The NJSBA Summer Conference

The NJSBA Summer Conference

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Attorneys and New Technologies:

How Versed Are You?

Speakers

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ATTORNEYS AND NEW TECHNOLOGIES – HOW VERSED ARE YOU?

2024 NJSBA VIRTUAL SUMMER CONFERENCE

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FACULTY

- **Cristina Dolan**, Professor, Columbia University Technology Mgmt. Program & Independent Board Director NASDAQ: SEALSQ
- **Ronald J. Hedges**, former United States Magistrate Judge
- **Naju R. Lathia**, Partner, Day Pitney LLP, Parsippany, NJ
- **Hon. Julien X. Neals**, United States District Judge, District of New Jersey, Newark, NJ

DISCLAIMER

- The information in these slides and in this presentation is not legal advice and should not be considered legal advice.
- This presentation represents the personal views of the presenter.
- This presentation is offered for informational and educational uses only.

AGENDA

- New Technologies: An Overview
- Regulation and Litigation Involving New Technologies
- Ethical Obligations of Attorneys to Understand New Technologies
- Suggested Best Practices When Dealing with New Technologies

NEW TECHNOLOGIES: AN OVERVIEW

Examples:

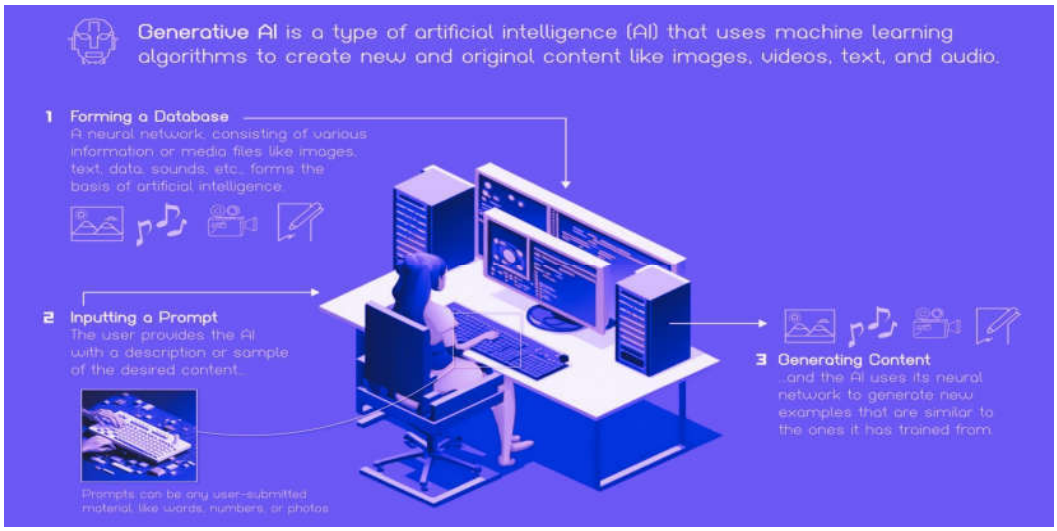
- Generative Artificial Intelligence (GAI)
- Collaboration Tools
- Ephemeral Messaging Tools

ARTIFICIAL INTELLIGENCE

What do we mean by AI?

- If a computer simply matches patterns to pre-determined categories, is that AI?
- If a computer uses algorithms that continuously learn such that outcomes are refined as data volumes increase and do so without human intervention, is that AI?

GENERATIVE ARTIFICIAL INTELLIGENCE



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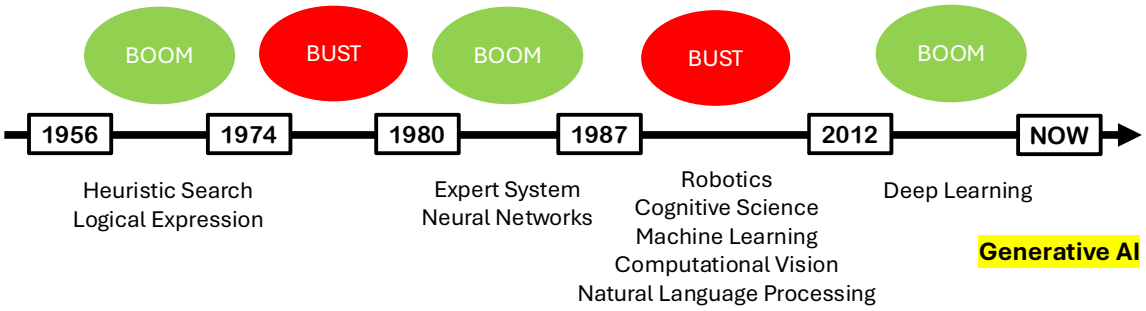
Long Slow Evolution of Artificial Intelligence

Early days (1950s-1970s):
•1950: Alan Turing proposes the **Turing Test**, a benchmark for machine intelligence.
•1956: John McCarthy coins the term "**Artificial Intelligence**" at the Dartmouth Conference.
•1956: Frank Rosenblatt invents the **perceptron**, the first artificial neural network capable of learning.
•1960: **ELIZA**, an early chatbot, is developed by Joseph Weizenbaum.
•1973: DENDRAL, the first practical expert system, is developed for organic chemistry.
Rise of Machine Learning (1980s-1990s):
•1980: Connectionism and backpropagation, crucial for training artificial neural networks, are introduced.
•1986: **Deep Blue**, an IBM chess computer, defeats Garry Kasparov, the world chess champion.
•1997: Deep Blue's successor, **Deep Mind**, defeats Lee Sedol, the Go world champion.
Deep Learning Revolution (2000s-2010s):
•2012: **AlexNet** wins the ImageNet competition, sparking a deep learning revolution.
•2014: The **Attention Mechanism** is introduced in neural networks, significantly improving their capabilities.
•2017: **AlphaGo** Zero, a **DeepMind** program, masters the game of Go without human knowledge.
The Age of Generative AI (2020s):
•2017: ***Attention is All You Need*** - **Big AI** – Compute and Data-driven training through large systems
•2020: **GPT-3**, a powerful generative pre-trained transformer model, is launched by OpenAI.
•2022: **ChatGPT**, a chatbot built on GPT-3, is released, showcasing advanced capabilities in conversation

Ups and Downs of Artificial Intelligence



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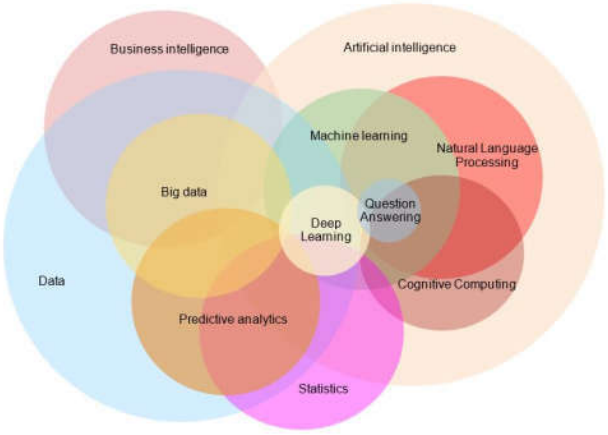
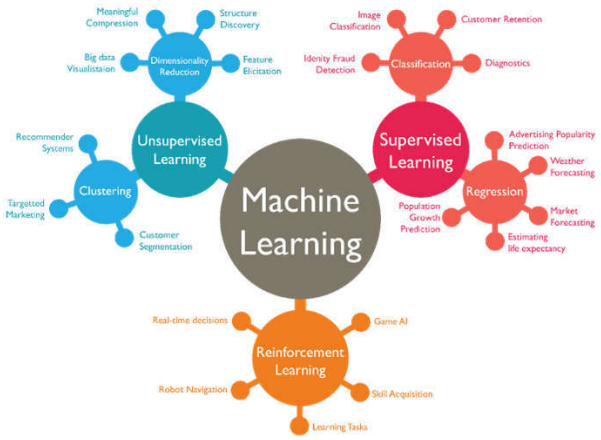
Broad Field of AI and Machine Learning





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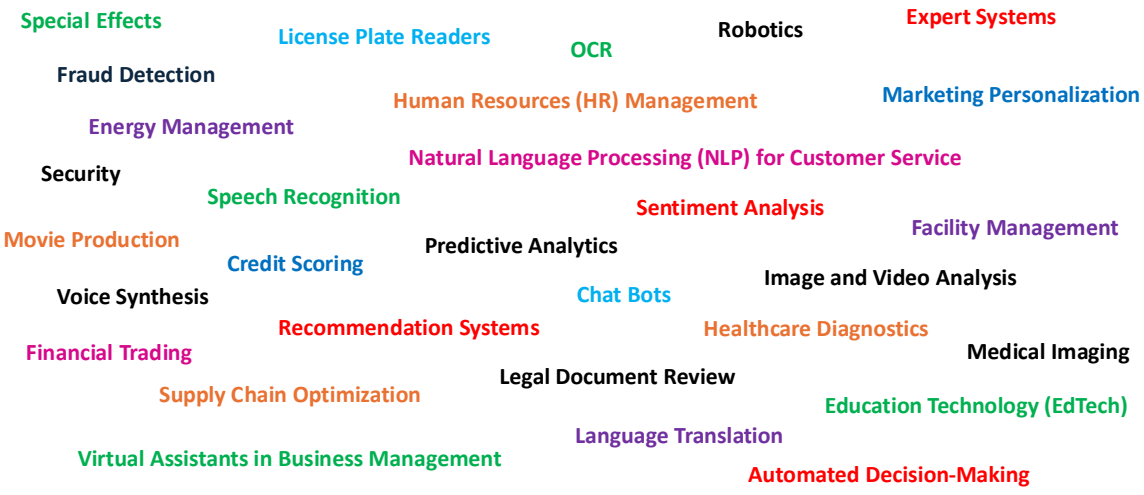
Artificial Intelligence Applications are Not New



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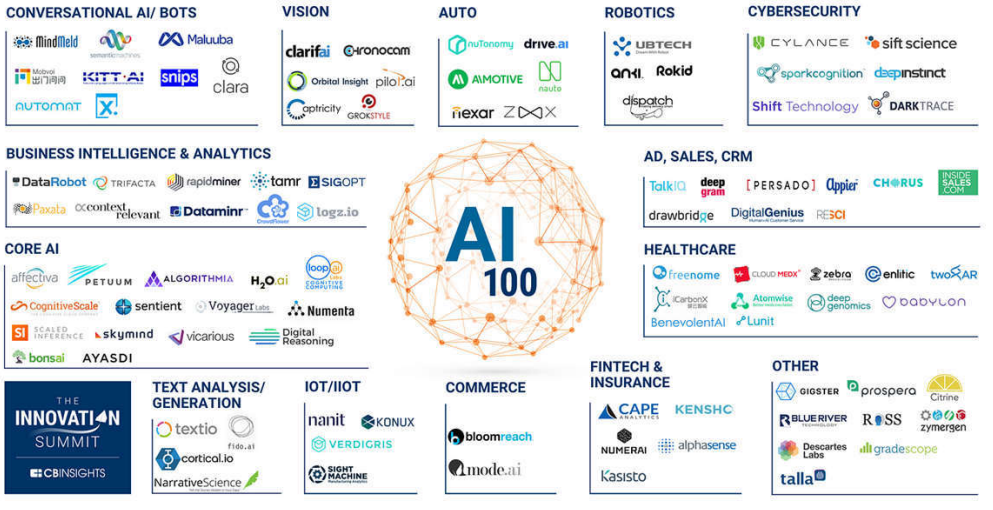
2017 - Companies Using AI to Transform Industries

CB Insights



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Before and After 2017 - Attention Paper

Symbolic AI – The system needed lots of training to learn and develop knowledge. Uses logic and reasoning.

Big AI – Compute and Data-driven training

In the Attention mechanism:

- Probability Driven
- Words in a sentence are assigned different weights.
- These weights determine how much focus or "attention" each word gets when trying to predict or comprehend another word.
- Lots of Data and Powerful Compute Available

June 11, 2020 – OpenAI Instruct GPT 3

Nov. 30, 2022 – OpenAI Chat GPT

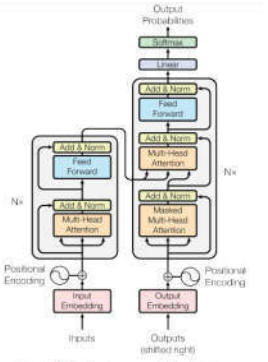

Figure 1: The Transformer - model architecture.

Attention Is All You Need

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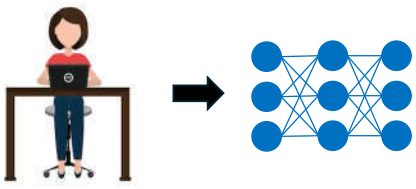
Abstract

The dominant sequence transduction models are based on complex recurrent or convolutional neural networks that include an encoder and a decoder. The best performing models also connect the encoder and decoder through an attention mechanism. We propose a new simple network architecture, the Transformer, based solely on attention mechanisms, dispensing with recurrence and convolutions entirely. Experiments on two machine translation tasks show these models to be superior in quality while being more parallelizable and requiring significantly less time to train. Our model achieves 28.4 BLEU on the WMT 2014 English-to-German translation task, improving over the existing best results, including ensembles, by over 2 BLEU. On the WMT 2014 English-to-French translation task, our model establishes a new single-model state-of-the-art BLEU score of 41.8 after training for 3.5 days on eight GPUs, a small fraction of the training costs of the best models from the literature. We show that the Transformer generalizes well to other tasks by applying it successfully to English constituency parsing both with large and limited training data.

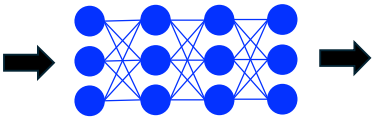
Machine Learning versus Deep Learning



Feature Extraction

Classification

Machine Learning
(Labelled Data & Feature Engineering)
Logic



Feature Extraction + Classification

Deep Learning
(Data & Compute Driven)
Probability

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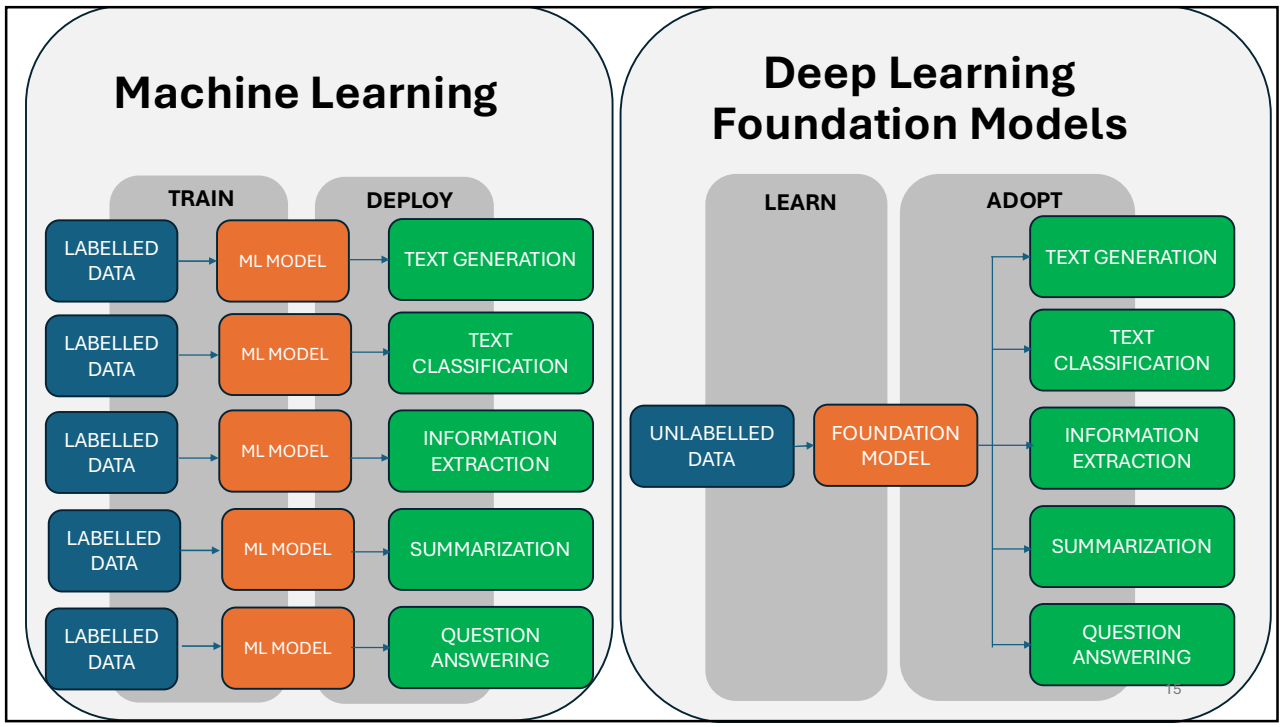
Machine Learning
TRAIN
DEPLOY
LABELLED DATA
ML MODEL
TEXT GENERATION
LABELLED DATA
ML MODEL
TEXT CLASSIFICATION
LABELLED DATA
ML MODEL
INFORMATION EXTRACTION
LABELLED DATA
ML MODEL
SUMMARIZATION
LABELLED DATA
ML MODEL
QUESTION ANSWERING
Deep Learning Foundation Models
LEARN
ADOPT
UNLABELLED DATA
FOUNDATION MODEL
TEXT GENERATION
TEXT CLASSIFICATION
INFORMATION EXTRACTION
SUMMARIZATION
QUESTION ANSWERING

