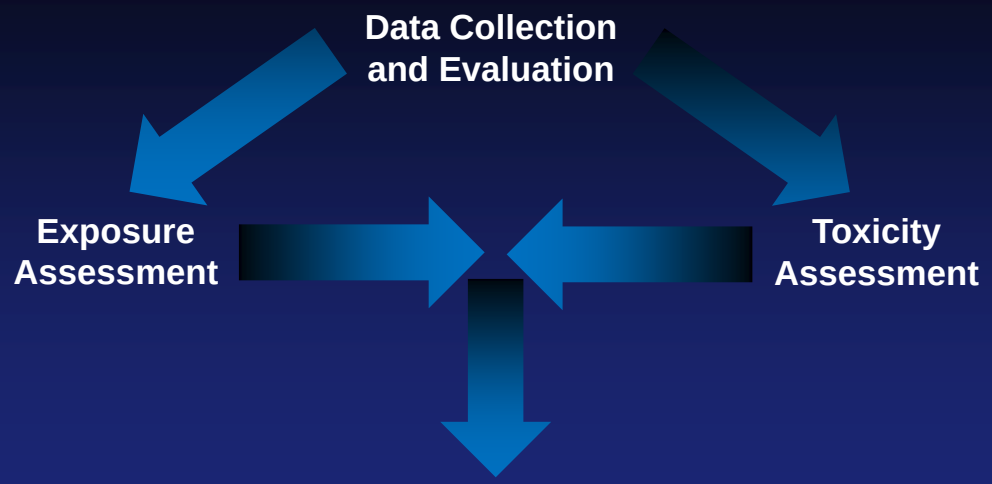
The Risk Assessment Process



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EPA: Federal Research Action Plan on Recycled Tire Crumb Used on Playing Fields and Playgrounds

- Draft Status Report expected by end of 2016
- Objectives:
  - Identify / Characterize chemical compounds crumb rubber in artificial turf fields and playgrounds.
  - Characterize exposure / how people are exposed to chemical compounds based on their activities.
  - Identify follow-up activities that could be conducted to provide additional insights about potential risks.
- Research Protocol Methods:
  - Conduct Data / Knowledge Gap Analysis
  - Stakeholder Engagement
    - Athletes, parents, and coaches
    - Government agencies
    - Industry representatives
  - Test Crumb Rubber / Characterize Chemicals, Potential Emissions, and Toxicity
  - Study / Characterize Exposure Under Use Conditions

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Agency Response, Action, and Findings

- NYC Department of Health and Mental Hygiene (NYDOHMH)
  - Commissioned a review of literature pertaining to chemical release, exposure, and health effects related to artificial turf fields.
    - The 11 studies reviewed had similar conclusions that exposure to chemicals in crumb rubber is likely to be small and unlikely to increase risk of health effects.
- NY Department of Environmental Conservation
  - Assessment of Potential Environmental Impacts from the use of Crumb Rubber as Infill Material in Synthetic Turf Fields (2008).
- California Office of Environmental Health
  - Hazard Assessment to determine if chemicals in crumb rubber can be released under various conditions and what, if any, exposures or health risks releases may pose those frequently using crumb rubber fields (underway).
  - Evaluation of Health Effects of Recycled Waste Tires in Playgrounds and Track Products (2007)
  - Study of chemicals and particulates in the air above the new generation of artificial turf playing fields and artificial turf as a risk factor for infection by MRSA (2009).
    - Results did not show increased risk of MRSA

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Agency Response, Action, and Findings

Connecticut

- Human Health Risk Assessment (2010):
  - Findings suggest, outdoor and indoor synthetic turf fields are not associated with elevated adverse health risks, but that it would be prudent to provide adequate ventilation for indoor fields to prevent a buildup of rubber-related volatile organic chemicals (VOC) and SVOC.
  - Results are consistent with findings from NYC, New York, the EPA, and Norwegian studies, which tested different kinds of fields and under a variety of weather conditions.

Washington

- Reviewing information about soccer players with cancer to see what expected levels of cancer would be based on Washington state cancer rates.

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Findings: Health Risks

- "Health risk assessment studies suggested that users of artificial turf fields, even professional athletes, were not exposed to elevated risks."
- "For the products and fields we tested, exposure to infill and artificial turf was generally considered de minimus, with the possible exception of lead for some fields and materials."
- Turin, Italy Study: examined routes of exposure and determined outdoor inhalation of dusts and gases was the main route of exposure for both carcinogenic and non-carcinogenic substances.
- Inhalation of atmospheric dusts and gases from vehicular traffic is associated with higher risk than playing soccer on an artificial field.
- "Artificial turf football fields present no more exposure risks than the rest of the city."

