RECUSAL AND DISQUALIFICATION MADE EASY

2023 Seminar Material

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New Jersey Institute for Continuing Legal Education

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RECUSAL AND DISQUALIFICATION MADE EASY

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Recusal and Disqualification

Carol Johnston
Supreme Court Advisory Committee on Professional Ethics

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Disqualification:

Removing lawyer of client's choice from the case



Conflicts of Interest:

Situations that affect the lawyer's objectivity and independence of judgment



Diverging interests of two clients, either in the same matter (where interests diverge)

or

In unrelated matters (where claims of loyalty -- and disloyalty -- emerge)

Interests of a former client,

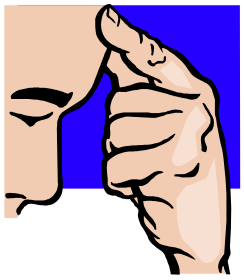
a third person,

or the lawyer him or her self

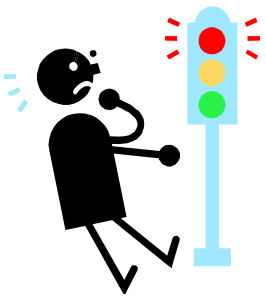
can impair the lawyer's requisite objectivity and independence of judgment



Some conflicts can be waived by the client,



Some conflicts are nonwaivable



Disqualification can occur:

- By the lawyer's own decision,

- On a motion by an adverse party,

- Or by the court's own action



RPC 1.7 Conflict of Interest: General Rule ("Concurrent Conflicts")

RPC 1.7. Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

RPC 1.7(a)(1):

representation of one client is "directly adverse" to another of the lawyer's clients

(concerns about the lawyer's loyalty)



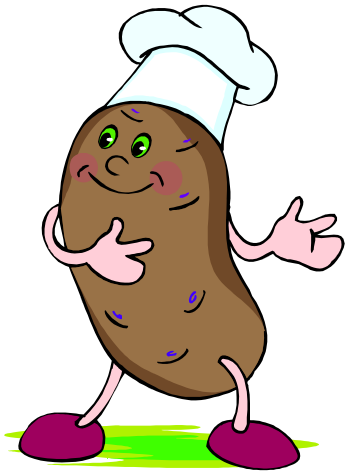
Village of Ridgewood v. Shell Oil,
289 N.J. Super. 181 (App. Div. 1996)



DeBolt v. Parker,
234 N.J. Super. 471, 479 (Law Div. 1988)



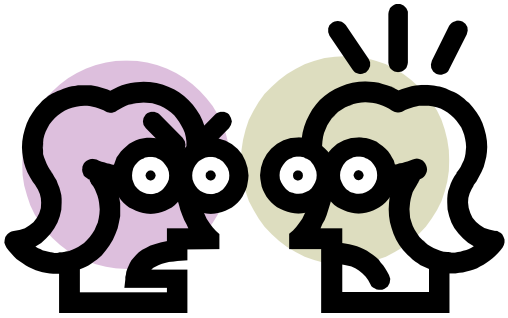
Santacroce v. Neff,
134 F.Supp.2d 366 (D.N.J. 2001)



RPC 1.7(a)(2):
representation “materially limited” by the lawyer’s responsibilities to another client, a third party, or by the lawyer’s own interests

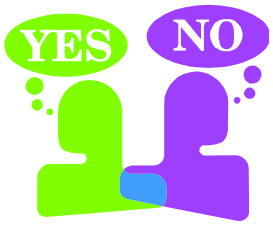
(concerns about objectivity and independence of judgment)

Conflicts arising due to interests of another client



Conflicts arising due to interests of another client

- Co-plaintiffs or co-defendants



Conflicts arising due to interests of another client

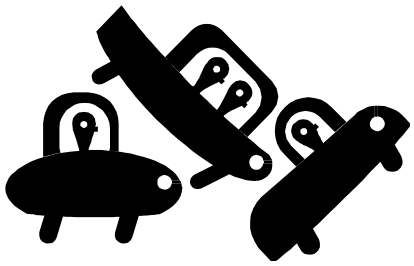
- Co-plaintiffs or co-defendants

- Employee and employer



Conflicts arising due to interests of another client

- Co-plaintiffs or co-defendants
- Employee and employer
- Driver and passenger



Conflicts arising due to interests of another client

- Co-plaintiffs or co-defendants
- Employee and employer
- Driver and passenger
- Criminal matters