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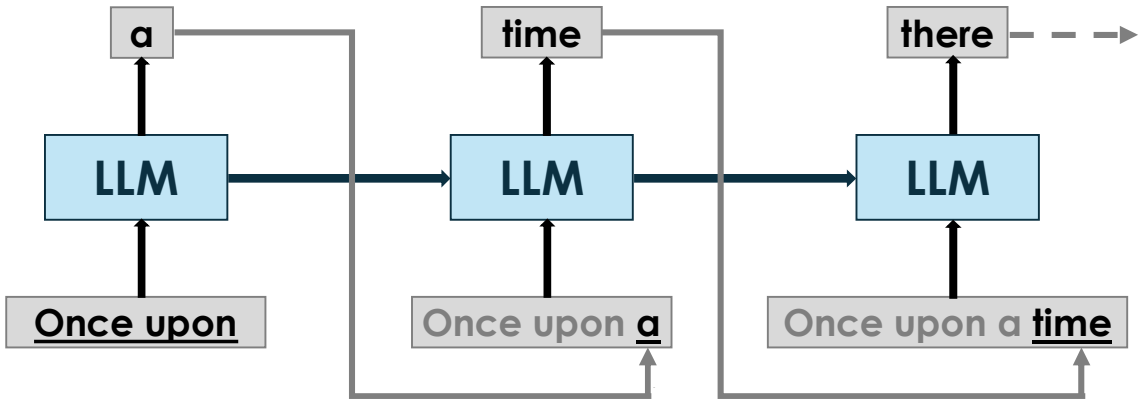
Generative AI – Utilizes Probability



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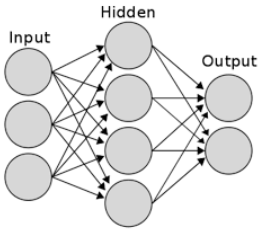
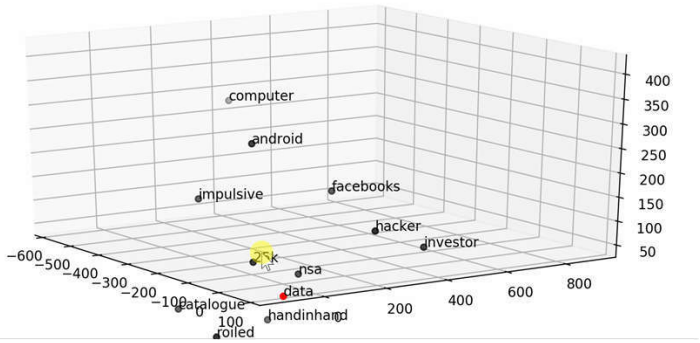
Generative AI – Probability in Neural Networks



- Complex Data
- Mathematical Relationships
- Parameters
- Tokens
- Vectors
- Neurons
- Deep Learning

Example OpenAI Platform: Cristina Dolan is an engineer => 8 Tokens => 29 Characters
Token IDs [34, 2889, 2259, 25227, 276, 374, 459, 24490]



Foundation Models (Neural Networks) Power Gen AI - are trained on big data and many parameters

Probability calculated from Cosine Similarity and Euclidean distance between vectors

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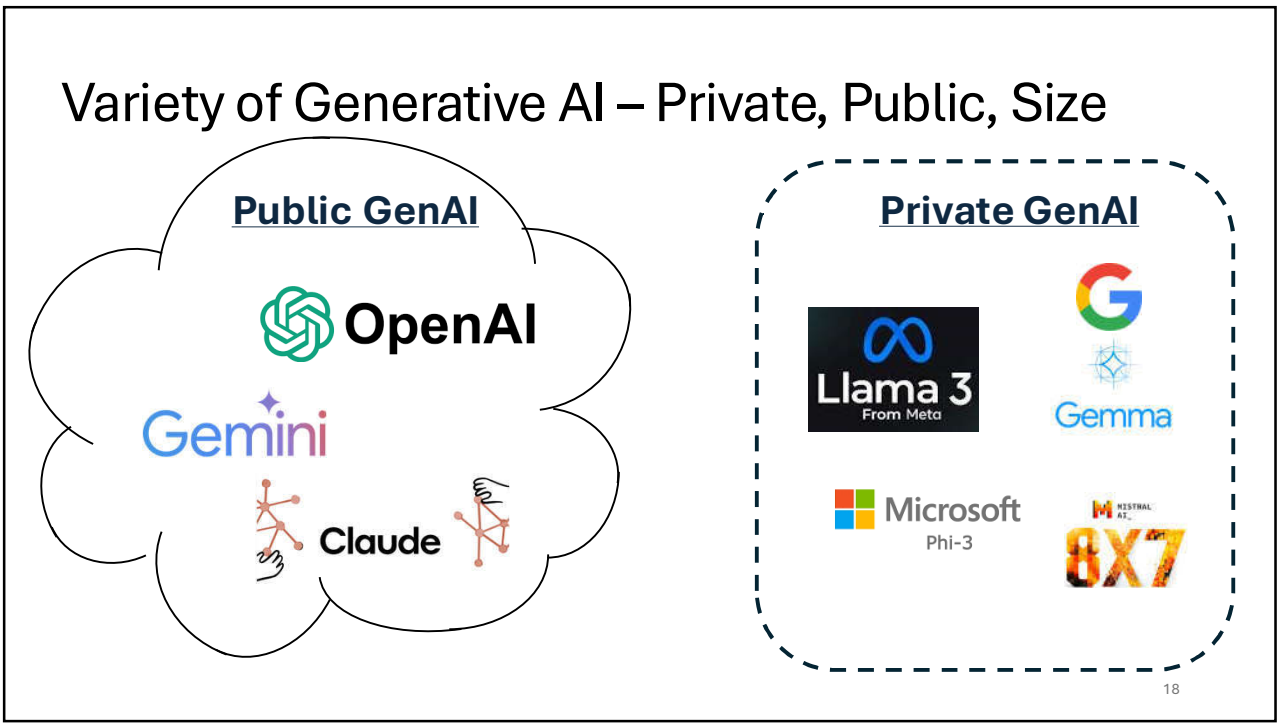
Variety of Generative AI – Private, Public, Size
Public GenAI
OpenAI
Gemini
Claude
Private GenAI
Llama 3
From Meta
Gemma
Microsoft
Phi-3
8X7
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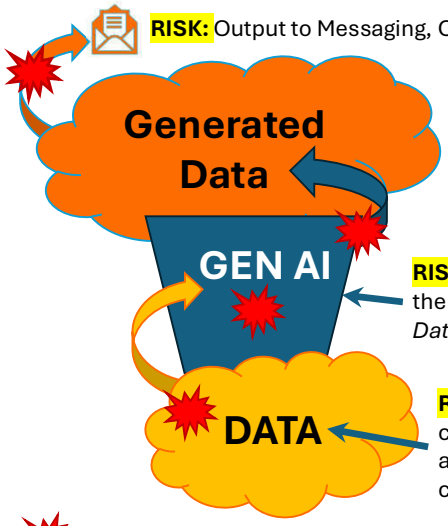
Data: Compliance, Regulations and Cyber Risk



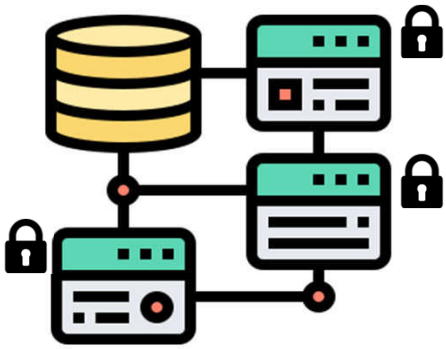
RISK: Output to Messaging, Collaboration, Email

RISK: GEN AI does not offer the traditional database *Data Access Controls*

RISK: Ingested Data cannot be removed and access can't be controlled.

CYBERSECURITY RISKS AT EVERY LEVEL

Traditional Database Data Access *Controls*



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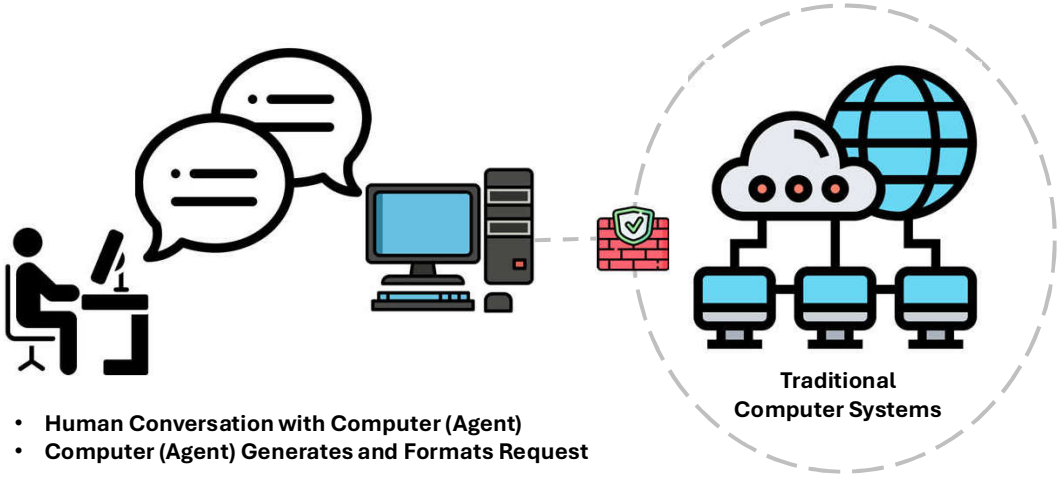
Private Language Models Can Protect Data

Chat GPT – **RAG** or **Agents** and *New Enterprise Computer Interface*



- **Human Conversation with Computer (Agent)**
- **Computer (Agent) Generates and Formats Request**

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COLLABORATION AND EPHEMERAL MESSAGING TOOLS

Examples:

- Slack
- Microsoft Teams
- Signal
- WhatsApp
- SnapChat

EPHEMERAL MESSAGING

Settlement between the FTC and Snapchat:

- "Touting the 'ephemeral' nature of 'snaps,' the term used to describe photo and video messages sent via the app, Snapchat marketed the app's central feature as the user's ability to send snaps that would 'disappear forever' after the sender-designated time period expired.
- Despite Snapchat's claims, the complaint describes several simple ways that recipients could save snaps indefinitely.
- Consumers can, for example, use third-party apps to log into the Snapchat service, according to the complaint. Because the service's deletion feature only functions in the official Snapchat app, recipients can use these widely available third-party apps to view and save snaps indefinitely. Indeed, such third-party apps have been downloaded millions of times.
- Despite a security researcher warning the company about this possibility, the complaint alleges, Snapchat continued to misrepresent that the sender controls how long a recipient can view a snap."

https://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were

REGULATION AND LITIGATION INVOLVING NEW TECHNOLOGIES

- Anticipate regulatory burdens that might be imposed on a new technology before it is selected
- Appreciate what might happen if a technology "fails" or violates a law or regulation
- Realize emerging liabilities that might arise from:
  - Bias
  - Invasion of individual privacy
  - Failure to comply with obligations imposed by law or regulation on the use of protected personal information

EEOC

EEOC Artificial Intelligence and Algorithmic Fairness Initiative:

"As part of the initiative, the EEOC will:

- Issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions;
- Identify promising practices;
- Hold listening sessions with key stakeholders about algorithmic tools and their employment ramifications; and
- Gather information about the adoption, design, and impact of hiring and other employment-related technologies."

https://www.eeoc.gov/ai#:~:text=As%20part%20of%20the%20initiative,and%20their%20employment%20ramifications%3B%20and

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EEOC

EEOC, “The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees” (May 12, 2022)

https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence

EEOC AND USDOJ

USDOJ, "Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring" (May 12, 2022), https://www.ada.gov/resources/ai-guidance/

EEOC AND FTC

- EEOC, "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964" (May 18, 2023), https://www.eeoc.gov/newsroom/eeoc-releases-new-resource-artificial-intelligence-and-title-vii
- FTC, "Policy Statement of the Federal Trade Commission on Biometric Information and Section 5 of the Federal Trade Commission Act" (May 18, 2023), https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-biometric-information-section-5-federal-trade-commission

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FTC

- Absent a comprehensive federal law, might the FTC be the national regulator of any "new" tech?
- Section 5 of the Federal Trade Commission Act (FTC Act) (15 USC 45) prohibits "unfair or deceptive acts or practices in or affecting commerce.''
- An example of what the FTC has done: *I/M/O Chegg, Inc.,* Docket No. 202-3151, https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-finalizes-order-ed-tech-provider-chegg-lax-security-exposed-student-data

FTC

"The FTC's order requires Chegg to implement a comprehensive information security program, limit the data the company can collect and retain, offer users multifactor authentication to secure their accounts, and allow users to request access to and deletion of their data."

NEW YORK CITY LOCAL LAW INT. NO. 144

- Regulates use of "automated employment decision tools" in hiring and promotion
- Requires notice prior to being subject to the tool
- Allows opting-out and another process
- Requires annual, independent "bias audit"

COMPREHENSIVE STATE DATA PRIVACY LAWS

- California
- Colorado
- Connecticut
- Delaware
- Florida -- **with a caveat**
- Indiana
- Iowa
- Kentucky
- Maryland
- Minnesota
- Montana
- Nebraska
- New Hampshire
- New Jersey -- **effective Jan. 1, 2025**
- Oregon
- Tennessee
- Texas
- Utah
- Vermont
- Virginia

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Ethical Obligations of Attorneys to Understand New Technology

Obligations

- No formal obligations under NJ law
- Ethical obligation under NJRCP 1.1(competence), 1.3 (diligence), and 1.6 (confidentiality)
- Attorneys found in violation of NJRCP may face discipline
- Obligation to reasonably understand and know how to operate new technology and online platforms, and their possible implications.

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Ethical Obligations of Attorneys to Understand New Technology

NJRPC 1.1 Competence

- Comment 8 to NJRCP 1.1 requires attorneys to be familiar with standard technological processes and developments
- NJ Supreme Court expressly requires attorneys to educate themselves on social media *Matter of Robertelli*, 248 N.J. 293 (2021)

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Ethical Obligations of Attorneys to Understand New Technology

NJRPC 1.1 Competence

- Familiarity with technology in legal practice
  - E-filing, case management software etc.
- Familiarity with permissible online evidence collection
  - Social media: *Matter of Robertelli*, 248 N.J. 293 (2021)
- Duty to understand and prevent auto deletion of evidence
  - Snapchat and apparition evidence: *Doe v. Purdue Univ.*, WL 2767405 (N.D. Ind., 2021), *DR Distributors v. Century Smoking,* 513 F. Supp. 3d 839, 943 (N.D. Ill., 2021)

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Ethical Obligations of Attorneys to Understand New Technology

NJRPC 1.3 Diligence

- NJRCP 1.3 requires attorneys to continue legal education
- Creates ethical obligation for attorneys to stay up to date on new developments in technology

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Ethical Obligations of Attorneys to Understand New Technology

NJRPC 1.3 Diligence

- Familiar with tools that advance representation
  - Generative AI
    - Obligation to check work
    - Obligation to understand bias in AI
  - Internet of Things (IoT)
    - Siri, Alexa, Smart appliances etc.
    - Duty to (1) identify the possible role of IoT, (2) be able to obtain or defuse relevant evidence from IoT devices, (3) be able to admit IoT data. 80 Ala. Law. 225, 259.

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Ethical Obligations of Attorneys to Understand New Technology

NJRPC 1.6 Confidence & Attorney-Client Privilege

- Rule 1.6 and ACP is silent on obligations in tech but attorneys always have a duty to protect client information
  - Email policies and encryption
    - *Eastman v. Thompson*, 636 F.Supp.3d 1078 (C.D.Cal., 2022)
      - Law school faculty brought action to prevent university from complying with House of Representatives Select Committee's subpoena seeking records of email communications between him and President concerning January 6, 2021 attack on United States Capitol.
      - Faculty used his faculty email to send communications and university policy warned that emails may be monitored. Brought the question of whether this policy breaks ACP.

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Ethical Obligations of Attorneys to Understand New Technology

Best practices to stay up to date

- Engage with NJSBA's CLE courses that introduce attorneys to developments in tech and associated legal implications
- Attend courses offered by legal research platforms on new developments in legal research
- Stay up to date on your organization's policies , and the services your organization works with

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SUGGESTED BEST PRACTICES

- What is the existing technology framework?
- Who decides what new technology is needed?
- Who checks out the new technology?
- Who incorporates the new technology?
  - Internal?
  - Third party?
- Who has access to the new technology?
- Who monitors the new technology?
- What is the audit trail for the new technology?