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Findings: Air and Water

- "Limited number of studies have shown that the concentrations of volatile and semi-volatile organic compounds in the air above artificial turf fields were typically not higher than the local background".
- Fewer volatile compounds were observed in the air over samples of older crumb rubber.
- Under natural weathering conditions there was a significant reduction of out-gassing organic compounds from the crumb rubber in the first 14 days; values remained consistent thereafter.
- A study of water quality found "the concentrations of heavy metals and organic contaminants in the field drainages were generally below respective regulatory limits."

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Findings: Lead

- A study of the impact of crumb rubber size on lead exposure risk confirms that "the exposure of lead ingestion and risk level increases as the particle size of crumb rubber gets smaller."
- A study was able to:
  - Determine that inhalable lead, if present, is "re-suspended from even minor physical activity on an artificial surface";
  - Conclude that "human exposure from lead-containing artificial turf fields is not just limited to dermal, but also to inhalation route of exposure"; and
  - Does not indicate "the magnitude of the potential contribution the inhalation route of exposure may contribute".
- Another study found that:
  - One crumb rubber sample had moderate lead content (53 p.p.m.) the others had relatively low concentrations of lead (3.12-5.76 p.p.m.), according to soil standards; and
  - 24.7-44.2% of lead in the samples was bio-accessible in synthetic gastric fluid.

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Findings: PAH

- A study indicates that uptake of PAH by football players active on artificial grounds with rubber crumb infill is minimal.
  - If there is exposure / uptake it is very limited and within the range of uptake of PAH from environmental sources and / or diet.
- Another study found that:
  - Crumb rubber often, especially on newer turf fields, contained PAHs at levels above health-based soil standards;
  - The levels of PAHs appear to decline as the field ages; and
  - PAHs contained in crumb rubber had zero or near-zero bio-accessibility in the synthetic digestive fluids.

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Synthetic Turf Council: Summary of Research

More than 50 independent and credible studies from groups such as the U.S. Consumer Product Safety Commission, and statewide governmental agencies such as the New York State Department of Environmental Conservation, New York State Department of Health and the California Environmental Protection Agency, have validated the safety of synthetic turf (see Position Statements to learn more).

Recent highlights include:

- In October 2010, the California Office of Environmental Assessment completed its multi-year study of air quality above crumb rubber infilled synthetic turf, and bacteria in the turf, and reported that there were no public health concerns.
- In July 2010, the Connecticut Department of Public Health announced that a new study of the risks to children and adults playing on synthetic turf fields containing crumb rubber infill shows “no elevated risks.”
- The California EPA released a report dated July 2009 which indicated there is a negligible human risk from inhaling the air above synthetic turf.
- Independent tests conducted by the New York State Department of Environmental Conservation and New York State Department of Health, released in May 2009, proved there were no significant health concerns at synthetic turf fields.
- In July 2008, a U.S. Consumer Product Safety Commission staff report approved the use of synthetic turf by children and people of all ages.

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Conclusions

- **Indoor artificial turf fields may present a greater potential risk of health impacts than outdoor artificial turf fields related to:**
  - **Bacteria survival / risk of infection (bacteria can exist but do not thrive; risk diminishes over time and if temperature of field is elevated)**
  - **Air quality, emissions, ventilation**
- **Crumb rubber made using color fast agents and older tires (often found on older fields) may be more likely to have increased levels of lead.**
- **Decreases in out-gassing organic / compounds and PAH may be affected as new crumb rubber is added to compensate for the loss of material.**
- **Only a comprehensive testing of a field can provide assurance that no health hazards exist.**

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Questions

THANK YOU

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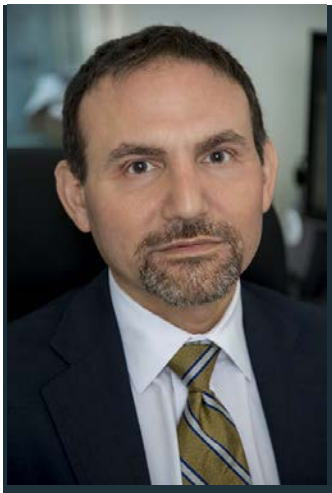
Biographies



Michael S. Bogin

PRINCIPAL

Michael Bogin's practice focuses on all aspects of environmental regulation and permitting, with particular emphasis on matters and facilities involving wastewater and stormwater discharges, tidal and freshwater wetlands and solid and hazardous waste management. Starting with the seminal New York City Landfills Superfund cases, Michael has litigated many CERCLA cost recovery and toxic tort claims involving a range of contaminants from dry cleaning solvents (PCE) in groundwater to mercury, lead and other heavy metal contamination. Michael has litigated Navigation Law and RCRA imminent and substantial endangerment claims against several utilities. He also tried the first New York State Stormwater Construction General Permit case under the Federal Water Pollution Control Act (more commonly called the Clean Water Act). He has appeared and argued cases in the New York state trial and appellate courts, United States District Courts and the Second Circuit Court of Appeals.