Conflicts arising due to interests of another client

- Co-plaintiffs or co-defendants
- Employee and employer
- Driver and passenger
- Criminal matters
- Insurance defense



Conflicts arising due to interests of another client

- Co-plaintiffs or co-defendants
- Employee and employer
- Driver and passenger
- Criminal matters
- Insurance defense
- Buyer and seller



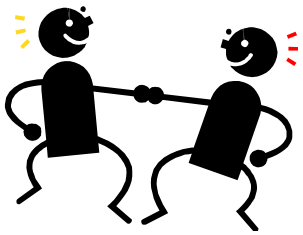
Conflicts arising due to interests of another client in transactional matters

- Drafting will for one client that will benefit another of the lawyer's clients

- Representing a client in a matter while concurrently representing the adverse party in an unrelated matter



Conflicts arising due to interests of former clients



Conflicts arising due to the lawyer's own interests

- Personal business interest
- financial interest
- family connection
- dislike of or romantic interest in client
- potential liability



RPC 1.7

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

1. Lawyer must reasonably believe he or she can provide competent and diligent representation

2. Client must provide “informed consent” to the representation, confirmed in writing

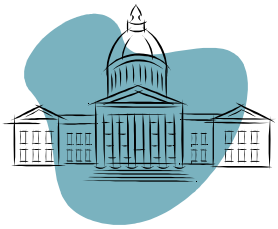
3. Some representations are flatly prohibited (nonwaivable conflicts)

Prohibited representations:



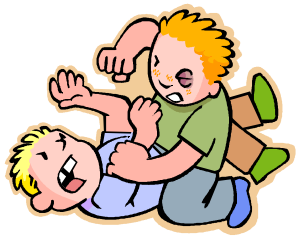
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Prohibited representations:
- Public entity



Prohibited representations:

- Public entity
- Assertion of a claim by one client against another client in the same litigation



Prohibited representations:

- Public entity
- Assertion of a claim by one client against another client in the same litigation
- Buyer and seller in commercial real estate transaction



Prohibited representations:

- Public entity
- Assertion of a claim by one client against another client in the same litigation
- Buyer and seller in commercial real estate transaction
- Side-switching



Prohibited representations:

- Public entity
- Assertion of a claim by one client against another client in the same litigation
- Buyer and seller in commercial real estate transaction
- Side-switching
- Representing both sides in negotiation



Prohibited representations:

- Public entity
- Assertion of a claim by one client against another client in the same litigation
- Buyer and seller in commercial real estate transaction
- Side-switching
- Representing both sides in negotiation
- Positions of multiple clients are incompatible



Prohibited representations:

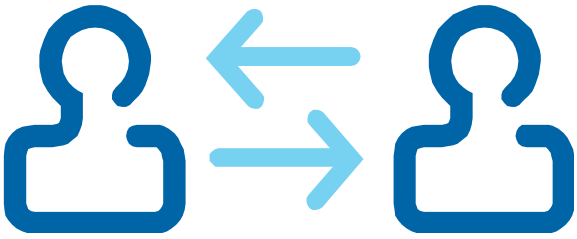
- Public entity
- Assertion of a claim by one client against another client in the same litigation
- Buyer and seller in commercial real estate transaction
- Side-switching
- Representing both sides in negotiation
- Positions of multiple clients are incompatible
- Real estate broker/title insurance agent and lawyer for a party



Imputing conflicts:

Private sector

Public sector



RPC 1.9 Duties to Former Clients

(a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

City of Atlantic City v. Trupos, 201 N.J. 447, 467 (2010):

Matters are "substantially related" when:

"(1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are relevant and material to the subsequent representation."



RPC 1.18. Prospective Client

(a) A lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.

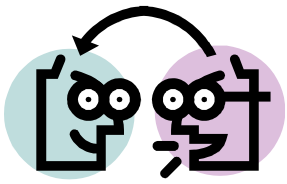
(b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful
to that person in the matter, except as provided in paragraph (c).