SUGGESTED BEST PRACTICES:

Illinois State Bar Ass'n Professional Conduct Advisory Opinion No. 16-06 (Oct. 2016), https://www.isba.org/sites/default/files/ethicsopinions/16-06.pdf:

"At the outset *** lawyers must conduct a due diligence investigation when selecting a provider. Reasonable inquiries and practices could include:

"1. Reviewing cloud computing industry standards and familiarizing oneself with the appropriate safeguards that should be employed;

2. Investigating whether the provider has implemented reasonable security precautions to protect client data from inadvertent disclosures, including but not limited to the use of firewalls, password protections, and encryption;

3. Investigating the provider's reputation and history;

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SUGGESTED BEST PRACTICES

4. Inquiring as to whether the provider has experienced any breaches of security and if so, investigating those breaches;

5. Requiring an agreement to reasonably ensure that the provider will abide by the lawyer's duties of confidentiality and will immediately notify the lawyer of any breaches or outside requests for client information;

6. Requiring that all data is appropriately backed up completely under the lawyer's control so that the lawyer will have a method for retrieval of the data;

7. Requiring provisions for the reasonable retrieval of information if the agreement is terminated or if the provider goes out of business."

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SUGGESTED BEST PRACTICES

1. Figure out how to prompt it in a way that gives the best result.
2. Use it for appropriate projects.
3. Do not feed it confidential information – the user cannot control what it does with that information.
4. Always verify what it gives you is accurate – "trust, but verify."
5. Do diligence to ensure that the response it gives you is not plagiarized.
6. Include appropriate notices and disclaimers about the item being produced with ChatGPT.
7. Develop a policy concerning scope of use and implement training on the policy

Source: IP lawyer vs. chatgpt: Top 10 legal issues of using Generative AI at work. Foley & Lardner LLP. (n.d.). https://www.foley.com/en/insights/publications/2023/03/ip-lawyer-vs-chatgpt-top-10-legal-issues-ai-work

RESOURCES*

- *Ethics Guidelines for Trustworthy AI* (High-Level Expert Group on Artificial Intelligence: Apr. 8, 2019), https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai
- "AI and Bias" Series, *Brookings Center for Technology Innovation,* https://www.brookings.edu/series/ai-and-bias/

*Note: Materials on artificial intelligence are published on what seems to be a daily basis. The materials listed in these Resources are examples.

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RESOURCES

- EEOC, "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964" (May 18, 2023), https://www.eeoc.gov/newsroom/eeoc-releases-new-resource-artificial-intelligence-and-title-vii
- FTC, "Policy Statement of the Federal Trade Commission on Biometric Information and Section 5 of the Federal Trade Commission Act" (May 18, 2023), https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-biometric-information-section-5-federal-trade-commission
- E. Tabassi, "Minimizing Harms and Maximizing the Potential of Generative AI," *Taking Measure* (NIST: Nov. 20, 2023), https://www.nist.gov/blogs/taking-measure/minimizing-harms-and-maximizing-potential-generative-ai

RESOURCES

- *CISA Services Directory* (2d ed. fall 2021), https://www.cisa.gov/sites/default/files/publications/FINAL_PDFEPUB_CISA%20Services%20Catalog%202.0.pdf
- L. Fair, *Multiple Data Breaches Suggest Ed Tech Company Chegg Didn't Do Its Homework, Alleges FTC* (FTC Business Blog: Oct. 31, 2022), https://www.ftc.gov/business-guidance/blog/2022/10/multiple-data-breaches-suggest-ed-tech-company-chegg-didnt-do-its-homework-alleges-ftc?mkt_tok=MTM4LUVaTS0wNDIAAAGH0x3YDZPPHKQrBOHYoXF44XeIJEdRYnuCTB9I4OVMJZhlDGYqWgWt58g0TvpXBZAdOV4Oe92lag0_gcw5Eco4w_vQ9Q4uMszL7hJ2m5bfge5h
- *Commentary on Law Firm Data Security* (The Sedona Conference: July 2020), https://thesedonaconference.org/node/9662

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RESOURCES

- G.L. Gottehrer, R.J. Hedges & C.S. Parikh, "Discovery Considerations When Choosing and Using Virtual Meeting Platforms and Ephemeral Apps," *PLI Chronicle* (Jan. 2021) (in materials)
- K.J. Withers, "'Ephemeral Data' and the Duty to Preserve Discoverable Electronically Stored Information," 37 *U. of Baltimore L. Rev.* 349 (2008), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?httpsredir=1&article=1829&context=ublr

RESOURCES

- Illinois Artificial Intelligence Video Interview Act, 820 ILCS 42/, https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4015&ChapterID=68
- New York City Local Law Int. No. 144, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=Advanced&Search

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- The Sedona Conference *Commentary on Ephemeral Messaging* (Public Comment Version Jan. 2021), Publications_Catalogue_May_2021.pdf (thesedonaconference.org)
- K.J. Withers, "'Ephemeral Data' and the Duty to Preserve Discoverable Electronically Stored Information," 37 *U. of Baltimore L. Rev.* 349 (2008), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?httpsredir=1&article=1829&context=ublr

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Discovery Considerations When Choosing and Using Virtual Meeting Platforms and Ephemeral Apps

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Introduction

New and ever-changing communication technologies create challenges for lawyers. The use of virtual meeting platforms (VMPs) has become standard practice in the legal industry, and they are being used for everything from client meetings to judicial proceedings. In addition, purportedly "disappearing" messaging apps are being used by some attorneys and clients who later learn that the communications did not actually disappear.

While these technologies differ, VMPs and so-called ephemeral messaging apps raise similar issues for attorneys in the context of preservation and discovery, including:

- Whether content of a virtual meeting or an ephemeral message is a "record" and in the possession, custody, or control of a sender or recipient;
- How discovery of content from these communication technologies might be undertaken;
- Whether ephemeral content is actually ephemeral;
- Whether the content is subject to a duty to retain or preserve; and
- What the consequences might be if content is lost.

Definitions

VMPs are "applications and other digital platforms that let you bring people together over the internet. Usually, these apps include a form of video conferencing, as well as tools like chat, reactions and screen sharing. Examples include Zoom, Webex, [and] Google Meet."

Ephemeral messaging apps "are a popular form of communication.… All messages are purposely short-lived, with the message deleting on the receiver's device, the sender's device, and on the system's servers seconds or minutes after the message is read.… [T]hey are now a ubiquitous part of corporate culture."

"Records" and "Possession, Custody, and Control"

It is unlikely that companies are explicitly authorizing the use of ephemeral messaging apps. Nonetheless, we have seen that large portions of the workforce are using them. With the onset of the COVID pandemic and the mass shift to remote work, we have seen a significant (and often company-sanctioned) increase in the use of VMPs and, with that, the creation of video recordings and in-VMP electronic messaging and chatting. Companies need to consider whether these data are business records and, if so, who is ultimately responsible for them.

Not surprisingly, the Federal Rules of Civil Procedure (FRCP) do not define ephemeral communications. Recognizing that technology is constantly changing, the Rules Committee chose not to define "electronically stored information" (ESI). As a result, we must infer the specifics of what constitutes ESI and whether ephemeral communications are encompassed in that definition. FRCP 34(a)(1)(A) provides some

context by requiring a litigant to produce just about anything "stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." Based on this, one could reasonably argue that ephemeral communications are encompassed in the Rules as they are "created electronically," but questions remain as to whether they are stored and in whose possession, custody or control they reside.

By definition, ephemeral messages are not typically stored. If, however, the messages are stored by a third-party, a determination must be made about who has "possession, custody or control" of them.

A party must consider the extent to which it has the right to obtain the information upon request. ESI is within a party's custody or control not only when the party has actual possession or ownership of the information, but also when the party has "the legal right to obtain the documents on demand." *In re Bankers Trust*, 61 F.3d 465, 469 (6th Cir. 1995), cert. dismissed, 517 US 1205 (1996); *Flagg v. City of Detroit*, 252 F.R.D. 346, 352 (E.D. Mich. 2008) (defendant was obligated to produce texts stored with its third-party service provider because messages were within defendant's control). Based on this case law and interpretation of the FRCP, it could be argued that to the extent an ephemeral communication is stored, even by a third-party, it is in the party's possession, custody and control and, therefore, the party likely has a duty to preserve and produce it.

Discovery of Content from VMPs and Ephemeral Apps

The analysis of whether content from VMPs and ephemeral apps is discoverable follows the analysis for the discovery of other electronically stored information. FRCP 26(b)(1) provides that, generally, a party is entitled to discovery regarding any nonprivileged matter that is relevant to its claim or defense and proportional to the needs of the case. Relevant evidence is defined broadly as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action."

If a party has reason to believe that the content of a virtual meeting, whether it be the recording of the meeting, a transcript of the chat from the meeting, or documents and slides shared during the meeting, is relevant to its claims or defenses in the case, it can request that the content be produced in discovery. Similarly, a party can request the production of the communications sent or received through an ephemeral messaging app if the content is relevant to the case.

Depending on the ephemeral app's settings and features, the sender or the recipient may have retained the content (which could be a message, photo, or video or audio recording) on their device. Even if the app's settings prevent the content from being saved, the sender or the recipient could have taken a screenshot of the content, printed the screenshot, or forwarded or saved the photo or recording, which could be discoverable.

Depending on the VMP or ephemeral app, the platform or app developer may retain a copy of the content of a virtual meeting conducted on its platform or of messages exchanged using its app. If the developer is not a party to the action, and a party asserts that the content is relevant to a claim or defense in a case, it can seek to obtain that content from the developer by subpoena.

Further complicating matters, if an attorney provides legal advice to a client during a virtual meeting or using an ephemeral app, and the developer has access to and retains that content, an argument could be made that the attorney-client privilege has been waived.

Is the Content Actually Ephemeral?

Attorneys must be aware that not all apps that are marketed as ephemeral are actually ephemeral because the implications for discovery can be significant. An example of purportedly ephemeral content not disappearing was the subject of the 2014 settlement between the Federal Trade Commission (FTC) and Snapchat, which resolved alleged misrepresentations Snapchat made to consumers about the "ephemeral" nature of the content sent using the app.

According to the FTC, despite touting its app as giving users the ability to send content that would "disappear forever" after a specified time period, there were several ways that recipients could prevent the content from disappearing, including by using third-party apps to access, view, and save content because the deletion feature only operated in the official Snapchat app. The FTC also alleged that Snapchat misrepresented that the sender would be notified if a recipient took a screenshot of a message when, in fact, there was a simple way for a recipient to get around this feature and take screenshots without the sender being notified.

Duty to Retain or Preserve?

Absent an affirmative duty to preserve, such as a threat of litigation, litigation hold or government investigation, an organization has no general obligation to save or store

its communications. A party cannot be sanctioned for destroying evidence that it has no duty to preserve. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Companies can use technology that assists with the timely destruction of communications. Data destruction must be done responsibly and ideally under the guidance of counsel and subject to a corporate document retention and deletion policy.

Use of ephemeral apps and VMPs, adopted subject to a defensible data retention and destruction policy, can be a key solution for data minimization. It can reduce data storage costs, create a more information-secure way of communicating (reducing potential data breaches) and ultimately reduce discovery costs. However, neither technology is, or should be seen as, a mechanism for avoiding discovery obligations, and companies should be cautious about using ephemeral messaging apps once they reasonably anticipate litigation.

What If Content is Lost?

While there is no case law addressing the loss of VMP content, there are three federal court decisions that deal with the loss of ephemeral messages: *Waymo LLC v. Uber Technologies, LLC*, No. C 17-00939 (N.D. Cal. 2018), *Herzig v. Arkansas Foundation for Medical Care, Inc.,* No. 18-CV-02101 (W.D. Ark. 2019), and *WeRide Corp. v. Huang*, No. 18-cv-07233 (N.D. Cal. 2020).

In *Waymo*, an action for alleged trade secret misappropriation, the court undertook an analysis under Fed. R. Civ. P. 37(e) and held that the corporate defendants' use of ephemeral messaging could be presented to the jury. *Waymo* settled before trial. The case is instructive in its analysis of Rule 37(e) and the steps that a court must take, and parties must address, before imposing sanctions for the loss of content from VMPs or ephemeral apps under that rule.

In *Herzig,* the court found that the plaintiffs installed and used a "communication application designed to disguise and destroy communications" and that they had engaged in intentional bad-faith spoliation. The court did not refer to Rule 37(e). Rather than sanction plaintiffs for the loss of the messages, the court granted summary judgment in defendant's favor on the merits. (Whether the messages at issue in *Herzig* were "ephemeral" at all can be debated.). *Herzig* is of little or no value when a court must engage in a spoliation analysis under Rule 37(e), although it might be helpful in analyzing alleged spoliation under the common law.

In *Huang*, terminating sanctions were imposed against the defendant corporation and two individual defendants pursuant to Fed. R. Civ. P. 37(b) and Rule 37(e) for what the court characterized as "staggering" spoliation of electronic information. As an

example of that intentional misconduct and spoliation, the court pointed to the corporation's decision to switch its internal communications to an ephemeral messaging app at the direction of one of the individual defendants, after the duty to preserve arose. *Huang* is of uncertain assistance for applying Rule 37(e) because it finds, without any analysis, that switching to ephemeral messaging constitutes spoliation and because the decision to make that switch was just one of several acts that led to a finding of intent.

Conclusion

The ubiquity of VMPs and "ephemeral" apps, and the potential for content shared through them to be discoverable, highlight the importance of attorneys educating themselves about these technologies as part of their ethical duty of technological competence.

For more information about the legal implications of ephemeral messages, virtual meeting platforms and related technologies, check out Gail, Ronald and Carrie's Preservation and Discovery of Virtual Meeting Data and Ephemeral Communications **program, available from PLI Programs On Demand.**

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iWitness

ARTIFICIAL INTELLIGENCE AND LEGAL ISSUES

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We live and practice law in a time of rapid—and sometimes confusing—technological change. Adoption of artificial intelligence (AI) is one. AI is no stranger to the practice of law. Clients use it to make business decisions; judges use it to assist their determinations, and experts in both civil and criminal litigation use it for their analyses. The output of AI can be relevant to issues that arise in litigation, and, because of its limitations, its use can invite legal challenge. Employment discrimination and criminal sentencing provide two examples.

AI refers to the development of computer systems that can mimic human decision-making and perform tasks that generally require human intelligence. AI uses algorithms, which are sets of rules that a computer can execute. Data are input into the algorithm, which applies those instructions and produces an output. Some artificial intelligence systems include algorithms that learn from data and improve automatically.

Mind-Sets in a Black Box

Many legal issues focus on the mind-set of the decision-maker, such as the intent of the manager who elects to terminate an employee, and on the process by which a person reaches a decision, such as the factors a judge considers when determining the appropriate sentence for a person convicted of a crime. The legal system has developed processes to examine how humans behave, but it is struggling to find an analytic framework to examine AI decision-making, which is often characterized by a lack of transparency into the processes by which it makes decisions and the biases of the programmers who create the algorithms on which it operates.

Critics observe that AI uses a decision process that is a "black box," meaning that it is based on algorithms that are so complex that the people who are affected by the decisions made by the systems cannot understand them and the government is unable to regulate them properly. The expanding use of AI in a wide range of industries, for significant decisions on everything from consumer credit limits to health care premiums, heightens concerns that the technology is effectively shielded from scrutiny by the complexity of the algorithms or trade secret considerations. The companies that design and use these algorithms consider them to be proprietary. Requests for disclosure of the algorithms and information about how they make their calculations are generally resisted on the grounds that these formulas are confidential business data that the companies are entitled to protect.

Attorneys are probably most familiar with AI's so-called "continuous active learning" in the context of technology-assisted review. Continuous active learning uses a machine-learning algorithm to find relevant electronic information within a large data set. It presents the reviewer with documents, ranked in order of priority, from those likely to be most relevant down to those likely to be less relevant. The reviewer provides input on the relevance of the documents presented by coding them, and based on that information, the system improves its understanding of which documents the reviewer considers relevant. The system continues to present documents to the reviewer and, through each step in this iterative process, "learns" from the feedback it receives and enhances its decision-making skills.

Continuous active learning systems also raise "black box" issues. These systems use algorithms to select the training data, rather than having humans select the data that are used to train the system. The role of the human in a continuous active learning system is limited to providing feedback to the system based on coding

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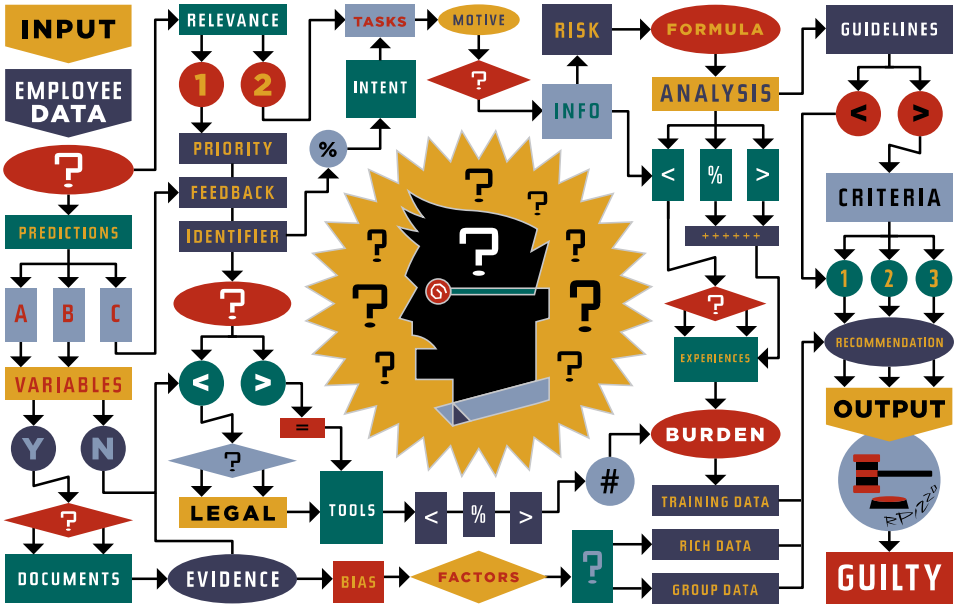

decisions. It does not include selecting documents to be used to train the system. As the training data are generated by algorithms, the data are unidentified and not preserved by the system, and they cannot be examined or challenged by litigators or regulators.