Michael has a long and successful practice of assisting clients to obtain voluntary cleanup agreements (VCAs) and brownfield cleanup agreements under the State Voluntary Cleanup Program (VCP) and later under the State Brownfield Cleanup Program (BCP). Among other projects, Michael obtained a VCA for the remediation of coal tar contamination at the former Keyspan (now National Grid) Manufactured Gas Plant (MGP) site located at Second Avenue and the Gowanus canal in Brooklyn; he also secured BCAs for the cleanup of petroleum contamination at Con Edison's former power plant properties on First Avenue in Manhattan.

Michael has lead the environmental teams on large residential and commercial waterfront developments in Williamsburg, Greenpoint, Long Island City, Maspeth, Coney Island and Staten Island. These projects have required Tidal Wetlands and Protection of Waters permits from the New York State Department of Environmental Conservation, individual Section 404 Permits or Nationwide Permit coverage from the U.S. Army Corps of Engineers, Section 401 Water Quality Certificates, Coastal Zone Management Act consistency determinations from the New York State Department of State and Coastal Erosion Hazard Area approvals.

Michael has a robust set of experiences working with government. He has represented many municipalities and school districts in complying with their environmental mandates under the Clean Water Act, federal and state freshwater wetland laws, the New York City watershed regulations and the State Environmental Quality Review Act. Following hurricanes Irene and Sandy, Michael has also developed significant expertise in coastal resiliency and FEMA flood zone mapping issues.

Hayley Carlock is Director of Environmental Advocacy at the non-profit environmental organization Scenic Hudson. Scenic Hudson works to create environmentally healthy communities, champion smart economic growth, open up riverfronts to the public and preserve the Hudson Valley's inspiring beauty and natural resources. Hayley represents the organization in a variety of administrative, litigation, regulatory and policy matters and has been with the organization since 2010.

Hayley's practice is focused on environmental, land use and energy matters including environmental and land use permitting, environmental impact review under the State Environmental Quality Review Act, facility siting and energy regulation before the State Public Service Commission, hazardous waste and clean water issues.

Prior to joining Scenic Hudson, Hayley worked in private practice for a small litigation firm in the Hudson Valley. She graduated with honors from Vermont Law School in 2009, and received her B.A. in Philosophy from the State University of New York at Binghamton.

Biographical Sketch
Resa A. Dimino

Ms. Resa A. Dimino is a consultant with more than 25 years of experience in recycling policy, programs, and business development. Prior to launching her consulting practice, Resa was the Director of Legislative Programs at WeRecycle!, an E-Stewards certified electronics recycler headquartered in Mt. Vernon, NY. Prior to joining WeRecycle!, Resa worked at the New York State Department of Environmental Conservation where she led the agency's efforts to create a new statewide solid waste management plan entitled *Beyond Waste: A Sustainable Materials Management Strategy for New York.* She was also part of the team that crafted the New York Electronic Equipment Recycling and Reuse Act, enacted in May 2010. In other work experience, Resa served as Director of Programs for the Bronx River Alliance, Environmental Analyst for Bronx Borough President Adolfo Carrion, Jr. and his predecessor, Fernando Ferrer, and Program Director at Bronx 2000.

Frederick Eisenbud

Campolo, Middleton & McCormick, LLP

4175 Veterans Memorial Highway, Suite 400
Ronkonkoma, New York 11779/ 631-493-9800/ feisenbud@cmmllp.com

2016 Listing: Martindale-Hubbell
(AV Rating)

Frederick Eisenbud is Of Counsel to the Firm and leads the Firm's Environmental & Land Use practice. Fred handles environmental and related legal disputes including cost recovery litigation (i.e., who pays for a cleanup?), State Environmental Quality Review Act (SEQRA) issues, defense of administrative charges (EPA/DEC/Health Departments), help obtaining administrative permits, challenges to administrative and municipal determinations via Article 78 petitions, environmental insurance claims, and environmental crimes defense. He also assists potential purchasers of contaminated Brownfield sites to resolve various environmental challenges that may arise in commercial real estate transactions, including Brownfields applications, environmental cleanup, preparing and recording environmental easements, and assessing whether one or more third parties may be liable for contribution claims to help pay for environmental investigations and remediations. Fred's practice also includes the representation of clients before Zoning Boards of Appeal, Planning Boards, and Town and Village Boards with regard to subdivisions, variances, and special use permits.

Prior to joining Campolo Middleton in May 2015, Fred was the principal of the Law Office of Frederick Eisenbud in Commack, New York, where he focused on providing responsive, smart and cost-effective solutions for the environmental law and litigation concerns of individuals, companies, municipalities, and community groups.