(c) If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have
given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.

(d) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client," and if no client-lawyer relationship is formed, is a "former prospective client."

O Builders & Associates v. Yuna Corp. of N.J.,
206 N.J. 109, 125-26 (2011):

"[A] lawyer who has been consulted by a former prospective client will be disqualified if and only if two factors exist in combination: the matter of the consultation and the matter then adverse must be 'the same or substantially related,' and the information the lawyer received during the consultation must be 'significantly harmful' to the former prospective client in the now adverse matter."

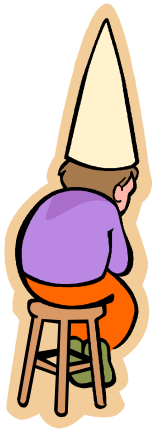


O Builders & Associates v. Yuna Corp. of N.J.,
206 N.J. 109, 125-26 (2011):

"Significantly harmful" information is information that is not "simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought, a determination that is exquisitely fact-sensitive and –specific."

Repercussions of representing clients in the face of a conflict:

- Attorney discipline
- Disgorgement of fee
- Removal from case
- Mistrial



Disqualification motions



Judicial Recusal Motions:
Sometimes a Tricky Decision
- Why to do?
- Why not to do?





RULE 1:12. Disqualification And Disability Of Judges

1:12-1. Cause for Disqualification; On the Court's Motion

The judge of any court shall be disqualified on the court's own motion and shall not sit in any matter, if the judge

- **(a) is by blood or marriage the second cousin of or is more closely related to any party to the action;**
- **(b) is by blood or marriage the first cousin of or is more closely related to any attorney in the action. This proscription shall extend to the partners, employers, employees or office associates of any such attorney except where the Chief Justice for good cause otherwise permits;**



RULE 1:12. Disqualification And Disability Of Judges

The judge of any court shall be disqualified on the court's own motion and shall not sit in any matter, if the judge

- **(c) has been attorney of record or counsel in the action; or**
- **(d) has given an opinion upon a matter in question in the action; or**
- **(e) is interested in the event of the action; or**
- **(f) has discussed or negotiated his or her post-retirement employment with any party, attorney or law firm involved in the matter; or**
- **(g) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.**

RULE 1:12. Disqualification And Disability Of Judges

- **Paragraphs (c), (d) and (e) shall not prevent a judge from sitting because of having given an opinion in another action in which the same matter in controversy came in question or given an opinion on any question in controversy in the pending action in the course of previous proceedings therein, or because the board of chosen freeholders of a county or the municipality in which the judge resides or is liable to be taxed are or may be parties to the record or otherwise interested.**

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(A) Judges shall hear and decide all assigned matters unless disqualification is required by this rule or other law.

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

1. *Personal bias, prejudice or knowledge*. Judges shall disqualify themselves if they have a personal bias or prejudice toward a party or a party's lawyer or have personal knowledge of disputed evidentiary facts involved in the proceeding.

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

2. *Financial Interest.* Judges shall disqualify themselves if they individually or as a fiduciary have a financial interest in an enterprise related to the litigation. Subject to paragraphs (i), (ii), (iii), and (iv) hereof, a financial interest means ownership of a legal or equitable interest, however small, or a relationship as director or advisor or other participation in the affairs of a party.



Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

2. *Financial Interest.* Judges shall disqualify themselves if they individually or as a fiduciary have a financial interest in an enterprise related to the litigation. Subject to paragraphs (i), (ii), (iii), and (iv) hereof, a financial interest means ownership of a legal or equitable interest, however small, or a relationship as director or advisor or other participation in the affairs of a party.

(a) Financial interest does not include:

(i) Ownership of an interest in securities held by a mutual fund or common investment fund, or ownership of securities held in managed funds, provided, in respect of managed funds, that no investment discretion has been retained by the judge or the judge's spouse, civil union partner, or domestic partner.

(ii) Ownership in securities held by an educational, religious, charitable, fraternal or civic organization in which the judge holds an office;

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

2. *Financial Interest.* Judges shall disqualify themselves if they individually or as a fiduciary have a financial interest in an enterprise related to the litigation. Subject to paragraphs (i), (ii), (iii), and (iv) hereof, a financial interest means ownership of a legal or equitable interest, however small, or a relationship as director or advisor or other participation in the affairs of a party.