Bias

Bias is another fundamental concern associated with AI. While we may think of algorithms as simply being math, and therefore neutral, studies have shown that algorithms can be tainted by human bias.

Bias can be intentionally introduced into algorithms by the people who design them. Programmers can build bias into algorithms by relying on data that they know are biased against a certain racial or religious group or that reflect historical discrimination. In this way, biased programmers can skew the outputs of algorithms in a way that unlawfully discriminates against women or minorities. Programmers can also create biased algorithms by instructing an algorithm to consider, or give disproportionate weight to, factors that are proxies for sexism or racism.

Algorithms can also be affected by the implicit or unconscious bias of the people who program them. The design decisions of well-intentioned programmers can be influenced by their sociological background and experiences, which may lead them to rely on data that favor a certain group and disadvantage another group, without being aware of it. For example, using photos of White men to train facial recognition algorithms has resulted in those systems being proficient at recognizing White men but inaccurate when it comes to women and people of color. White male programmers may have trained those algorithms using photos of other White men without realizing that their training did not reflect society and would yield biased results.

Bias can also be an issue with continuous active learning systems. For example, if the algorithm uses skewed training data, it will create problems for the continuous active learning system and yield inaccurate and biased results. Similarly, if incomplete or insufficiently rich data are used to train the system, the results will reflect that deficiency and be biased.

If AI influences a decision as to who gets hired or promoted or receives a pay increase, it can be an instrument of unlawful employment discrimination. An algorithm for ranking candidates for promotion, for example, could explicitly include an identifier for race. More likely, it would include variables correlated with race, such as whether the candidate has graduated from high school or has an arrest record or lives in a certain ZIP code. If the AI is an active learning tool—one that identifies candidates most like those who have proven successful in the past—then, if the employer has historically favored employees of a particular race, the algorithm will do the same.

Addressing Biased Artificial Intelligence

How, then, might a legal framework like Title VII of the Civil Rights Act of 1964 address bias that arises from the use of AI?

Employment discrimination cases under Title VII generally fall into two categories: disparate treatment and disparate impact. In disparate treatment cases, the plaintiff must show that the employer intended to discriminate on the basis of some prohibited characteristic. But intent is difficult to demonstrate when the decision-maker is not a person, but an algorithm.

> A defendant may not know what information is being taken into consideration by an algorithm in making a risk assessment.

Suppose a Black employee alleges discrimination because he was denied a promotion that went to an arguably less qualified White worker. This plaintiff would have met the minimal burden of providing facts from which an inference of discrimination could be drawn. The employer, however, could then present evidence

Illustration by Robert Pizzo

that it based its decision on a promotion algorithm. At that point, it is the plaintiff's burden to demonstrate that, notwithstanding the seemingly race-neutral basis for its decision, the employer's real motive was discriminatory.

The plaintiff might attempt to show that the employer created the algorithm with the intention of favoring White employees, but few employers develop their own AI. More likely, the employer has licensed the AI from a third party, and the plaintiff might try to demonstrate that the employer knew that relying on the tool would have a discriminatory effect. Finally, the plaintiff might strive to demonstrate that the output of the AI tool was dependent on input from the employer and that the employer knowingly provided biased data.

In disparate impact cases, the employer uses a facially neutral method for allocating employment benefits, which is claimed to have the effect of discriminating on the basis of a proscribed characteristic such as race. A promotion algorithm may be such a neutral tool. To challenge it, the plaintiff need not show discriminatory animus but would likely rely on statistical analysis demonstrating that use of the AI resulted in White candidates being favored over Black candidates for promotion, after controlling for factors other than race.

Once the plaintiff has demonstrated that the algorithm has a disparate impact, the employer is entitled to demonstrate that it is nevertheless performing a legitimate function—here, the selection of qualified applicants for promotion.

If the employer satisfies this obligation, the burden shifts back to the plaintiff to show that other selection devices, without a similarly disparate effect on Black candidates, would also serve the employer's legitimate interest. Thus, the plaintiff must not only demonstrate the differential impact of the algorithm, but also identify an alternative, nondiscriminatory selection method that meets the employer's needs.

An employment discrimination plaintiff, then, can challenge an employer's use of biased AI, but that plaintiff will confront significant hurdles, whether proceeding on a disparate treatment or disparate impact theory.

Artificial Intelligence in Criminal Proceedings

AI has been used in criminal proceedings for some time. Decisions involving, for example, bail, sentencing, and parole may be influenced by "recommendations" made by pretrial or probation departments that are based at least in part on the output of AI. These recommendations—and the judicial decisions that result from them—can give rise to due process issues.

The use of AI in the criminal context presents several basic questions. First, should predictions of future criminal behavior be considered at all in pretrial, sentencing, or parole decisions? Second, when those predictions are made by AI, are they subject to the types of bias discussed above? Yet, even if there is consensus that predictive AI is appropriate in the criminal context and that problems of systemic bias can be addressed, a fundamental question of due process remains.

We have one decision on point: *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016), *cert. denied*, 137 S. Ct. 2290 (2017). *Loomis* was a challenge to the use of the COMPAS risk assessment tool. The defendant had pleaded guilty to various minor offenses arising out of a drive-by shooting. In preparation for sentencing, the State presented an estimate of the risk of recidivism based on COMPAS's analysis of an interview with the defendant and information from his criminal history. The defendant was sentenced to a term of imprisonment and challenged the use of the tool on due process grounds, arguing that he was denied his due process rights to be sentenced on an individualized basis and on accurate information. In particular, Loomis asserted that because the algorithm was a black box, he was unable to challenge how it came to its conclusions. The trial court denied Loomis relief, and the Wisconsin Supreme Court affirmed. Although it raised questions about the tool, the Wisconsin Supreme Court cautiously approved its use, noting that the assessment was only one factor in a judge's sentencing decision, which the judge could disregard. Moreover, the court observed that "due process implications compel us to caution circuit courts that because COMPAS risk assessment scores are based on group data, they are able to identify groups of high-risk offenders—not a particular high-risk individual."

Where does *Loomis* leave us? First, a defendant may not know what information is being taken into consideration by an algorithm in making a risk assessment. Second, a defendant almost certainly does not know how the algorithm weighs various data to produce an assessment. While a criminal defendant might seek discovery of the algorithm, its proprietary nature would be a major obstacle.

Of course, this should all be put into context. Federal and state sentencing guidelines establish criteria that judges follow in making sentencing decisions, and those guidelines often rely on calculations that assign values to various offender characteristics. Nevertheless, these guidelines are transparent about the formula they rely on for reaching an ultimate recommendation. AI, by contrast, is opaque.

The use of AI in litigation introduces complexities and invites considering whether its shortcomings may be grounds for litigating decisions based on its output. There is much more that can and will be said about artificial intelligence including, among other things, how it might be challenged in other contexts, whether counsel must become competent in AI technologies, and when it is appropriate to take discovery into how an algorithm "works" and delivers its outcome. ■

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The Truth About Lie Detection

Speakers

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Expert Polygraph Testing
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Bergen County Prosecutor's Office
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A Matter of Trusts

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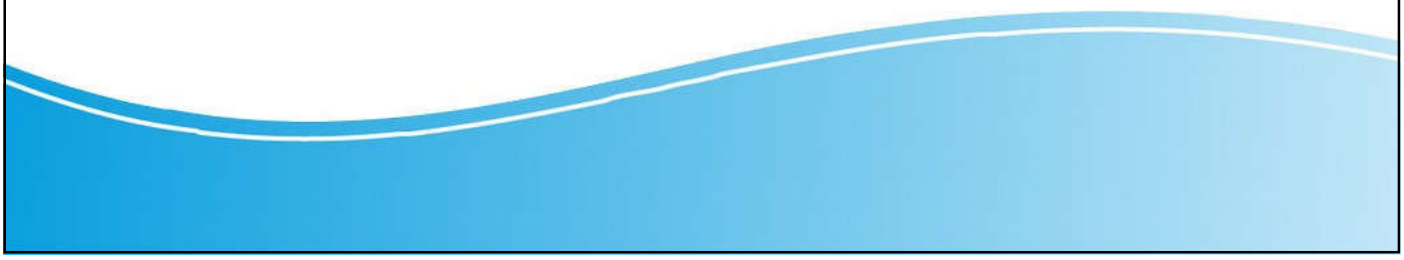
Understanding SNT's – first-party vs. third-party SNT's



- There are a lot of misconceptions about special needs trusts (SNT's)… even among lawyers
- There are a lot of misconceptions about trusts, forget the special needs part

- What is a trust?
- A trust is a contractual relationship between a grantor and trustee
- Grantor gives money to trustee to hold in trust for beneficiary

- Where does the special needs part come in?
- SNT is a type of trust meant to protect a person with disabilities, a person with special needs
- Person with disabilities is the beneficiary

- Why would you need a SNT? Usually it's to protect eligibility for disability benefits
- People with disabilities can qualify for disability benefits, public assistance programs provided by the government

- Most common disability benefits…
- Supplemental Security Income (SSI) – cash assistance program that pays around $750 per month
- Medicaid – government health insurance program with almost no costs

- Section 8 Housing – subsidized housing and vouchers
- SNAP – food assistance

- Social Security Disability Insurance (SSD or SSDI) – monthly cash program that pays based on work history (yours or a family member's)
- Medicare – government health insurance program with more costs than Medicaid, but more options sometimes

- Some of the most important disability benefits programs are means-tested
- Means-tested means that to qualify, you must have less than a certain amount of assets and income

- Some programs aren't means-tested – SSD and Medicare are based on your work history (or a family member's work history)

- SSI and Medicaid are means-tested
- There's a bunch of different programs with different rules, but for the most common program, you must have less than $2,000 in assets to qualify for SSI and Medicaid

- So if someone is getting SSI and Medicaid, and they get some pot of money, such as an inheritance, or personal injury recovery, or gift from family, or something else…
- They'll probably lose their benefits

- Losing benefits can be very problematic
- Medicaid can pay for important programs, such as day programs, group housing, long term care, etc.
- If you lose benefits, it can be very difficult to get back on

- Instead, the best practice much of the time is for that money to go to SNT
- Purpose of SNT is to set that money aside, available to meet the person's needs, while not counting against that asset limit and disqualifying person from benefits

- Idea is that benefits meet basic needs, and trust is available for special needs (although that's not always realistic, especially in NJ with cost of living)

- Also general trust purpose – a lot of times, person with disabilities (beneficiary) can't manage trust assets, so this allows another person (trustee) to manage investments, decide how to spend it, deal with taxes, etc.

- There are two main types of special needs trust
- First-party SNT
- Third-party SNT
- Different rules for each, important not to mix them up!

- First-party – the money is coming from the person with disabilities – the grantor is the beneficiary (or someone acting on behalf of beneficiary)
- Third-party – the money is coming from someone other than the person with disabilities – grantor and beneficiary are different people

- If you think back to grammar school…
- First party = I (I put my money in the trust)
- Third party = They (they put their money in the trust)

- Most common first-party trust scenario is where person with disabilities gets money as a result of lawsuit – e.g., personal injury lawsuit settlement from accident that led to disability
- Money is payable to person with disabilities, so it's first-party (I put my money in trust)

- Most common third-party trust scenario is where parents are leaving money to benefit child with disabilities as part of their estate plan
- In their will, instead of leaving share to child, they leave it to SNT
- Money is coming from parents, so it's a third-party (they put their money in trust)

- Sometimes people neglect to do this type of estate planning, or forget to change retirement account beneficiary designations, or something similar
- In that case, money is payable directly to person with disabilities, and a first-party SNT is probably needed

- In general, it's preferable for money to go into a third-party SNT rather than a first-party SNT
- There are a lot of rules that apply to first-party SNT, that don't apply to third-party SNT

- Biggest issue is probably that a first-party SNT has to repay the government when the beneficiary passes away for any Medicaid assistance that the government provided to the beneficiary during the beneficiary's lifetime

- If the beneficiary gets Medicaid for any length of time, this Medicaid lien is usually a large amount
- NJ Medicaid is semi-privatized, administered by private companies called managed care organization, or MCO (such as Horizon NJ Health)
- State pays a monthly capitated rate to MCO (similar to health insurance premium)

- So even if person doesn't use extensive services, capitated rate adds up
- Bottom line is that if beneficiary gets Medicaid, first-party trust will probably have to make a big repayment to the state when the beneficiary passes away. Usually isn't any money left for remainder beneficiaries.

- First-party trust has Medicaid payback requirement
- Third-party trust has no Medicaid payback requirement – no obligation to repay the state for amounts it spends on Medicaid for beneficiary
- Third-party trust should never include Medicaid payback provision

- First-party trust also has to comply with other rules, trustee has to follow rules while administering trust
- First-party SNT has to follow 42 USC 1396p(d)(4)(A), so these trusts are sometimes called d4A trust
- Have to comply with rules set forth in NJAC 10:71-4.11(g) (OBRA '93 provisions)

- Have to inform Medicaid of any expenditures over $5,000 (they probably won't reply)
- Have to account to Social Security and Medicaid each year

- Another big rule with first-party SNT's… distributions must be for sole benefit of beneficiary
- Trust can't benefit anyone other than beneficiary… no gifts to third parties (including family members like children, spouse, parents)

- Government has taken a strict position on this in past
- For example, if trust buys a house for beneficiary to live in, and parents live in house too, parents may have to pay rent to trust
- If trust buys something that family uses (TV, pool, etc.), government may take issue if it's not primarily for beneficiary's use

- Sole benefit rule applies to first-party SNT's
- No such rule for third-party SNT's, grantors can do whatever they want
- Third-party SNT can benefit person with disabilities and their children, etc. if grantor provides for it

- Some other requirements for first-party SNT's
- They can only be funded before the beneficiary turns age 65
- If person is age 65 or older, cannot add principal to trust
- Person has to be disabled at time trust is established

- Bottom-line: First-party SNT's have to follow a bunch of onerous rules that third-party SNT's do not have to follow
- In general, where possible, it's better to put assets into third-party SNT
- But where person with disabilities already owns assets, must use a first-party SNT

- Beneficiary (and their spouse) should never put their own money into an existing third-party SNT
- If that happens, whole third-party SNT might have to start following first-party SNT rules (be subject to Medicaid payback, etc.)

- What do first and third-party SNT's have in common?
- Most important point – all distributions are within sole discretion of trustee
- Beneficiary has no right to withdraw from trust, right to compel distributions, right to income, etc.

- Beneficiary has no control over trust
- Trustee decides how much to spend, what to pay for, when to pay for it
- Trustee can say no to beneficiary
- No obligation for trustee to make distribution to beneficiary under any circumstances – trustee need not support beneficiary, can leave beneficiary homeless and in crushing debt

- Beneficiary has no control over trust assets and cannot compel distributions, therefore trust assets and income are not considered available to beneficiary, and don't count towards eligibility limits for public benefits programs

- Obviously, grantor is putting a lot of trust in trustee to do the right thing
- You wouldn't want to really leave the beneficiary homeless and in crushing debt
- It's important to appoint a trustee who grantor trusts, who will act in beneficiary's best interests and take responsibilities seriously

- Usually this would be either a family member (but not spouse)
- ...or a professional trustee, such as a bank's trust department

- Trustee is entitled to take an annual fee by statute – 6% of income, 0.5% of corpus
- Family members often do not take the fee (even though being trustee can be a lot of work)
- Professional trustees often take a higher fee than the statutory rate – trust agreement should allow for this (or you may not be able to find a professional trustee if it becomes necessary)

- A lot of banks don't want to serve as trustee for SNT, seeing the job as overly complicated, unless there's a lot of money in trust (generally $1mm+, sometimes several million plus)
- Some smaller local companies have lower limits

- Having a professional trustee allows for professional money management (trustee makes all investment decisions), handling of taxes, etc.
- Also can be other benefits – it can be easier for a bank to say no to the beneficiary than a family member

- Sometimes we recommend a professional trustee if family tension seems likely with a family member trustee
- This comes up especially where beneficiary is disabled due to mental health issues
- Beneficiary may have wherewithal to ask for unreasonable things, but not recognize they're unreasonable, and get mad at trustee for saying no – it's harder to guilt-trip a bank

- Should a SNT be stand-alone (in a separate document), or part of a will?
- First-party SNT must be stand-alone
- Third-party SNT could be part of a will (a testamentary trust)… but I think it's a better idea for it to be stand-alone

- With a stand-alone trust, you can change trust without changing will (might want to change trustee, etc.)
- Also, testamentary trust only takes effect when testator dies, but stand-alone trust can take effect during grantor's lifetime
- Other family members might want to leave inheritance or make gifts to third-party trust during grantor's lifetime

- Also, as part of estate planning…
- Make sure clients update any beneficiary designations, especially on retirement accounts
- Third-party trust isn't effective unless property actually gets to it

- If client has an old beneficiary designation that leaves share directly to disabled child, and not to the spiffy third-party SNT you set up…
- Then only option may be first-party SNT (if possible)
- Estate planning should be coordinated holistically

- Finally, clients sometimes don't know whether they need an SNT or not
- For people with disabilities under age 18, they often don't get disability benefits yet because of parents' income and assets, but they may be eligible for benefits after age 18

- Also, as mentioned earlier…
- Not all assets are means-tested
- SSDI and Medicare are not means-tested
- If a person doesn't get means-tested benefits, they don't need an SNT to protect benefits

- However, they might want means-tested benefits in future
- Medicaid pays for things that Medicare doesn't pay for, including long term care
- Medicaid can supplement Medicare
- If they may want Medicaid in future, a SNT is a good idea

- Often, clients don’t know exactly what benefits they or their loved ones receive
- They might get both Medicare and Medicaid
- They might not know if they’re getting SSI or SSD
- It’s important to figure this out
- If they can’t manage money anyway, SNT probably makes sense regardless of what benefits they get

- It's important to ask about these issues when meeting with clients for estate planning (is anyone in the family disabled?), personal injury or divorce (is the person getting Medicaid?), etc.