Fred has a depth of experience that provides him with a comprehensive understanding of environmental law. In 1968, he joined the Peace Corps as a volunteer in Liberia. For three years, he taught fifth and sixth grades in all subjects, and pre-schoolers to speak English, in Jondu, a remote village that lacked electricity, running water, and stores. Initially lacking resources, Fred wrote his own science, health, and history books, and recorded stories told by his students which he typed and used to teach reading. During a visit to the States after his second year as a Peace Corps volunteer, he gave slide shows and lectures at a number of elementary schools in exchange for schoolbooks which were no longer being used. Combined with other books he was able to get from U.S. A.I.D., by the time he left Liberia in December 1971, Fred had obtained a book for every student, in every grade, in every subject in the Jondu Elementary School.

From February to August 1972, Fred worked for Environmental Analysts, Inc., an environmental consulting firm in Garden City. Well before it became the norm to prepare environmental impact statements, Fred helped prepare assessments of local conditions where the firm's clients proposed to construct major projects.

After graduating with distinction from Hofstra Law School in 1975, and serving as Editor-in-Chief of the Hofstra Law Review, Fred was appointed by the United States Attorney General to the Honor Law Graduate Program at the Department of Justice in Washington, D.C. Fred was assigned to the Criminal Division, Appellate Section, of the Department. He wrote and argued appeals from cases arising out of Strike Forces in five different federal circuits, prepared memoranda in opposition to petitions for writs of certiorari to the United States Supreme Court, and assisted in the preparation of a number of briefs to the Supreme Court in cases that were accepted for review.

From 1978 until 1987, Fred was an Assistant District Attorney in Suffolk County. He served in the Appeals Bureau, Felony Trial Bureau, Grand Jury Bureau, and Special Investigation Unit before he started and became the Chief of the Environmental Crime Unit. From 1984 until 1987, Fred was the only Assistant District Attorney in the state who investigated and prosecuted environmental crimes on a full-time basis. During that time, he obtained the first two jail sentences arising out of environmental crimes in the State's history, and the Environmental Crime Unit had more convictions than the Attorney General's Office had in the rest of the state combined.

Fred left the D.A.'s office in 1987 for the Suffolk County Attorney's Office, where he became Deputy Chief of the Federal and Civil Litigation Bureau, and served as Counsel to the Suffolk County Board of Health during a time when it was endeavoring to strengthen its ground water protection regulations.

After three years, Fred left the County for private practice, focusing on environmental and municipal litigation, both with a Melville firm and with his own firm, the Law Office of Frederick Eisenbud.

Biography

Michael J. Lesser has been of Counsel to Sive, Paget & Riesel, P.C. since November 2010. Mr. Lesser is also retired from the New York State Department of Environmental Conservation after over twenty years of service, most recently in DEC's Albany headquarters where he was the Supervising Attorney for the state's Superfund and Brownfields Remediation Programs. He also previously served as the supervisor of DEC's Brownfield and Superfund Enforcement Unit for Central and Southern New York and as Program Counsel and legal advisor for DEC's Division of Law Enforcement and the state's Environmental Conservation Officers. Mr. Lesser lives and works in the Albany area, where he frequently writes and lectures on environmental topics and volunteers for the Environmental Law Section of the New York State Bar Association. In the latter regard, he is the recently retired 2015-16 Chair of the Environmental Law Section.

Maggie Macdonald

ASSOCIATE

Maggie focuses her practice on environmental litigation, environmental impact review, and land use issues. Since joining the firm in 2011 she has worked on brownfields and (E) designation submissions for sites in New York City, storm water pollution prevention, and landlord-tenant disputes. Maggie's work also involves enforcement under federal environmental laws including the Comprehensive Environmental Response, Compensation, and Liability Act, the Resource Conservation and Recovery Act, the National Historic Preservation Act, the Clean Air Act and the Clean Water Act. Maggie has extensive E-discovery experience and has attended conferences on cutting edge technologies in the field of E-Discovery and electronic document review. In addition, Maggie works with recycler and consumer clients dealing with electronics recycling and she is engaged with the developing area of electronics recycling law and regulations in New York State.

Prior to joining the firm, Maggie interned at the New York State Department of Environmental Conservation in Region 2, where she focused on tidal wetlands enforcement. Maggie also participated in the Natural Resources Defense Council clinical program, working on issues relating to water conservation. During law school she was an Executive Editor of the New York University Environmental Law Journal and Chair of the Environmental Law Society and Co-Chair of the Open Meditation and Yoga Society.