(a) Financial interest does not include:

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest unless there is a reasonable possibility that the value of the interest will be affected by the judge's decision;

(iv) Ownership of an interest in government securities unless there is a reasonable possibility that the value of the interest will be affected by the judge's decision.

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

3. *Personal Relationships.* Judges shall disqualify themselves if:

(a) The judge or the judge's spouse, civil union partner, or domestic partner, or a first cousin or more closely related relative to either of them, or the spouse, civil union partner, or domestic partner of such relative, or to the judge's knowledge, a second cousin or related relative to either of them, as defined below, or the spouse, civil union partner, or domestic partner of such relative is a party to the proceeding or is likely to be called as a witness in the proceeding.

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

3. *Personal Relationships.* Judges shall disqualify themselves if:

(b) The judge or the judge's spouse, civil union partner, or domestic partner, or a first cousin or more closely related relative to either of them, or the spouse, civil union partner, or domestic partner of such relative is a lawyer for a party.

(c) The judge or the judge's spouse, civil union partner, or domestic partner, or any member of the judge's family residing in the judge's household has an interest in the litigation, including, among other things, a financial interest, as defined by Rule 3.17(B)(2), in an enterprise related to the litigation.

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

3. *Personal Relationships.* Judges shall disqualify themselves if:

(d) The judge has a social relationship with a party or a lawyer for a party of a nature that would give rise to partiality or the appearance of partiality.

4. *Prior Professional Relationships.* Judges shall disqualify themselves based on their prior professional relationships as follows:

(a) In proceedings in which the judge served as a lawyer in the matter in controversy or in which the judge has been a witness or may be called as a witness.

Code of Judicial Conduct, Canon 3

Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

4. *Prior Professional Relationships.* Judges shall disqualify themselves based on their prior professional relationships as follows:

(b) In proceedings in which a party was a former private client for whose matter the judge had primary responsibility, disqualification is necessary for a period of seven years following the conclusion of that representation. However, disqualification for a period of time in excess of seven years from the conclusion of the representation may be required in certain circumstances. In making that determination, a judge should consider . . . (1) the scope of the representation . . .; (2) the duration of the representation; (3) the nature of the representation; (4) . . . Whether the principals of the [corporate] entity are the same as existed during the representation.

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

4. *Prior Professional Relationships.* Judges shall disqualify themselves based on their prior professional relationships as follows:

For purposes of this rule, an insurance company that retained the judge to defend its insureds in tort actions shall not be considered a former client of the judge.

Code of Judicial Conduct, Canon 3

Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

4. *Prior Professional Relationships.* Judges shall disqualify themselves based on their prior professional relationships as follows:

(c) In proceedings in which a party is a governmental entity that previously employed the judge:

(i) for a period of two years following judicial appointment if the judge was employed as a state government attorney, county prosecutor or assistant county prosecutor, provided, however, that prior employment as a state government attorney with broad supervisory authority shall not disqualify judges who had no actual involvement in the matter while in government service;

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

4. *Prior Professional Relationships.* Judges shall disqualify themselves based on their prior professional relationships as follows:

(c) In proceedings in which a party is a governmental entity that previously employed the judge:

(ii) for a period of five years following judicial appointment if the judge represented a local government entity.

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

4. *Prior Professional Relationships.* Judges shall disqualify themselves based on their prior professional relationships as follows:

(d) In proceedings in which the judge's former law firm is involved, for a period of at least seven years following termination of the relationship or until all financial obligations of the law firm to the judge are satisfied, whichever is longer;

(e) In proceedings in which the judge's former law clerk is appearing or has signed papers, for a period of six months following termination of the clerkship.

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

5. *Post-Retirement Employment.* Judges shall disqualify themselves if the judge has initiated contact about or discussed or negotiated his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially, regardless of whether or not the discussions or negotiations lead to employment of the judge by the party, attorney or law firm;

6. Irrespective of the time periods specified in this rule, judges shall disqualify themselves whenever the nature of the relationship to a party or a lawyer, because of a continuing social relationship or otherwise, would give rise to partiality or the appearance of partiality.

Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(C) A disqualification required by this rule is not subject to the parties' waiver. The judge shall, however, disclose to the parties any circumstances not deemed by the judge to require disqualification, but which might be regarded by the parties as affecting the judge's impartiality.

(D) A judge shall address disqualification or issues of recusal and disqualification promptly upon recognition of grounds which would give rise to partiality or the appearance of partiality.



Code of Judicial Conduct, Canon 3
Rule 3.17 Disqualification

(E) A judge shall not be automatically disqualified upon learning that a complaint has been filed against the judge with the Advisory Committee on Judicial Conduct, litigation naming the judge as a party, or any other complaint about the judge by a party. If, however, the judge concludes that there is a reasonable basis to question the court's impartiality, the judge may recuse himself or herself. A judge shall promptly disclose to the parties to the pending litigation that a complaint has been filed or made.

Judicial Disciplinary Matters

- In re Sciuto: 2003 N.J. LEXIS 1132
- In re Newman: 189 N.J. 477 (2006)



Judicial Disciplinary Matters

- In re Saltman: 185 N.J. 598 (2005)
- In re Miniman: 195 N.J. 276 (2008)
- In re Council: 202 N.J. 37 (2010)



Relevant Supreme Court Decisions

- **DeNike v. Cupo: 196 N.J. 502 (2008)**
- **State v McCabe: 210 N.J. 34 (2010)**



About the Panelists…

Carol Johnston, New Jersey Supreme Court Clerk's Office, joined the Administrative Office of the Courts in Trenton, New Jersey, in 2006 and serves as Secretary to the Advisory Committee on Professional Ethics, the Committee on Attorney Advertising and the Committee on the Unauthorized Practice of Law. She also answers the attorney ethics research assistance hotline.

Ms. Johnston formerly served as a Deputy Attorney General with the New Jersey Attorney General's Office, Division of Law, for 15 years. She was Ethics Officer for the Department of Law and Public Safety and a member of the Prosecutor's Code of Ethics Committee.

Ms. Johnston has lectured for ICLE, the American Law Institute-American Bar Association (ALI-ABA), the New Jersey State Bar Association, the New Jersey Judiciary, the National Association of Retail Collection Attorneys, and several county bar associations and American Inns of Court. In 2017 she was the recipient of ICLE's Distinguished Service Award for Excellence in Continuing Legal Education.

Ms. Johnston is a graduate of Hamilton College and New York Law School. She clerked for Chief Justice Robert N. Wilentz.

Rubin M. Sinins, Certified as a Civil and Criminal Trial Attorney by the Supreme Court of New Jersey, is a Shareholder in Javerbaum, Wurgaft, Hicks, Kahn, Wikstrom & Sinins, P.C. in Springfield, New Jersey. His litigation experience is wide-ranging, from the defense of complex investigations, civil complaints, and criminal charges to the prosecution of diverse civil claims, including fraud, breach of contract, wrongful termination, whistleblower actions, invasion of privacy, defamation, wrongful death, personal injury, and sexual abuse. He has tried numerous cases in criminal, civil and equity courts, and represents licensed professionals before regulatory boards.

Mr. Sinins is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern District of New York, the Third Circuit Court of Appeals and the United States Supreme Court. A Fellow of the American College of Trial Lawyers, he is Past President of the Essex County Bar Association and a member and Past Chair of the Judicial and Prosecutorial Appointments Committee of the Essex County Bar Association. He is Past Chair of the District V-B Ethics Committee and serves as Co-Chair of the Criminal Section of the New Jersey Association for Justice.

Mr. Sinins has lectured extensively for continuing legal education seminars for ICLE, county bar association and other organizations. His articles have appeared in the *New Jersey Law Journal* and other publications, and he is the recipient of several honors.

Mr. Sinins received his B.A., with honors, and M.A. from the University of Pennsylvania and his J.D. from the George Washington University National Law Center, where he was a Notes Editor of the *George Washington Law Review*. Following law school, he served as research associate to the Honorable A. Leon Higginbotham, Chief Judge (retired) of the United States Third Circuit Court of Appeals.

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