- Another note – there are different terms of art for SNT's
- Sometimes people in NJ refer to first-party SNT's as special needs trusts, and third-party SNT's as supplemental needs trusts
- No official terminology

- Finally, timing of SNT
- For first-party SNT, when should it be done?
- As early as possible
- Money counts towards person's eligibility limit once it's available to the person
- Available means it can be used to pay for food or shelter

- If the money is sitting in an attorney's trust account, available for the client to pick up at any time, the money is available to the client, regardless of whether the client actually picks it up
- Best practice is to set up first-party SNT before settlement is finalized, and pay money directly from attorney to trustee

- Thank you!
- Questions?
- Mark R. Friedman – 908-391-8959
- www.SpecialNeedsNJ.com

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BASICS OF TRUSTS AND THEN SOME...

1

WHAT ARE TRUSTS

1. DEFINITION
2. PARTIES
3. TYPES OF TRUSTS

TRUSTS - DEFINITION

"A Trust Is A Right In A Property (Real Or Personal) That Is Held In A Fiduciary Relationship By One Party For The Benefit Of Another. The Trustee Is The One Who Holds Title To The Trust Property And The Beneficiary Is The Person Who Receives The Benefits Of The Trust"

SEE Cornell LII, estates and trusts, *https://www.law.cornell.edu/wex/estates_and_trusts#:~:text=generally%2c%20a%20trust%20is%20a,the%20benefits%20of%20the%20trust.*

PARTIES

- GRANTOR/SETTLOR/TRUSTOR
- TRUSTEE
- BENEFICIARIES

TYPES OF TRUSTS

GRANTOR TRUSTS vs. NON-GRANTOR TRUSTS

- INTENTIONALY DEFECTIVE GRANTOR TRUSTS
- SIMPLE OR COMPLEX

TYPES OF TRUSTS (cont'd)

TESTAMENTARY vs. LIVING TRUSTS

(a) LIVING TRUSTS CAN BE REVOCABLE OR IRREVOCABLE

(b) TESTAMENTARY TRUSTS ARE ALMOST ALWAYS IRREVOCABLE

TYPES OF TESTAMENTARY TRUSTS

FOR SPOUSES

QTIP OR REVERSE QTIP TRUSTS

CREDIT SHELTER TRUSTS

QDOTs

TYPES OF TESTAMENTARY TRUSTS (cont'd)

FOR NON-SPOUSAL BENEFICIARIES

STAGGERED TRUSTS

LIFETIME OR DYNASTY TRUSTS

SPECIAL NEEDS TRUSTS

QTIP TRUSTs (TESTAMENTARY TRUSTs)

- QUALIFIED TERMINAL INTEREST PROPERTY TRUSTs
  - Assets Pass into a trust for the benefit of surviving spouse (SS) upon death of one spouse
  - SS has right to all income each year
  - Principal for Health, Education, Maintenance and Support (HEMS) Standard
  - 5 * 5 Power
  - SS may serve as the sole Trustee
  - Marital Deduction Protection

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TYPES OF LIVING TRUSTS

REVOCABLE

WILL SUBSTITUTE/ALTER EGO

INDIVIDUAL vs JOINT

TYPES OF LIVING TRUSTS (cont'd)

- **IRREVOCABLE**
  - IRREVOCABLE LIFE INSURANCE TRUSTS (ILITS)
  - SPOUSAL ACCESS TRUSTS (SLATS)
  - GRANTOR RETAINED ANNUITY TRUSTS (GRATS)
  - CHARITABLE TRUSTS (CRTS, CLATS, CRUTS AND CRATS)
  - MEDICAID ASSET PROTECTION TRUSTS
  - SPECIAL NEEDS TRUSTS

SLATs (IRREVOCABLE LIVING TRUSTs)

- SPOUSAL ACCESS TRUSTs
  - Set up by one spouse for the benefit of the other
  - Grantor Spouse gifts assets belonging only to him or her
    - **Be careful of the Step Transaction Doctrine**

SLATs (cont'd)

- Spouse may serve as the sole Trustee; but better protection with Independent Co-Trustee
- Bypasses both estates upon death thereby minimizing estate tax burden
- Spouses can set up one for each other
  - **Be careful of the Reciprocal Trust Doctrine**

MAPTs (IRREVOCABLE LIVING TRUSTs)

- MEDICAID ASSET PROTECTION TRUSTs (FOR THE HOME OR OTHER ASSETS)
  - Established by Grantor(s) who is planning for Medicaid eligibility down the road (at least 5 years)
  - Drafted properly, a home should escape Medicaid recovery (after 5 years)
  - Drafted properly, assets may be pulled back into the estate upon death to get the step up in basis benefit

MAPTs (cont'd)

- Grantor(s) can never receive any benefit (income or principal) from the trust assets
- Grantor(s) can never serve as Trustee(s)
- But family members may serve as Trustees

WHO IS THE RIGHT CANDIDATE FOR TRUST PLANNING

- Testamentary Trusts – anyone looking for asset protection for their children
- Revocable Living Trusts – slightly more sophisticated assets; prefer ease of administration for their children and smooth transfer of assets without delays

WHO IS THE RIGHT CANDIDATE FOR TRUST PLANNING

- Irrevocable Living Trusts –
  - Those with higher net worths and are planning for the minimization of death taxes upon death
  - Those with sophisticated assets or in litigious professions who may be in need asset protection (for themselves)
  - Those families who have children with special needs
  - Those on the other end of the spectrum who want to protect some of their hard-earned assets from the devastating costs of long term care


Questions?
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Thank You!

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McCarter & English

New Jersey's Trust Code

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August 21, 2024

Origin of New Jersey's Trust Code

- **Uniform Trust Code –** model act adopted by the National Conference of Commissioners on Uniform State Laws (a/k/a the Uniform Law Commission)
- 35 States and the District of Columbia Have Adopted UTC or Version of UTC:
  - Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming
- Legislation for Adoption Proposed – New York
- **New Jersey's Trust Code** – *N.J.S.A.* 3B:31-1 et seq.

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Settlor's Intent

- ***N.J.S.A.* 3B:31-2** - "terms of a trust" means "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding"

- ***N.J.S.A.* 3B:31-5** – terms of trust generally prevail over the provisions of New Jersey's Trust Code, subject to certain exceptions:
  - Trust Code provisions governing formation of a trust
  - Trustee's duty under Trust Code to act in good faith and in accordance with terms of trust
  - Trust Code's requirement that trust be for the benefit of beneficiaries
  - Trust Code's requirement that trust is not contrary to public policy
  - the court's ability to modify a trust in accordance with the Trust Code
  - Trust Code's limitations on exculpatory provisions

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Creation of Trusts

- Mental Capacity required. *N.J.S.A.* 3B:31-19(a)(1)
  - If Revocable – same capacity required to execute a Will (i.e., testamentary capacity). *N.J.S.A.* 3B:31-42. Minimal Standard: testator must understand:
    - (a) property to be disposed,
    - (b) natural objects of bounty,
    - (c) meaning of the business in which she is engaged,
    - (d) the relation of those factors, and
    - (e) the distribution to be made by will. Gellert v. Livingston, 5 N.J. 65, 71 (1950).
- Cannot be product of fraud, duress, or undue influence. *N.J.S.A.* 3B:31-23
- Supplements existing law. *N.J.S.A.* 3B:31-6.

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Creation of Trusts (cont.)

- **"Definite Beneficiaries"** required
  - A beneficiary is definite "if the beneficiary can be ascertained now or in the future, subject to . . . any applicable rule against perpetuities." *N.J.S.A.* 3B:31-19(b).
  - **Exceptions:**
    - Charitable trusts. *N.J.S.A.* 3B:31-19(a)(3)(a).
    - Trusts for care of animals. *N.J.S.A.* 3B:31-19(a)(3)(b).
    - Certain noncharitable trusts as provided under N.J.S.3B:31-25. *N.J.S.A.* 3B:31-19(a)(3)(c).
- **Duties** – a trustee must have duties to perform. *N.J.S.A.* 3B:31-19(a)(4).
- **Sole Trustee Cannot be Sole Beneficiary** - *N.J.S.A.* 3B:31-19(a)(5).

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Types of Trusts Governed by Trust Code

- Types of Trusts:
  - (a) revocable,
  - (b) irrevocable,
  - (c) charitable trusts,
  - (d) noncharitable, and
  - (e) trusts for care of animals (“pet trusts”)

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Types of Trusts Governed by Trust Code (cont.)

- **Charitable Trusts** – "created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purpose the achievement of which is beneficial to the community." *N.J.S.A.* 3B:31-22(a)
  - No specific beneficiary required (exception to general rule). *N.J.S.A.* 3B:31-19(a)(3)(a).
  - Court can select a beneficiary. *N.J.S.A.* 3B:31-22(b)
  - **Standing to Enforce Terms** (*N.J.S.A.* 3B:31-22(c)):
    - beneficiaries
    - Attorney General
    - settlor
    - "other persons with standing"

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Types of Trusts Governed by Trust Code (cont.)

- **"Noncharitable Trust Without Ascertainable Beneficiary"** (*N.J.S.A.* 3B:31-25):
  - Such trusts may be created for either"
    - (a) a valid noncharitable purpose; or
    - (b) a valid noncharitable purpose to be selected by the trustee
  - Example: trust for care of cemetery plot
  - **Standing to Enforce Trust Terms** (*N.J.S.A.* 3B:31-25(b)):
    - Settlor
    - Person appointed under trust
    - Person appointed by the court

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Trustee Duties

- **Duty of Disclosure** –
  - **New Specific Obligations:**
    - **Reasonably Informed** - keep "qualified beneficiaries" reasonably informed about administration and provide them materials facts needed to protect their interests. *N.J.S.A.* 3B:31-67(a).
    - **Respond "promptly"** to beneficiary's request for information. *N.J.S.A.* 3B:31-67(a).
    - **Produce** copy of trust instrument to any beneficiary who requests it. *N.J.S.A.* 3B:31-67(b).
  - **General Five Year Statute of Limitations** – claims of breach of trust generally subject to a 5 year SOL running from date of first to occur of:
    - (1) "the removal, resignation, or death of the trustee;"
    - (2) "the termination of the beneficiary's interest in the trust"; or
    - (3) "the termination of the trust." *N.J.S.A.* 3B:31-74(c).
  - **Shortened Six Month Statute of Limitations** – a trustee can benefit from a shortened 6 month SOL if trustee provides beneficiary a report that:
    - (1) "adequately disclosed the existence of a potential claim for breach of trust" (*N.J.S.A.* 3B:31-74(a)); and
      - Adequate Disclosure = "sufficient information so that the beneficiary or a representative knows of the potential claim or should have inquired into its existence." *N.J.S.A.* 3B:31-74(b).
    - (2) "informed the beneficiary of the time allowed for commencing a proceeding." *N.J.S.A.* 3B:31-74(a).

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Trustee Duties (cont.)

- **Duty of Loyalty** –
  - **Voidable Transaction** – a transaction is voidable by a beneficiary if the transaction:
    - (a) benefits the trustee; or
    - (b) is affected by a conflict between trustee's fiduciary and personal interests. *N.J.S.A.* 3B:31-55(b).
  - **Exceptions** (*N.J.S.A.* 3B:31-55(b)):
    - transaction authorized by trust terms,
    - transaction approved by court,
    - a claim challenging transaction time-barred,
    - the beneficiary consented, ratified the transaction, or released trustee, or
    - transaction was performed before the individual or entity became trustee

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Trustee Duties (cont.)

- **Duty to Prudently Invest & Manage Trust Assets** – Prudent Investor Act (*N.J.S.A.* 3B:20-11.1, et seq.) – existed before adoption of Trust Code:
  - in investing & managing trust assets, trustee must consider purposes, terms, distribution requirements, and other circumstances of the trust
  - Trustee must always exercise reasonable care, skill, and caution in managing trust assets. *N.J.S.A.* 3B:20-11.3(a).
    - Generally means diversification
  - **Default Act** – trust instrument can provide that trustee governed by other standards
  - **Exculpatory Provisions** – can exculpate trustee
    - **Trust Code's Exception** – trust instrument cannot exculpate trustee for acting;
      - (a) in bad faith; or
      - (b) with indifference of the trust terms or a beneficiary's interests. *N.J.S.A.* 3B:31-77(a).
  - Delegation

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Trustee Duties (cont.)

- **Duty to Prudently Invest & Manage Trust Assets** – Prudent Investor Act (*N.J.S.A.* 3B:20-11.1, et seq.) –
  - Delegation –
    - Under PIA, trustee can delegate investment or management functions, but must exercise reasonable care, skill and caution in:
      - (a) selecting agent,
      - (b) establishing scope of agency, and
      - (c) periodically reviewing agent's actions. *N.J.S.A.* 3B:20-11.10(a).
    - Similar requirements under Trust Code - trustee must:
      - (a) participate prudently in selecting an agent,
      - (b) define in writing the scope of delegation, and
      - (c) periodically review the agent's actions. *N.J.S.A.* 3B:31-60(b).

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Trustee Duties (cont.)

- **Duty of Impartiality** – applies if more than one beneficiary:
  - Trustee must act impartially when dealing with each beneficiary's respective interest. *N.J.S.A.* 3B:31-56.
  - Duty applies when:
    - investing;
    - managing assets; and
    - making distributions

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Beneficiaries

- Trust must be established "for the benefit of its beneficiaries." *N.J.S.A.* 3B:31-21.

- **Who is deemed a "Beneficiary"?**
  - (a) any person with a present, future, vested, or contingent interest in the trust.
  - **(b) holder of a power of appointment**
  - (c) "the owner of an interest by assignment or other transfer," and
  - (d) in the case of a charitable trust, "any person who is entitled to enforce the trust." *N.J.S.A.* 3B:31-3.

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Beneficiaries (cont.)

- **"Qualified Beneficiaries"**
  - New Concept
  - **Definition** – "a beneficiary who, on the date the beneficiary's qualification is determined:
  - (1) is a distributee or permissible distributee of trust income or principal;
  - (2) would be a distributee or permissible distributee of trust income or principal if the interests of those current distributees were to terminate; or
  - (3) would be a distributee or permissible distributee of trust income or principal if the trust terminated.
  - **Why significant?** Under Trust Code, there are scenarios in which trustee must notify "qualified beneficiaries" of certain issues that might arise.

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Beneficiaries (cont.)

- **Notice Requirements** – if a statute requires notice to "qualified beneficiaries" such notice must be given to:
  - the "qualified beneficiaries";
  - "any other beneficiary who has sent the trustee a request for notice";
  - a charitable organization designated to receive distributions;
  - one appointed to enforce a trust established for the care of an animal;
  - one appointed to enforce a trust established for another noncharitable purpose; and
  - Attorney General (in the case of a charitable trust). *N.J.S.A.* 3B:31-10.

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Beneficiaries (cont.)

- **When Notice Required for "Qualified Beneficiaries" and Others:**
  - change of the principal place of administration of the trust (*N.J.S.A.* 3B:31-8(d));
  - termination of an uneconomic trust (*N.J.S.A.* 3B:31-30(a)); and
  - must be kept reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests (*N.J.S.A.* 3B:31-67(a))
- **Authority of "Qualified Beneficiaries:**
  - **Appoint Successor Trustee of Noncharitable Trust** – if vacancy, but no successor named and no procedure to name a successor, "qualified beneficiaries" can appoint successor by unanimous agreement. *N.J.S.A.* 3B:31-49(c).

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Beneficiaries (cont.)