Jennifer Maglienti is an Associate Counsel at the NYS Department of Environmental Conservation and is chief of the Bureau of Minerals & Materials Management. Jennifer has represented DEC staff for over eighteen years and currently serves as program counsel to the Division of Mineral Resources. In that role, she advises staff on matters involving oil and gas well permitting, compulsory integration, underground gas storage and mined land reclamation. As bureau chief, Jennifer supervises staff who counsel the Department on solid waste, pesticides and radiation matters, as well as coordinating DEC rulemakings. Prior to her current position, Jennifer advised department staff on permitting and enforcement matters concerning major electric generating facilities and major gas transmission facilities. She holds a B.S. in biology from Syracuse University and a J.D. from Albany Law School.

LAW OFFICE OF
VERONICA REED

Veronica Reed
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Veronica Reed is a family law attorney focused on special education, children's civil rights, family law and injured-at-school cases. The Law Office of Veronica Reed opened in March 2016. Based in downtown Schenectady the practice provides a range of legal services and representation for upstate New York parents and children before the NYS Education Department, NYS Department of Health, and in Family, State and Federal Court.

Ms Reed's 20-year corporate career with General Electric, Kawasaki, Booz Allen Hamilton, and MTA New York City Transit predominately focused on commercial contracts and claims for national and international construction and manufacturing projects. After law school, Ms Reed was a defense litigator in New York City for Fisher & Fisher and Traub, Lieberman, Straus & Shrewsberry, LLP, practicing in the areas of education, professional liability, employment discrimination and practices, premises liability, and CGL and PL insurance coverage. She represented religious and educational institutions and commercial clients in all phases of litigation in New York City and downstate counties and in Eastern and Southern U.S. District Courts.

Ms Reed holds a BA from Seattle Pacific University and a JD from New York Law School. She was admitted to practice in New York in 2005. She is admitted to practice in multiple U.S. District Courts.

Veronica's profile is available on Avvo, Linkedin and the Law Office website at www.kidsworklife.com.

Nicholas A. Robinson is University Professor for the Environment at Pace University, and the Gilbert & Sarah Kerlin Professor of Environmental Law *Emeritus* at the Elisabeth Haub School of Law (White Plains, New York), whose environmental legal education programs he founded in 1978. Yale University School of Forestry & Environmental Studies appointed him an Professor Adjunct in 2008. He led the committee that launched the NYSBA Section on Environmental Law, and served as its second chairperson. From 1983-85, he served as Deputy Commissioner and General Counsel of the NYS Department of Environmental Conservation, and previously chaired the NYS Freshwater Wetlands Appeals Board. He served as the Legal Advisor to the International Union for the Conservation of Nature (IUCN), and was the initial chair of the IUCN Academy of Environmental Law, a learned society of more than 200 university law schools worldwide. He is a graduate of Brown University (1967) and Columbia University School of Law (1970).

Robert M. Rosenthal is Of Counsel at the Albany office of Greenberg Traurig, LLP, where he focuses his practice on environmental and energy law matters, including litigation and permitting. Prior to joining the firm in 2013, Bob served as the Assistant Counsel for Energy and Environment in the New York Governor's Office. In that position, Bob worked on a number of high profile matters, including the reform of the Long Island Power Authority (LIPA), which included amending LIPA's enabling statute and the agreement between LIPA and the service operator. Bob worked on the adoption of New York's new power plant siting law and regulations, and the revisions to the Public Service Law related to the authority of the Public Service Commission over electric utilities. He was also responsible for counseling the state's environmental and energy agencies on legal matters, and reviewing and approving the agencies' proposed regulations for publication in the State Register. Since coming to Greenberg Traurig, Bob has represented several clients in obtaining regulatory approvals for major gas pipelines, electric generation facilities (traditional power plants, solar and wind energy) and solid waste landfills, and has litigated several cases that have raised issued concerning compliance with state and federal environmental laws.

GEORGE A. RUSK, J.D.
Vice President

Director
Occupational/Environmental Forensics

PRACTICE AREAS

Environmental Law
International Policy, guidelines, and case law
Strategy Documents
Review/Analysis of Federal and State Environmental Legislation/Regulations

EDUCATION

J.D., State University of New York at Buffalo

B.A., Political Science, Yale University

CERTIFICATIONS

Federal Bar, Western New York District
New York State Bar

Mr. Rusk has over 20 years' experience and extensive background in environmental law. He coordinates project activity involving litigation, permitting, and regulatory agency proceedings and provides overall direction for E & E's forensic sciences practice, including the development of affidavits, opinion letters, demonstrative aids, and expert testimony. Mr. Rusk also tracks federal and state regulatory and legal developments; develops/implements corporate programs to ensure that E & E protocol and procedures are legally defensible, structured to minimize potential liability, and properly documented to support litigation; implements and oversees Phase I and II environmental audits and regulatory compliance assessments performed in support of corporate mergers and acquisitions of industrial and commercial properties; and provides in-house counsel regarding project confidentiality, conflict of interest, and evidentiary requirements to E & E employees involved in health and waste litigation, regulatory disputes, and project activities that raise liability concerns.

Litigation Support

Mr. Rusk provides liaison with client attorneys directing litigation, helps coordinate E & E resources, and provides QC to ensure that E & E work products prepared in anticipation of litigation are consistent with the overall litigation strategy and are prepared to withstand scrutiny in legal and administrative forums. He works directly with outside counsel and E & E toxicologists, medical doctors, engineers, and other technical staff to provide focused technical support on contested matters. He has directed projects that included the development of integrated geographic information system (GIS) databases, contaminant dispersion maps, and presentation aids for large-scale toxic tort cases; independent pretrial medical examinations to develop medical history summary databases; scientific research and literature reviews to identify relevant exposure standards and health effects of particular compounds; development of briefing packages for expert witnesses to ensure consistency of testimony and work products; fact-gathering efforts and research studies to identify alternate causation theories on cases involving alleged chemical exposures and contamination from historic PCB and waste disposal practices; engineering evaluations of remediation work to assess the reasonableness of disputed insurance claims; and development of allocation models to evaluate relative responsibilities of potentially

responsible parties involved in cost recovery litigation.

World Trade Center (WTC) Health Evaluations, New York City. On behalf of a confidential client, Mr. Rusk managed E & E's support to legal counsel to defend hundreds of claims alleging health injuries, environmental damage, and property damage associated with the WTC terrorist attacks of September 11, 2001. He helped to identify expert witnesses for pulmonary function impairment and potential exposure/health issues associated with asbestos, pulverized silica dust, metals, PCBs, and other volatile organics. He also supported the development of a comprehensive data archive of relevant reports, scientific studies, and medical records; the development of a GIS database to facilitate evaluation of specific analytical data and screening of plaintiff exposure claims regarding specific contaminants at different locations; the review and development of summary reports relating to relevant scientific and health studies; the review of toxicological profiles; the review of indoor air reports and development of benchmarks to assess low-level exposures in indoor air settings; and the preparation and review of case studies, medical summaries, deposition questions, affidavits, and opinion letters.

Mr. Rusk also helped to develop strategy reports highlighting technical issues raised by reports and studies generated by New York City hospitals, government agencies, universities, and other institutions; as well as to develop Daubert challenges of expert testimony and studies upon which such testimony was based. He had an active role in the development and presentation of seminar materials to educate defense attorneys on issues relating to the use of expert consultants and testifying witnesses; toxicological issues and exposure; dose temporal eligibility and confounder concerns relative to specific contaminants; pulmonary function test criteria and methodology; sampling and QC concerns; and other issues relating to large-scale toxic tort litigation.

Daniel A. Ruzow
Whiteman Osterman & Hanna LLP
One Commerce Plaza
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DANIEL A. RUZOW, ESQ., is a partner of Whiteman Osterman & Hanna LLP, Albany's largest law firm. He concentrates his practice in the environmental, zoning and planning review and permitting of major controversial and complex commercial, industrial and residential developments and in litigation defending such approvals. He also has represented number of environmental and community organizations, municipalities and State agencies in the review of such projects or in related litigation.

Mr. Ruzow was the lead counsel for the Coalition of Watershed Towns from 1991-1999, an intermunicipal organization of 34 towns and 5 counties comprising the majority of the Catskill and Delaware Watershed for the New York City water supply. He has been recognized by the Environmental Law Section of the New York State Bar Association for his work in successfully negotiating the landmark New York City Watershed Memorandum of Agreement signed in January 1997. In September 2007, he successfully negotiated a multi-party Agreement in Principle with the State and City of New York and seven national and regional environmental groups on behalf of Crossroads Ventures LLC, the developer of the proposed Belleayre Resort, in the Central Catskills.

Mr. Ruzow is recognized nationally for his knowledge and experience with New York's State Environmental Quality Review Act (SEQRA) and is co-author of the leading treatise on SEQRA, *Environmental Impact Review in New York*, published by Matthew Bender (1990-2014). He is a past-Chair of the Environmental Law Section of the New York State Bar Association. He also served as Chair of the New York State Bar Association Administrative Law Committee from 1992-95. Mr. Ruzow previously served as Assistant Commissioner and Counsel for Hearings of the New York State Department of Environmental Conservation and also served as SEQRA counsel to the Department. Mr. Ruzow was the principal draftsman of DEC's original Part 624 Hearing Regulations in 1981 and its Hearing Reform program. He also was an advisor to the Department on the 1993-4 amendments to the Part 624 regulations as well as the 1987 and 1996 amendments to the SEQRA regulations. He has authored several law review and journal articles on SEQRA and DEC Hearings and since 1981 has been a frequent lecturer on SEQRA, administrative hearings and local land use laws for the New York State Bar Association and the New York Planning Federation where he served as a Board member. He has also been recognized for his environmental experience in *The International Who's Who of Business Lawyers* (2005-14*)* and Britain's Chambers & Partners, *Chambers USA America's Leading Lawyers for Business* (2005-14) and *Best Lawyers in America* (2005-2014).