- **Representation**
  - Trust Code adopts many of the virtual representation principles contained in Rule 4:26-3.
  - **Horizontal Virtual Representation** – *N.J.S.A.* 3B:31-16 authorizes one to represent a minor or incapacitated person who has a "substantially identical interest." (Similar to Rule 4:26-3(c).)
  - **Vertical Virtual Representation** – Rule 4:26-3(a)
  - **Holder of Power of Appointment** – holder of a general testamentary power of appointment can bind "persons whose interests, as permissible appointees, takers in default, or otherwise are subject to the power." *N.J.S.A.* 3B:31-14(a). (Similar to Rule 4:26-3(b)).
  - **Guardian of the Property** – *N.J.S.A.* 3B:31-15(a)
  - **Guardian of the Person** – *N.J.S.A.* 3B:31-15(b)
  - **Parent** – *N.J.S.A.* 3B:31-15(f) (if no guardian has been appointed)
  - **Agent Under a Power of Attorney** – *N.J.S.A.* 3B:31-15(c)
  - **Trustee** – can bind beneficiaries – *N.J.S.A.* 3B:31-15(d)
  - **Personal Representative** – can bind those interested in estate. *N.J.S.A.* 3B:31-15(e)
  - No conflict of interest – *N.J.S.A.* 3B:31-15

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Directed Trusts

- **Roles:**
  - **Beneficiary**
  - **Directed Trustee**
  - **Trust Director**
- **Two Statutes:**
  - **"Powers to Direct" Statute** – *N.J.S.A.* 3B:31-61
    - Governs powers to direct a variety of trustee actions
    - Based on UTC 808.
  - **"Powers to Direct Investment Functions"** – *N.J.S.A.* 3B:31-62
    - Governs powers to direct trust investments only
    - Based on Delaware's Directed Trust statute – 12 Del. Code 3313.

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Nonjudicial Settlement Agreements

- **Purpose:** address certain trust administration matters while avoiding court proceeding in the process. *N.J.S.A.* 3B:31-11.
- **Matters That Can Be Addressed:** "any matter involving a trust." *N.J.S.A.* 3B:31-11(b). This includes, but is not limited to, the following:
  - the interpretation or construction of the terms of the trust;
  - the approval of a trustee's report or accounting;
  - direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
  - the resignation or appointment of a trustee and the determination of a trustee's compensation;
  - transfer of a trust's principal place of administration; and
  - liability of a trustee for an action relating to the trust. *N.J.S.A.* 3B:31-11(d).

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Nonjudicial Settlement Agreements (cont.)

- **Limitations on Nonjudicial Settlement Agreements:**
  - Cannot violate a "material purpose of the trust." *N.J.S.A.* 3B:31-11(c).
  - Agreement must include "terms and conditions that could be properly approved by the court under [the Trust Code] or other applicable law. *N.J.S.A.* 3B:31-11(c).
  - Agreement cannot "be used to produce a result that is contrary to other sections of Title 3B of the New Jersey Statutes, including, but not limited to, terminating or modifying a trust in an impermissible manner." *N.J.S.A.* 3B:31-11(f).
- **Who Must Enter the Agreement?**
  - All "Interested Persons" – "persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court." *N.J.S.A.* 3B:31-11(a)-(b).

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Modification or Termination of Trusts

- **Noncharitable Trust** – may be modified through one of the following methods:
  - Agreement of trustee and all beneficiaries. *N.J.S.A.* 3B:31-27(a).
    - Cannot be inconsistent with material purpose of trust.
  - Consent of all beneficiaries (without consent of the trustee), but with court approval. *N.J.S.A.* 3B:31-27(a).
    - This approach can be used to (a) modify the trust or (b) terminate the trust.
    - Modification cannot be inconsistent with material purpose of trust. *N.J.S.A.* 3B:31-27(b).
    - Termination permitted only if continuation "not necessary to achieve any material purpose of the trust." *N.J.S.A.* 3B:31-27(b).
  - Consent of one or more beneficiaries (without consent of every beneficiary), but with court approval. *N.J.S.A.* 3B:31-27(e).
    - This approach can be used to (a) modify the trust or (b) terminate the trust.
    - **Requirement:** Court must be satisfied that
      - "If all of the beneficiaries had consented, the trust could have been modified or terminated under this section"; and
      - "the interests of a beneficiary who does not consent will be adequately protected." *N.J.S.A.* 3B:31-27(e).

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Modification or Termination of Trusts (cont.)

- **Charitable Trust** –
  - **Cy Pres Doctrine** – codified under *N.J.S.A.* 3B:31-29. Modification or termination permitted if charitable trust becomes:
    - Unlawful;
    - Impracticable;
    - Impossible to achieve; or
    - Wasteful. *N.J.S.A.* 3B:31-29(a).
  - Court must direct "that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes." *N.J.S.A.* 3B:31-29(a).

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Modification or Termination of Trusts (cont.)

- **Charitable or Noncharitable Trust**
  - **Equitable Deviation Doctrine** – codified under *N.J.S.A.* 3B:31-28.
    - Court can modify or terminate "if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust." *N.J.S.A.* 3B:31-28(a).
      - **Requirement:** modification or termination must be consistent with settlor's probable intent. *N.J.S.A.* 3B:31-28(a).
    - In addition, the court may modify the administrative terms "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." *N.J.S.A.* 3B:31-28(b).
  - Modification to Achieve Tax Objectives. *N.J.S.A.* 3B:31-33
  - Termination of Uneconomical Trust – (i.e., under $100,000 in value) *N.J.S.A.* 3B:31-30

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Thank You

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Avoiding Affidavit of Merit Pitfalls

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Avoiding Affidavit of Merit Pitfalls & AOM Update

"In the early stages of a medical malpractice action, a plaintiff must provide an affidavit from an equivalently credentialed physician attesting 'that there exists a reasonable probability that the' defendant physician's treatment 'fell outside acceptable professional' standards." Buck v. Henry, 207 N.J. 377, 382 (2011) (quoting N.J.S.A. 2A:53A-27). "Under the [AMS], the failure to file an ppropriate affidavit within the statutory time limits may result in dismissal of even meritorious cases." Ibid. (internal citation omitted). Scaggs v. Wishnie, DPM, A-3718-22 (App. Div. 2023)

In accordance with N.J.S.A. 2A:53A-28, a plaintiff may be exempt from providing an AOM by certifying it could not be provided because defendants failed to satisfy a medical records request. See also Aster ex rel. Garofalo v. Shoreline Behav. Health, 346 N.J. Super. 536, 545-46 (App. Div. 2002). A certification may be presented at the Ferreira conference, which was purposely created to "remind the parties of the sanctions that will be imposed if they do not fulfill their [AOM] obligations." Ferreira, 178 N.J. at 147.

The Affidavit of Merit statute, N.J.S.A. 2A:53A-27, is a tort reform measure designed to weed out frivolous lawsuits by requiring "a plaintiff in a medical malpractice case to make a threshold showing that the claims asserted are meritorious." Galik v. Clara Maas Med. Ctr., 167 N.J. 341, 350 (2001); Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J. Super 1, 14 (App. Div. 2010); Cornblatt v. Barow, 153 N.J. 218, 242 (1998).

Specifically, the statute provides that:

> In any action for damages for personal injuries...resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside the acceptable professional or occupational standards or treatment practices." N.J.S.A. 2A:53A-27.

Significantly, the law explicitly specifies 16 licensed professions entitled to its protection: (1) accountants, (2) architects, (3) attorneys, (4) dentists, (5) engineers, (6) medical doctors, (7) podiatrists, (8) chiropractors, (9) registered nurses, (10) health care facilities, (11) physical therapists, (12) land surveyor, (13) registered pharmacists, (14)veterinarians, (15) insurance producers, and (16) certified midwives. N.J.S.A. 2A:53-A-26.

Pitfall Areas & Recent Case Law

(1) **Not Having Records**: In accordance with N.J.S.A. 2A:53A-28, a plaintiff may be exempt from providing an AOM by certifying it could not be provided because defendants failed to satisfy a medical records request. See also Aster ex rel. Garofalo v. Shoreline Behav. Health, 346 N.J. Super. 536,

545-46 (App. Div. 2002). A certification may be presented at the Ferreira conference, which was purposely created to "remind the parties of the sanctions that will be imposed if they do not fulfill their [AOM] obligations." Ferreira, 178 N.J. at 147. Scaggs v. Wishnie, DPM, A-3718-22 (App. Div. 2023).

Plaintiff Tracy Scaggs sued defendants Peter A. Wishnie, D.P.M., Christina Sawires, D.P.M, and Family Foot and Ankle Specialists, LLC. alleging medical malpractice related to surgery on her infected toe. The same day suit was filed, plaintiff's counsel mailed a request for medical records to defendants stating: "[P]lease provide a complete, certified copy of all records pertaining to Tracy Scaggs. Please include typed transcription of any handwritten notes. A signed medical authorization is enclosed. Please note these records are necessary in the preparation of an [a]ffidavit of [m]erit [(AOM)]."

When defendants failed to provide the medical records within forty-five days, plaintiff filed a motion to waive the statutory requirement that she file an AOM because she was unable to do so without the records. See N.J.S.A. 2A:53A-28. Fourteen days after the motion was filed, and prior to the adjourned oral argument date of March 31, 2023, defendants provided plaintiff her medical records.

The day plaintiff's motion was argued, defendants filed a motion to dismiss plaintiff's complaint for failure to supply an AOM within 120 days of defendants' answer per the Affidavit of Merit Statute (AMS), N.J.S.A. 2A:53A26 to -29. At argument, the motion judge requested supplemental briefing on the waiver motion as well as the motion to dismiss, which was returnable a month later. The judge advised the parties the motions would be heard together. About two weeks before the motions' argument, plaintiff served an AOM on defendants at a Ferreira conference.

At the motions' oral argument, plaintiff contended the AOM should be waived because she certified defendants failed to comply with the AMS by timely providing her the medical records needed to prepare an AOM.

Defendants opposed, asserting "plaintiff failed to identify with any specificity what medical records were required to be produced necessary for the preparation of the [AOM]" or "demonstrate that the records requested had a substantial bearing on [the] preparation of the affidavit."

In accordance with N.J.S.A. 2A:53A-28, a plaintiff may be exempt from providing an AOM by certifying it could not be provided because defendants failed to satisfy a medical records request. See also Aster ex rel. Garofalo v. Shoreline Behav. Health, 346 N.J. Super. 536, 545-46 (App. Div. 2002). A certification may be presented at the Ferreira conference, which was purposely created to "remind the parties of the sanctions that will be imposed if they do not fulfill their [AOM] obligations." Ferreira, 178 N.J. at 147.

(2) **Expert Having the Correct Experience**:

Under 2A:53A-27:

> 2.In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

> In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c.17 (C.2A:53A-41). In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice to the general area or specialty involved in the action for a period of at least five years**.** The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

A perceived challenge can arise, however, if utilizing the Hill Int'l, inc. v. Atl.City Bd. Of Educ., 438 N.J. Super. 562, 588 (App. Div. 2014), which incorrectly states that:

> Assuming the affiant is such a like-licensed professional, the affiant must also satisfy the additional criteria of N.J.S.A. 2A:53A–27, requiring that the affiant have "particular expertise in the general area or specialty involved in the action," which can be established either by board certification or the affiant's devotion of a substantial amount of his or her practice to that relevant general area or specialty within the past five years. N.J.S.A. 2A:53A-27. An affiant's satisfaction of the "particular expertise" requirement in Section 27 does not eliminate the need for the affiant to possess the same category of professional license as the defendant who has been sued. The "particular expertise" requirement is an additional, not an alternative, essential qualification.

Before utilizing an expert to review for merit and sign an Affidavit of Merit it is essential to review their credentials and the timing of those credentials. This has created an additional concern in the context of nursing homes.

Our Courts have consistently held that only those licensed professions listed within the statute are entitled to an Affidavit of Merit, and the legislature unequivocally did not include licensed nursing home administrators in the statute's enumeration of the protected licensed professionals. Accordingly, a health care facility, as an enumerated professional under the AOM statute, while entitled to an AOM, does not require one from a licensed nursing home administrator – an occupation not contemplated in the AOM statute.

The Supreme Court reiterated this very point in Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc., 250 N.J. 368 (2022). The Supreme Court held that a plaintiff need not submit an AOM in support of vicarious liability claims against a hospital based on the alleged negligent conduct of a hospital employee who is not a "licensed person" under the AOM statute. Id. at 383-84. The plaintiff in Haviland alleged that a radiology technician had negligently performed a post-surgery imaging exam resulting in injury to plaintiff's shoulder that eventually required surgery. Id. at 373. The Court held that an AOM was not necessary because the alleged malpractice was committed by a radiology technician who is not a "licensed person" under N.J.S.A. 2A:53A-26. Id. at 383-84. In reaching that holding, the Supreme Court recognized that a "licensed person" as defined in the AOM statute is expressly limited to certain professionals. The Court declined to expand the definition of "licensed person" beyond the "carefully circumscribed list of professions to which the Legislature has elected to apply the AOM requirement." Id. 383.

Furthermore, applying the holding in Haviland, the Appellate Division held that a plaintiff did not have to serve an AOM on the defendant hospital for vicarious liability by a licensed practical nurse

("LPN") because LPNs, unlike registered nurses, are not included in the AOM statute. Gilligan v. Junod, 2022 N.J. Super. LEXIS 134 (App. Div. Nov. 9, 2022).

As defined by the statute, a health care facility is a: Facility or institution… engaged primarily in providing services for…diagnosis, or treatment of human disease, but not limited to, a general hospital, special hospital, mental hospital, public health center, diagnostic center, treatment center, rehabilitation center, extended care facility, skilled nursing home. N.J.S.A. 26:2H-2(a).

Where a deviation of the licensed professional's standard of care is alleged, plaintiff's expert is required to have expertise in the general area of the underlying negligence lawsuit. Herein, the underlying negligence involves the grossly negligent nursing care provided by the facility staff. Accordingly, at its essence, health care facilities are corporations that possess the skill and expertise to provide direct skilled nursing expertise to patients for diagnosing and treatment of medical conditions. As such, there is nothing in the definition of "Health Care Facility" that is applicable to an administrator. A nursing home administrator is not an equivalent to a health care facility and cannot be the individual required under the Affidavit of Merit statute to provide an Affidavit of Merit against such an entity. Moreover, an AOM from a physician would not be appropriate to support claims involving nursing negligence in a nursing home. For instance, in Freeman v. Clara Maass Center; et al., Docket # ESX-L-1765-18, the Honorable Keith Lynott J.S.C. determined a wound care nurse who had significant supervisory experience, but was not a licensed hospital administrator, was qualified to render direct liability against the hospital holding:

> "[T]he Court concludes that there is no provision that the affiant must be or have been a hospital administrator in order to direct a claim of negligence as to hiring, training, supervision or maintaining of nursing staff or implementation at the facility level of nursing procedures relating to wound care. Here again, the Defendants have not cited controlling legal authority to the contrary." Id.

Judge Lynott further held that the expert nurse's supervisory experience and training satisfied AOM Statute as she demonstrated a "particular expertise in the general area or specialty involved in the action" established by N.J.S.A. 2A:53A-27. Id. Judge Lynott aptly found:

> "Nothing more is exigible of the Plaintiff to meet the AOM requirement in this context. Nurse Decker's CV and Certifications establish experience in training, supervision, and monitoring of nursing staff and in assessing, implementing and ensuing compliance with applicable nursing policies and procedures. That she is not and has not been a full-time administrator does not disqualify her from rendering an AOM. Her AOM satisfies the statutory intendment of demonstrating that the Plaintiff's claims – including the direct claims against the medical facilities - are not frivolous." Id.

Likewise, in Finley v. Woodcliff Lake Manor Health & Rehabilitation Center, LLC, et al., Docket # BER-L-510-22, Judge Padovano recently held that a nurse expert, who had adequate supervisory experience, but was not a licensed nursing home administrator, was qualified to render direct claims against a nursing home in a nursing negligence action.

Accordingly, Trial Courts are consistently, and correctly, holding that healthcare facilities, including nursing homes, do not require the plaintiff to serve an affidavit of merit from a licensed administrator to support direct claims against the facility.

Further, on this topic, the "affidavit of merit must be supplied by a similarly licensed professional to the licensed professionals who were charged with Lowe's care." McCormick v. State, 446 N.J. Super.

603, 610 (App. Div. 2016). In a vicarious liability matter, the professional who provides the affidavit of merit might not match the employer's professional license. Id. 615 (App. Div. 2016) (citing Borough of Berlin v. Remington & Vernick Engineers, 337 N.J. Super. 590 (App.Div.), certif. denied, 168 N.J. 294 (2001)).

New Jersey clearly stated: "the enhanced credential requirements established under section 41 for those submitting affidavits of merit and expert testimony apply only to physicians in medical malpractice actions." Meehan v. Antonellis, 226 N.J. 216, 234–35 (2016) (citing Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522 (2004) (instructing that court applies statute as written when legislative intent is clear (citing In re Passaic Cty. Utils. Auth., 164 N.J. 270, 299 (2000))). Therefore, as long as the affiant is "licensed in this state or another and have 'particular expertise in the general area or specialty involved in the action[,]'" the affidavit of merit complies with N.J.S.A. 2A:53A–27. Id. at 237. This Court further explained that if "the alleged departure of professional standard of care is within the particular expertise of two licensed professions," then the Court must focus on "the specific allegations of professional negligence," to determine whether the affidavit of merit satisfies the requirement. Meehan, 226 N.J. at 238 (citing Berlin, 337 N.J. Super. at 596-98; Garden Howe Urban Renewal Assocs. V. HACBM Architects Eng'rs Planners, L.L.C., 439 N.J. Super. 446, 458-59 (App. Div. 2015)).