Mr. Ruzow obtained his undergraduate degree from Franklin and Marshall College and law degree from Fordham Law School.

Thomas A. Ulasewicz, Esq. is a private practitioner with the law firm of FitzGerald Morris Baker Firth PC in Glens Falls, NY. His practice areas include Environmental law, land use planning, and zoning, municipal law and real property law.

Mr. Ulasewicz is a member of the Executive Committee of the Environmental Law Section of the NYS Bar Association since 1988 and is a co-chair of that Section's Committee on the Adirondacks, Catskills, Forest Preserve and Natural Resource Management. He has been active in the past as a member of the Forest Preserve Advisory Council Legal Working Group concerning eradicating invasive species on forest preserve lands.

Mr. Ulasewicz served in numerous executive legal positions with the NYS Department of Environmental Conservation from 1979 to 1984 including Acting General Counsel. Mr. Ulasewicz was the Executive Director of the NYS Adirondack Park Agency from 1984 to 1988. He has been in private practice since that time.

Cheryl P. Vollweiler

Traub Lieberman New York

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Email cvollweiler@traublieberman.com

Curriculum Vitae

Cheryl Vollweiler's practice concentrates in all aspects of insurance coverage and defense. Her areas of expertise include complex insurance disputes, reinsurance, bad faith litigation, international arbitration, products liability, general liability, premises and hotel liability, cyber risk, technology and data security, property damage and first-party coverage and toxic torts (including pharmaceutical and herbal/homeopathic products, chemical exposure, latent injuries, environmental, lead and mold). She has acted as coverage counsel, defense counsel to U.S. and foreign insurers in U.S. litigation nationwide and international arbitrations, and has supervised defense counsel on a nationwide basis on diverse books of business. Ms. Vollweiler also has extensive experience drafting insurance policies.

Ms. Vollweiler, a frequent lecturer on insurance coverage-related issues, punitive damages, e-discovery, toxic torts, pharmaceutical products liability, cyber law and other topics, was admitted to the bar in 1989 and is admitted to practice before the U.S. District Courts for the Eastern and Southern Districts of New York. She received her Juris Doctor degree from Hofstra University School of Law in 1988. In 1985, Ms. Vollweiler received a Bachelor of Arts degree in Politics from Brandeis University. She is proud to join Traub Lieberman after many years as a partner at a prominent, large insurance defense firm.

Education

- J.D., Hofstra University School of Law, 1988
- B.A. in Politics, Brandeis University, 1985

Admissions

- New York
- United States District Court, Eastern District of NY
- United States District Court, Southern District of NY

Cheryl P. Vollweiler

Distinctions

- **Professional and Community Affiliations**
  - President of the Association of Professional Insurance Women (APIW), 2014-2016
  - **Super Lawyers®,** 2009-2011; 2013-2016
  - New York State Bar Association
  - American Bar Association
  - Financial Women's Association of New York
  - The International Alliance of Women
- **Noteworthy**
  - Ms. Vollweiler sits on several prominent industry association Boards including: the Association of Professional Insurance Women; the Financial Women's Association of New York , where she also co-chairs the Directorships & Corporate Governance Committee; and the New York State Bar Association, where she co-chairs the Toxic Tort Committee of the Environmental Law Section.

Cheryl P. Vollweiler

- Ms. Vollweiler also sits on the Board of Directors of Wingspan Arts, Inc., a not-for-profit corporation that brings arts education to diverse student groups in the New York Metropolitan Area in the performing, visual, media and literary arts.

Practice Areas

- Appellate Practice
- Bad Faith and Extra-Contractual
- Complex and Multi-District Litigation
- Cyber-Risk, Technology & Data Security
- Environmental Law
- General Liability
- Insurance Coverage/Reinsurance
- Premises Liability
- Product Liability
- Toxic Torts

News

- **Traub Lieberman New York and New Jersey Lawyers Named 2016 "Super Lawyers" and "Rising Stars"**

  September 21, 2016
- **Traub Lieberman Partner Cheryl P. Vollweiler to be a Panelist at the NYSBA Environmental Section Annual Meeting**
  September 12, 2016
- **Traub Lieberman Partner Cheryl P. Vollweiler to Speak on Panel at The Internet of Insurance Business Conference**
  August 18, 2016
- **Download Traub Lieberman Partner Cheryl P. Vollweiler's Co-Authored Sedona Conference WG1 "Commentary on Rule 34 and Rule 45 Possession, Custody or Control"**
  August 17, 2016
- **Traub Lieberman Partner Cheryl P. Vollweiler to Present at NYSBA's "Law School for Insurance Professionals" Program**
  July 14, 2016
- **Traub Lieberman Partner Cheryl P. Vollweiler to Speak at NYSBA Conference**
  May 16, 2016
- **TLSS Partners Richard K. Traub, Cheryl P. Vollweiler and Stuart A. Panensky to Present at the BII Bermuda Insurance Market Conference**
  September 17, 2015
- **TLSS New York and New Jersey Lawyers Named 2015 "Super Lawyers" and "Rising Stars"**
  September 15, 2015
- **TLSS Partner Cheryl Vollweiler Co-Authors the Sedona Conference WG1 "Commentary on Rule 34 and Rule 45 Possession, Custody, or Control"**
  May 13, 2015
- **TLSS Partner Cheryl P. Vollweiler to Co-Chair ACI's Networking and Leadership Forum**
  May 5, 2015
- **TLSS Partners Stu Panensky, Rich Traub and Cheryl Vollweiler to Present Cyber-Risk Seminar for Bermuda Insurance Institute**
  April 28th, 2015
- **TLSS Partner to Speak at the New York State Bar Association Annual Meeting**
  January 13, 2015
- **TLSS Partner Cheryl Vollweiler to Speak on Panel at the Annual Insurance Executive Conference on December 5th, 2014 in NYC**
  October 14, 2014
- **Traub Lieberman Straus & Shrewsberry LLP Proudly Supports the Association of Professional Insurance Women-APIW at their September 16th, 2014 Luncheon-NYC**
  September 17, 2014

- **Cheryl Vollweiler, Partner at TLSS New York, Elected President of the Association of Professional Insurance Women (APIW) for 2014-2016**
  July 23, 2014
- **The Target Data Security Breach: An Evolving Case Study**
  January 3, 2014
- **TLSS Attorneys Cheryl P. Vollweiler, Eric D. Suben, and Nicole Bishop Obtain Summary Judgment Enforcing Assault and Battery Endorsement**
  July 15, 2011
- **Traub Lieberman Is Pleased to Announce That Cheryl P. Vollweiler Has Joined the Firm As Partner**
  April 1, 2008

Contact

Speaker Biography: Lawrence H. Weintraub, Esq.

Since 2007, Lawrence H. Weintraub has worked in the Office of General Counsel of the New York State Department of Environmental Conservation (DEC). He is the program counsel for the Division of Environmental Permits which administers the State Environmental Quality Review Act and the Uniform Procedures Act. As such, he has counseled the agency with respect to many of its major permitting and environmental reviews since 2007. Larry also represents the DEC staff in proceedings before the Public Service Commission and the Federal Energy Regulatory Commission. Before joining the DEC, he worked in both government and private practice with a focus on environmental and municipal law. He graduated from the David C. Clark School of Law at the University of the District of Columbia (formerly Antioch School of Law), and received a BA degree in Geology from the State University of New York at Binghamton. He is admitted to the New York Bar and several Federal Courts. For his work on the environmental assessment form workbooks and EAF Mapper, he is a group recipient of the 2014 American Planning Association, New York Upstate Chapter's Best Practice Award.

Thomas S. West is the founder and managing partner of The West Firm, PLLC, and is recognized at the highest level for his distinguished accomplishments in the field of environmental law by a number of rating organizations. Tom has an extensive environmental practice, representing a broad variety of clients on environmental issues involving counseling, civil litigation, administrative practice, state and federal Superfund remediation, Brownfield redevelopment, and criminal defense. He also has extensive experience assisting clients in obtaining permits and licenses in all of the regulatory programs, including energy development, air quality, water quality, water quantity, solid waste, hazardous waste, and low-level radioactive waste. In the solid waste arena, Tom has represented clients regarding the permitting of new landfills and the expansion of existing landfills, including the Hyland landfill, the Ontario County landfill, the Chemung County landfill, the Hakes C&D landfill and the Clinton County landfill. He has negotiated Host Agreements with municipalities for most of these landfills and municipal agreements leading to the private operation of public solid waste management facilities. He regularly adjudicates cases before the Department and has defended permits, licenses and municipal agreements in state and federal court.

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Randall C. Young is the Co-Chair of the Ethics task force for the Environmental Law Section of the New York State Bar Association. He is also the Regional Attorney for Region Six of the New York State Department of Environmental Conservation and an author of books and articles regarding law and legal history.