(3) **Who is Named in the AOM**:

In the recent decision Rosetta Hargett, etc. vs. Hamilton Park OPCO LLC, et al. A-2036-22, a question as to who needs to be named in the AOM is still unsettled. In this medical malpractice action, plaintiff, as administratrix ad prosequendum for the estate of decedent, sued a nursing facility and a hospital alleging negligent care that resulted in pressure wounds and, ultimately, decedent's physical decline and death. Plaintiff asserted direct claims of administrative negligence against both facilities as well as claims based on vicarious liability for nursing malpractice.

Plaintiff served a single affidavit of merit executed by a registered nurse who opined that the nursing home, the hospital, and members of their nursing and nursing administrative staff deviated from the applicable standards of care. The AOM did not distinguish between the nursing staff at the separate facilities and did not name any individual nurses.

The trial court conducted two Ferreira conferences. Defendants objected to the AOM because the nurse who executed it was not qualified to render an opinion as to direct administrative negligence claims against the facilities and the AOM did not identify any individual nurses for whom the facilities could be held vicariously liable.

Plaintiff did not seek to conduct any pre-AOM discovery and declined the opportunity to serve a supplemental AOM. Defendants moved to dismiss for failure to serve an appropriate AOM, and the trial court dismissed the complaint on that basis. Plaintiff subsequently settled her claims against the hospital. On appeal, plaintiff abandoned her direct administrative negligence claim against the nursing home and proceeded based only on vicarious liability.

The court affirmed, concluding the AOM was not sufficient to support plaintiff's vicarious liability claim because it indiscriminately combined the nursing staffs of two separate facilities and did not identify any individual nurses. The court also concluded plaintiff's claim was in essence an administrative negligence claim because it was based on the nursing home's systemic failure to provide adequate care rather than a claim based on the negligence of any individual nurses.

Generally, an AOM should identify the licensed person who allegedly deviated from the acceptable standard of care. Medeiros v. O'Donnell & Naccarto, Inc., 347 N.J. Super. 536, 542, 790 A.2d 969 (App. Div. 2002). That is not to say an AOM must always name the licensed person who is the subject of a vicarious liability claim. A number of decisions considered and accepted an AOM that did not identify the licensed person by name. In each case, however, it was possible to identify by the description within the AOM the licensed person or entity alleged to have deviated from the applicable standard of care. *See,et.g., ibid.* (AOM referred to engineers and there was only one engineering firm). Fink, 167 N.J. at 551 (doctor who discontinued certain medication was identifiable).

In Hargett, there were multiple facilities sued that included a nursing home and hospital, which the Court discerned was an issue when it came to the sole AOM served.

> "Here, it is not possible to identify any Alaris Health nurses who Kotz asserts were negligent because the AOM refers generally to the entire Alaris Health nursing staff over an extended period and indiscriminately combines the nursing staffs of two separate facilities. Appellant did not satisfy her obligation as to Alaris Health by serving an AOM that opines collectively as to the care provided by its nurses and the nurses at Jersey City Medical Center. **Appellant was required to "provide each defendant" with an appropriate AOM and failed to do so.**
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> By serving one AOM that included all of the nurses at Alaris Health and Jersey City Medical Center, appellant deprived Alaris Health of its right to an appropriate AOM and effectively thwarted the purpose of the AOM statute to weed out frivolous lawsuits.

It is also important to note that under recent case law, the New Jersey Appellate Division has also stated that a Licensed Practical Nurse (LPN) was not a "licensed person" as defined in and covered by the AOM Statute. Gilligan v. Junod, A-1907-21, 2022 N.J. (Super. Ct. App. Div. Nov 9, 2022). Accordingly, the Court concluded that an AOM was not required to pursue a claim of professional negligence against an LPN.

Similarly, Certified Nursing Assistants (CNA's), Emergency Medical Technicians (EMTs) and paramedics, are also not covered by the AOM Statute.

(4) ***Ferreira* Conferences**.

Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003) was a matter in which Plaintiff's counsel, while not conforming with the exact timeframe criteria of the AOM statute for serving of an AOM, Plaintiff's counsel "complied with the underlying purpose of the statute by having an expert verify the meritorious nature of the claim at an early stage of the case." Defendants were estopped from claiming dismissal based on their failure to request the affidavit between filing the answer and the end of the 120 day statutory period and failure to file their motion to dismiss until after the receipt of the affidavit.

In review of the purpose of the statute, the Court stated that "the statute was not intended to encourage gamesmanship or a slavish adherence to form over substance. The statute was not intended to reward defendants who wait for a default before requesting that the plaintiff turn over the affidavit of merit." However, the Court also warned that if the doctrines of substantial compliance and extraordinary circumstances do not apply, Plaintiffs should expert the complaint will be dismissed with prejudice. Id.

"To ensure that discovery related issues, such as compliance with the Affidavit of Merit statute, do not become sideshows to the primary purpose of the civil justice system, to shepherd legitimate claims expeditiously to trial, the Court proposes that an accelerated case management conference be held within ninety days of the service of an answer in all malpractice actions. **At the conference, the court will address all discovery issues, including whether an Affidavit of Merit has been served on Defendant. If an Affidavit has been served, defendant will be required to advise the court whether he or she has an objections to the adequacy of the affidavit. If there is any deficiency in the affidavit, plaintiff will have to the end of the 120-day time period to conform the affidavit to the statutory requirements.** Id.

The Ferreira conference was created "to staunch the flow of dismissal motions based on claims of non-compliance with the statute." Buck v. Henry, 207 N.J. 377, 382 (2011) (citing Ferreira, supra, 178 N.J. at 154–55). The Court explained "'a case management conference be held within ninety days of the service of an answer' at which the professional defendant would raise 'any objections to the adequacy of the affidavit' served by the plaintiff." Buck, 208 N.J. at 382 (citing Ferreira, supra, 178 N.J. at 154–55).

"The Ferreira conference was designed to be the Judiciary's key tool to promote satisfaction of the AMS's salutary policy goals." A.T. v. Cohen, 231 N.J. 337, 346, 175 A.3d 932, 937 (2017). This Court held the conference was mandated and required. Id. This Court further held the mandated conference "imposed requirements on both courts and defendants to discover and address issues as to the sufficiency of a plaintiff's AOM." Id. (citing Ferreira, 178 N.J. at 155).

The Court noted that "if the [trial] court determined that an affidavit was deficient, then the plaintiff would 'have to the end of the 120–day time period to conform the affidavit to the statutory requirements.'" Buck, 208 N.J. at 382 (citing Ferreira, supra, 178 N.J. at 55). Important to the case at bar, the Court further stated, "If no affidavit has been served, the court will remind the parties of their obligations under the statute and case law." Meehan v. Antonellis, 226 N.J. 216, 229 (2016)(quoting Ferreira, supra, 178 N.J. at 155). The Court theorized "an ounce of prevention is worth a pound of cure." Buck, 208 N.J. at 382 (citing Ferreira, supra, 178 N.J. at 147).

The Court further explained the purpose to the requirement is to weed out frivolous claims and "not to create hidden pitfalls for meritorious ones." Buck v. Henry, 207 N.J. 377, 383 (2011). The Court further noted that issues with the affidavit of merit should be resolved at a conference rather than on a motion for summary judgment. Id.

When the Ferreira conference objectives have not been met, this Court has reversed a dismissal with prejudice and reinstated the claim. Meehan v. Antonellis, 226 N.J. 216, 221 (2016) (holding "the Ferreira conference failed to accomplish one of its primary functions, that is, determining whether the treatment provided by the professional defendant involved the defendant's specialty"). In Meehan, the plaintiff had not submitted an affidavit of merit by the time the Ferreira conference was held. Id. at 222. In fact, the Court noted, at the Ferreira conference, "Plaintiff stated that he was familiar with the affidavit of merit requirement but requested the court 'to explain [the requirement], just to make sure there is no misunderstanding[.]'" Meehan, 226 N.J. at 222.

Unfortunately, despite filing the matter under the proper malpractice coding, there is concern as the scheduling of the Ferreira conference does not always occur. Under the recent decision, Estate of Towle v. Hudson County No. A-279-22, a medical malpractice/wrongful death claim was brought against a correctional facility healthcare provider (CFG). Plaintiff failed to serve an Affidavit of Merit of an appropriately licensed person; filing only an AOM of an ER doctor. However, no Ferreira conference was held. Defendants filed a notice of motion to dismiss for failure to supply an Affidavit of Merit on Day 127. Plaintiffs later served additional affidavits from a nurse practitioner, board-certified psychiatrist, and

a board certified internal medicine specialist. The appellate division affirmed that despite the trial court's consideration of the fact that there was no Ferreira conference, that the lack of the conference did not justify the errors by the Plaintiff and no extraordinary circumstances applied. This despite, the NJ Supreme Court stating: "A Ferreira conference must be held within ninety days of service of the answer, at which time the plaintiff's obligations under the AOM statute may be clarified and the court and counsel may address the adequacy of any AOM already obtained." McCormick v. State, 446 N.J. Super. 603, 619 (App. Div. 2016). And further, when multiple errors, including the trial court did not hold a Ferreira conference, the Court has found that "[t]he equities militate in favor of permitting a facially meritorious action to proceed." A.T. v. Cohen, 231 N.J. 337, 340 (2017). This Court noted in A.T. that it had directed a Ferreira conference be held unless waived by the parties. Id. at 341.

However, failure to pay attention to the necessary deadlines can also affect the matter later on, should additional defendants be brought into the matter. Again, even though the Court has not initiated the Ferreira, this does not exonerate the Plaintiff from their duty to timely file an AOM. This was demonstrated in the Levine matter. Levine v. Kindred Hosp. N.J. Morris County, 2019 N.J. Super. Unpub. LEXIS 869 (Apr. 15, 2019).

In Levine, a pro-se plaintiff appealed the trial court's dismissal of the defendant. The trial court had dismissed the defendant because the plaintiff had failed to serve an appropriate affidavit of merit (AOM), as required by the AOM statute, N.J.S.A. 2A:53A-24 to -29. The plaintiff had previously provided the court with three separate AOMs, but the defendant argued that each AOM had been deficient. The trial court and Appellate Division agreed with the defendant. Although the defendant had advised the plaintiff of his/her obligation to cure the deficiencies of the AOMs prior to the expiration date under the statute, the plaintiff failed to do so. Notably, a second *Ferreira* conference was never held, and the Appellate Division made clear in its ruling that "reliance on the scheduling of a *Ferreira* conference to avoid the strictures of the [AOM] statute is entirely unwarranted and will not serve to toll the statutory time frames." *A.T. v. Cohen*, 231 N.J. 337, 348 (2017) (quoting *Paragon Contractors, Inc. v. Peachtree Condo. Ass'n*, 202 N.J. 415, 426 (2010)). Therefore, the failure to hold a second *Ferreira* conference does not toll nor excuse the plaintiff's failure to timely file an appropriate AOM when no exceptional circumstances existed to warrant an extension.

The practical implication of this decision is it now extends to AOMs in the medical malpractice context. If an unsuspecting plaintiff sits on his/her obligation to file and serve an AOM while waiting for the court to hold a *Ferreira* conference, a knowledgeable defendant can file a motion for dismissal, with prejudice, after the relevant time period expires. This tactic is also available to defendants in cases where the plaintiff mistakenly believes the matter is not one arising out of professional malpractice.

However, in the recent decision, Gonzalez v. Ibrahim, A3719-22, extraordinary circumstances for the late filing of an Affidavit of Merit were upheld when a Ferriera conference for a new defendant was not held. In this medical malpractice matter, the matter was filed alleging that a surgeon injected the wrong body part. The surgeon and surgery center were defendants. Trial court found that common knowledge applied and no AOM was due on the matter. Plaintiffs subsequently amended their complaint to add an anesthesiologist, whose negligence was identified in the original complaint. The AOM defense was raised in Defendants' Answer but not in answers to interrogatories referencing all applicable statutes. The Notice to Dismiss was filed after 120 days. Plaintiff immediately served an AOM after the motion was filed but defended the motion on the common knowledge exception. No Ferriera was held.

In Gonzalez, the Court did feel that extraordinary circumstances permitted the late filing of the AOM. Although this Court held the failure to hold a Ferreira conference does not toll the time to file an affidavit of merit, it could be one factor in determining whether extraordinary circumstances apply. A.T. v. Cohen, 231 N.J. 337, 347-48 (2017) (citing Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202

N.J. 415, 419 (2010)). The lack of Ferreira conference combined with "a confluence of factors" may demonstrate extraordinary circumstances "to allow the untimely affidavit to be accepted and to require that the matter proceed on its merits." A.T., 231 N.J. at 348. In A.T., extraordinary circumstances existed because the attorney was inexperienced with malpractice matters, had been confused based upon timelines, filed well within the statute of limitations, and obtained an affidavit of merit within three days of the running of the time period. Id. at 349. This Court stated given all of these factors, "the Judiciary failed to do what this Court expected, namely to act as a backstop" with the scheduling of a Ferreira conference. Id. The Court noted, "The lack of a scheduled Ferreira conference significantly contributed to an almost perfect storm of injustice." A.T. v. Cohen, 231 N.J. 337, 350 (2017).

Extraordinary circumstances has also been found in circumstances where a hospital's failure to provide timely, legible medical records constituted extraordinary circumstances. Barreiro v. Morais, 318 N.J. Super. 461, 471 (App.Div.1999)

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Where There's a Defective Will –

Is There a Way?

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Where There's a Defective Will – Is There a Way?

Tara S. Sinha, Esq.
Witman Stadtmauer, P.A.

New Jersey Will Requirements

Minimum Age to Make a Will	18
Written Document Required	YES
Nuncupative (Oral) Wills	NO
Holographic Wills (Hand-written, unwitnessed)	YES
Number of Witnesses Required	2
Self-Proving Affidavit	Allowed
Statutory Form for Self-Proving Affidavit	YES (N.J.S.A. 3B:3-4, 3B:3-5)

What is a valid Will?

N.J.S.A. 3B:3-2 – A Will shall be:

(1) In writing

(2) Signed by the testator or in the testator's name by another in the testator's conscious presence at the testator's direction

(3) Signed by at least two witnesses within a reasonable time after seeing testator sign or acknowledge signature

A writing that does not comply with all of the above is still valid, whether or not witnessed, if the signature and material portions of the document are in testator's handwriting (holographic Wills)

Self-Proving Wills

- Done at time Will is executed (N.J.S.A. 3B:3-4) or subsequently (N.J.S.A. 3B:3-5).
- Signatures of testator and witnesses are properly notarized.
- If self-proving, Will is admitted to probate without further affidavit, deposition or proof.
- If not self-proving, witnesses are required to appear before Surrogate's Court.

Writings Intended as Wills

3B:3-2. Execution; witnessed wills; writings intended as wills.

a. Except as provided in subsection b. and in N.J.S.3B:3-3, a will shall be:

(1) in writing;

(2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and

(3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.

b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

c. Intent that the document constitutes the testator's will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator's handwriting.

Writings Intended as Wills

- N.J.S.A. 3B:3-3 (emphasis added)

  Although a document or writing added upon a document was not executed in compliance with N.J.S.A. 3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.A. 3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or alteration of the will; or (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

Writings Intended as Wills

- In re Macool, 416 N.J. Super. 298 (App. Div. 2010)
- Interpreted N.J.S.A. 3B:3-3 and held:
  - Writing offered for probate did not have to be signed; and
  - Created a two-part test for determining intent; proponent of the writing had to prove by clear and convincing evidence that –

    (1) Decedent reviewed the document in question

    (2) Thereafter gave his/her assent to it

Writings Intended as Wills

- In re Ehrlich, 427 N.J. Super. 64 (App. Div. 2012)
- Decedent was an experienced trusts and estates attorney that mailed his original Will to his nominated executor; kept a copy in a marked envelope with "Original Mailed to <name><date>"
- Court applied Macool and determined that decedent viewed document and handwritten note was evidence of assent, admitting unsigned copy as decedent's Will

Lost Wills

- In re Schultz's Will, 102 N.J. Eq. 14 (Prerog. 1923) – law is well-settled in NJ that court has jurisdiction to establish a Will that has been lost, stolen, or destroyed without the knowledge of the testator
- Wyckoff v. Wyckoff, 16 N.J. Eq. 401 (Ch. 1863) – Will may be established on satisfactory proof of the destruction of the instrument and of its contents or substance; proof, by one witness or many, must be clear, satisfactory, and convincing

Lost Wills

- If the Will was in testator's possession or testator had ready access to it, there is a presumption that testator destroyed the Will
- Presumption is rebuttable
  - In re Calef's Will, 109 N.J. Eq. 181 (Ch. 1931)
  - Campbell v. Cavanaugh, 96 N.J. Eq. 724 (Ch. 1923)

How to Revoke a Will

- N.J.S.A. 3B:3-13
  - Execution of a subsequent Will
  - Performing a "revocatory act on the Will" with the intent to revoke the Will or any part of it
    - Burning
    - Tearing
    - Obliterating or destroying

Lost Wills

- Burden of proof is upon the proponent to prove the lost, stolen or destroyed will by clear and convincing evidence
- Evidence must prove
  - The contents of the lost Will
  - The execution of the allegedly lost Will
  - The circumstances under which the Will was lost, stolen, or destroyed

In re Roman's Will, 80 N.J. Super. 481 (Hudson Cty. Ct. 1963)

Probate in New Jersey

- Probate in the county where the decedent was domiciled
- Surrogate's office is located in county seat; some counties have satellite offices around the county
- Check local procedure – appointment or walk-in; fact sheet beforehand; in-person or by mail
- Surrogate will not probate a Will until 10 days after date of death – caveat

Probate in New Jersey

- What to bring when probate? Original Will, death certificate, executor's identification, names and addresses of next of kin, payment
- If Will establishes trusts, best to qualify trusts at same time as probate Will – separate trust qualification fee; exception - - disclaimer trust – must disclaim first
- If intestacy – the administrator will have to post a bond based upon the value of the estate – NOTE: N.J.S.A. 3B:15-1(c) – exception if administration is granted to surviving spouse and entire estate pays to spouse

Probate in Superior Court

- Probate is required in Chancery Division, Probate Part where –
  - (a) markings, notations, and/or cross outs have been made to the original Will
  - (b) the original Will has been destroyed
  - (c) the validity of the Will is in dispute
  - (d) a caveat has been filed
  - (e) writing intended as a Will
- All interested parties must receive notice.

Matters in Which the Surrogate's Court Cannot Act

R. 4:82 - Unless specifically authorized by order or judgment of the Superior Court, and then only in accordance with such order or judgment, the Surrogate's Court shall not act in any matter in which (1) a caveat has been filed with it before the entry of its judgment; (2) a doubt arises on the face of a will or a will has been lost or destroyed; (3) the application is to admit to probate a writing intended as a will as defined by N.J.S.A. 3B:3-2(b) or N.J.S.A. 3B:3-3; (4) the application is to appoint an administrator pendente lite or other limited administrator; (5) a dispute arises before the Surrogate's Court as to any matter; or (6) the Surrogate certifies the case to be of doubt or difficulty.

Contesting a Will

- Before probate - Caveat – Probably the easiest way to contest the probate of a Will. Typically filed within the 10 day waiting period before probate. Forces the Will proponents to bring an order to show cause in Superior Court in order to probate the Will because the Surrogate is disqualified from probating the Will
- After probate - R. 4:85-1 – Aggrieved party must file complaint on order to show cause within four months of probate unless they live outside of the state, in which case the complaint must be filed within six months

How Can You Fix A Will?

Reformation

In construing a Will, the Court can "depart from [the Will's] strict wording when that course is necessary to give effect to the intention of the testator."

Barrett v. Barrett, 134 N.J. Eq. 138, 148 (Ch. 1943)

Reformation

In construing a Will, the court's primary objective is "to ascertain and give effect to the probable intention of the testator." In determining the testator's subjective intent, the court should "give primary emphasis to his dominant plan and purpose as they appear from the entirety of his will when read and considered in the light of the surrounding facts and circumstances."

Fidelity Union Trust Co. v. Robert, 36 N.J. 561 (1962)

Reformation

- There is a "presumption under New Jersey law that a testator intends the maximum tax advantage for his estate." In re Rankin, 169 N.J. Super. 317 (App. Div. 1979)
- Thus, "absent an express statement in the will, we should start with the assumption that the testator intended the maximum tax advantage for the estate." Genser v. Roberts, 48 N.J. 379 (1967)

Reformation

- In Re Branigan, 129 N.J. 324 (1992) – Decedent's Will, while tax compliant at time of execution, did not take advantage of tax laws (GST) at time of death, resulting in large taxes owed. Co-Executors sought to reform Will to bifurcate QTIP Trust to allocate GST to minimize taxes.

Reformation - Branigan

- Trial court did not allow reformation because no patent or latent ambiguities in the Will.
- NJ Supreme Court allowed reformation, holding testator would have wanted to minimize taxes and trust changes would not entail an alteration of any substantive provision of the Will.
- In same mindset, Court did not allow reformation to convert LPOA to GPOA because, while such change would reduce taxes, it would alter the disposition of the Will

Disclaimers

- Governed by IRC § 2518 and N.J.S.A. 3B: 9-1, et seq.
- Beneficiary decides not to claim assets passing to them from estate – can be under intestate laws, Will, or non-probate assets (insurance, IRA, joint assets)
- Can use to fund a credit shelter trust, pass asset to a younger generation, or other post-mortem planning techniques

Disclaimers

- IRC requirements
  - In writing
  - Received by transferor of interest or holder of title within 9 months
  - Disclaimant accepted no benefits
  - Interest passes without any direction by disclaimant
- NJ distinctions
  - No 9-month requirement
  - For real property, written disclaimer must identify municipality, county, lot and block of parcel and also record in county where real property situated
  - Record with Surrogate where Will probated

Disclaimers

- A disclaimer can be of an undivided portion of an interest or of a whole interest
- Disclaimer is filed with the Surrogate and delivered to personal representative or fiduciary
- If for non-probate property, also deliver to payor or other person having legal title to or possession of the interest disclaimed or who is entitled thereto in event of disclaimer

Disclaimers – N.J.S.A. 3B:9-4(b)

Disclaimers by fiduciaries – A fiduciary or agent may disclaim on behalf of a principal only if the governing instrument authorizes the agent to disclaim or the agent has court approval after a finding that such disclaimer "is advisable and will not materially prejudice the rights of (1) creditors, devisees, heirs or beneficiaries of the estate, (2) beneficiaries of the trust, or (3) the minor, incapacitated individual, conservatee, or principal for whom such fiduciary or agent acts."

Bars to Disclaimer – N.J.S.A. 3B:9-9

a. The right of an individual to disclaim property or any interest therein is barred by:

(1) an assignment, conveyance, encumbrance, pledge or transfer of the property or interest or a contract therefor; or

(2) a written waiver of the right to disclaim; or

(3) an acceptance of the property or interest or a benefit under it after actual knowledge that a property right has been conferred; or

(4) a sale of the property or interest that was seized under judicial process before the disclaimer is made; or

(5) the expiration of the permitted applicable perpetuities period; or

(6) a fraud on the individual's creditors as set forth in the "Uniform Voidable Transactions Act" (R.S.25:2-20 et seq.).

Bars to Disclaimer – N.J.S.A. 3B:9-9

b. The disclaimant shall not be barred from disclaiming all or any part of the balance of the property where the disclaimant has received a portion of the property and there still remains an interest which the disclaimant is yet to receive.

c. A bar to the right to disclaim a present interest in joint property does not bar the right to disclaim a future interest in that property.

d. The right to disclaim may be barred to the extent provided by other applicable statutory law.

Disclaimers

- Disclaimers can be expressly incorporated into an estate plan – i.e. disclaimer Wills.
- Disclaimers can be an effective post-mortem planning tool to fix problems with estate planning documents, asset titling, or negative tax consequences.

Potential Disclaimer Benefits

- Assets passing to non-spouse can be disclaimed back to spouse to increase marital deduction
- Spouse can disclaim joint assets to fund credit shelter trust
- Spouse disclaims assets to a younger generation
- Non-marital beneficiaries disclaim interest in sprinkle trust to convert to a QTIP
- Wealthy child disclaims to grandchildren
- Non-Class A beneficiary disclaims to avoid inheritance tax

Modification under UTC – N.J.S.A. 3B:31-27

- (a)A noncharitable irrevocable trust may be modified or terminated upon consent of the trustee and all beneficiaries, if the modification or termination is not inconsistent with a material purpose of the trust.

Modification under UTC – N.J.S.A. 3B:31-27

- (b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

Reformation and Construction

- N.J.S.A. 3B:31-31 - The court may reform the terms of a trust, **even if unambiguous**, to conform the terms to the settlor's probable intent if it is proved by clear and convincing evidence that there was a mistake of fact or law, whether in expression or inducement.
- N.J.S.A. 3B:31-32 – Nothing in this act shall prevent the court from construing the terms of a trust, even if unambiguous, to conform to the settlor's probable intent.

Trustee Vacancies – N.J.S.A. 3B:31-49 (b)

If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled unless the trust instrument provides otherwise. A vacancy in a trusteeship shall be filled if the trust has no remaining trustee.

Trustee Vacancies – N.J.S.A. 3B:31-49(c)

- A vacancy in a trusteeship of a noncharitable trust that is required to be filled shall be filled in the following order of priority:
  - The person designated pursuant to the terms of the trust to be a successor trustee
  - A procedure established pursuant to the terms of the trust to appoint a successor
  - A person appointed by unanimous agreement of the qualified beneficiaries
  - A person appointed by the court

Religious Divorce and Custody

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November 14, 2023 בס"ד

Get Laws Survey

District of Columbia

- Bill considered in 2015
- Tort-based, creates civil cause of action for damages.
- Bill language here.

Florida

- Bill considered in 2008
- Modeled after DRL 236 (b) (note Jewish legal issues that arise with this framing
- Bill language here.
- The Legislature raised constitutional concerns; potential issues with viability of resulting Gets under Jewish law also raised.
- Additional resources: here and here.

Maryland

- Late 1990s/ early 200s effort
  - Considered Get law in 2000 session
  - Modeled after DRL 253
  - Oral testimony came with significant pushback, largely around why this was a matter for the state
  - Bill language here.
  - Additional resources: article
- 2007 effort
  - Led by Sen. Cheryl Kagan.
  - Also modeled after DRL 253, with help of Nathan Lewin
  - Oral testimony came with significant pushback, largely around why this was a matter for the state.
  - Bill died in process.
  - Bill language here.
  - Additional Resources: Here,here.

New York

- DRL 253–bill language here.
- DRL 236 (b)--bill language here.

Pennsylvania

- The term “barriers to remarriage” is redefined in an amendment to P.L. 63 No.26

November 14, 2023 בס"ד

A Note on Get Legislation

Keshet Starr, Esq.

The Organization for the Resolution of Agunot (ORA) is a non-profit organization that seeks to remove abuse from the Jewish divorce process. We do so by providing direct support to individuals seeking a religious divorce; operating a helpline to educate callers initiating the divorce process on rights and strategy; conducting support groups and other trauma services; advocating for system-wide change; educating communities, rabbinic leaders, and legal providers on Jewish divorce denial and Jewish prenuptial agreements. Our work sits at the intersection of the civil and religious divorce systems, and our expertise is in creating opportunities for the two systems to more effectively work together. We have appeared as expert witnesses in court, educated judges and court personnel, and addressed many legal associations and networks.

Passing legislation related to the *get* (Jewish divorce) is a fraught and complex task. On one hand, there are numerous constitutional issues that arise in this area, including both Establishment and Free Exercise clause concerns. *Get* laws must be crafted carefully and strategically to be able to withstand constitutional scrutiny in these areas. On the other hand, there are also many Jewish legal issues that arise with regards to *get* legislation. Jewish law contains many requirements as to how a Jewish divorce must be delivered, particularly with regards to the freedom of action of the party issuing the divorce. If a *get* is deemed to have been issued with inappropriate coercion, that divorce would be considered invalid and leave an *agunah* (a woman denied a Jewish divorce) without the option to remarry in her community. It is important to realize that coercion does not refer solely to physical threats, but includes certain types of financial pressure, as well.

For these reasons, it is critical that *get* legislation be drafted (a) with the guidance of experts in the field, and (2) in close collaboration with rabbinic leaders. Taking these steps will ensure that any resulting legislation will be applicable to those who need it most. New York's second get law, Domestic Relations Law 236(b) is an example of how a lack of communication can undermine the effectiveness of legislation. Because the law involves financial loss to the *get* refuser and was developed without rabbinic input, many rabbinic leaders consider it invalid and some will not ratify divorces issued as a result of this law. This means that the legislation is often effectively inaccessible to those from religious communities who are most dependent on this relief. In addition, many judges lack training on this law and do not apply it, additionally limiting its usefulness. Furthermore, since all Jewish divorce related legislation must be framed neutrally, it is also advisable to consult interfaith leaders for input on how potential legislation can serve those seeking religious divorce in other faith communities, as well.

Drafting and passing legislation is one daunting task; ensuring that such legislation is both applied in practice and effective is yet another hurdle. By creating a collaborative process, lawmakers can draft stronger legislation to start, and also lay the groundwork for the full use and application of the law in the community, allowing such legislation to be truly change-making.

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NEW YORK DOMESTIC RELATIONS LAW SECTION 253

Removal of barriers to remarriage

Domestic Relations (DOM) CHAPTER 14, ARTICLE 13

§ 253. Removal of barriers to remarriage. 1. This section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in subdivision one of section eleven of this chapter.

2. Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

3. No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (i) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

4. In any action for divorce based on subdivisions five and six of section one hundred seventy of this chapter in which the defendant enters a general appearance and does not contest the requested relief, no final judgment of annulment or divorce shall be entered unless both parties shall have filed and served sworn statements: (i) that he or she has, to the best of his or her knowledge, taken all steps solely within his or her power to remove all barriers to the other party's remarriage following the annulment or divorce; or (ii) that the other party has waived in writing the requirements of this subdivision.

5. The writing attesting to any waiver of the requirements of subdivision two, three or four of this section shall be filed with the court prior to the entry of a final judgment of annulment or divorce.

6. As used in the sworn statements prescribed by this section "barrier to remarriage" includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act. Nothing in this section shall be construed to require any party to consult with any clergyman or minister to determine whether there exists any such religious or conscientious restraint or inhibition. It shall not be deemed a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses. "All steps solely within his or her power" shall not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination.

7. No final judgment of annulment or divorce shall be entered, notwithstanding the filing of the plaintiff's sworn statement prescribed by this section, if the clergyman or minister who has solemnized the marriage certifies, in a sworn statement, that he or she has solemnized the marriage and that, to his or her knowledge, the plaintiff has failed to take all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce, provided that the said clergyman or minister is alive and available and competent to testify at the time when final judgment would be entered.

8. Any person who knowingly submits a false sworn statement under this section shall be guilty of making an apparently sworn false statement in the first degree and shall be punished in accordance with section 210.40

of the penal law.

9. Nothing in this section shall be construed to authorize any court to inquire into or determine any ecclesiastical or religious issue. The truth of any statement submitted pursuant to this section shall not be the subject of any judicial inquiry, except as provided in subdivision eight of this section.

NEW YORK DOMESTIC RELATIONS LAW SECTION 236

§ 236. Special controlling provisions; prior actions or proceedings; new actions or proceedings. Except as otherwise expressly provided in this section, the provisions of part A shall be controlling with respect to any action or proceeding commenced prior to the date on which the provisions of this section as amended become effective and the provisions of part B shall be controlling with respect to any action or proceeding commenced on or after such effective date. Any reference to this section or the provisions hereof in any action, proceeding, judgment, order, rule or agreement shall be deemed and construed to refer to either the provisions of part A or part B respectively and exclusively, determined as provided in this paragraph any inconsistent provision of law notwithstanding.

PART A

PRIOR ACTIONS OR PROCEEDINGS

Alimony, temporary and permanent. 1. Alimony. In any action or proceeding brought (1) during the lifetime of both parties to the marriage to annul a marriage or declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, the court may direct either spouse to provide suitably for the support of the other as, in the court's discretion, justice requires, having regard to the length of time of the marriage, the ability of each spouse to be self supporting, the circumstances of the case and of the respective parties. Such direction may require the payment of a sum or sums of money either directly to either spouse or to third persons for real and personal property and services furnished to either spouse, or for the rental of or mortgage amortization or interest payments, insurance, taxes, repairs

or other carrying charges on premises occupied by either spouse, or for both payments to either spouse and to such third persons. Such direction
shall be effective as of the date of the application therefor, and any retroactive amount of alimony due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary alimony which has been paid. Such direction may be made in the
final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made
notwithstanding that the parties continue to reside in the same abode and notwithstanding that the court refuses to grant the relief requested by either spouse (1) by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to either spouse in an action in which jurisdiction over the person of the other spouse was not obtained, or (2) by reason of the misconduct of the other spouse, unless such misconduct would itself constitute grounds for separation or divorce, or (3) by reason of a failure of proof of the grounds of either spouse's action or counterclaim. Any order or judgment made as in this section provided may
combine in one lump sum any amount payable to either spouse under this
section with any amount payable to either spouse under section two hundred forty of this chapter. Upon the application of either spouse, upon such notice to the other party and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or by final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage

rendered on or after September first, nineteen hundred forty or any judgment of separation or divorce whenever rendered, amend the judgment
by inserting such direction. Subject to the provisions of section two hundred forty-four of this chapter, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. Such modification may increase such support nunc pro tunc based on newly discovered evidence.

2. Compulsory financial disclosure. In all matrimonial actions and proceedings commenced on or after September first, nineteen hundred seventy-five in supreme court in which alimony, maintenance or support is in issue and all support proceedings in family court, there shall be compulsory disclosure by both parties of their respective financial states. No showing of special circumstances shall be required before such disclosure is ordered. A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said statement is not demanded, it shall be filed by each party, within ten days after joinder of issue, in the court in which the procedure is pending. As used in this section, the term net worth shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the

statement of net worth. Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

PART B

NEW ACTIONS OR PROCEEDINGS

Maintenance and distributive award. 1. Definitions. Whenever used in this part, the following terms shall have the respective meanings hereinafter set forth or indicated:

a. The term "maintenance" shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with
the provisions of subdivisions five-a and six of this part, to be paid at fixed intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon the payee's valid or invalid marriage, or upon modification pursuant to paragraph b of subdivision nine of this part or section two hundred forty-eight of this chapter.

b. The term "distributive award" shall mean payments provided for in a valid agreement between the parties or awarded by the court, in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable either in a lump sum or over a period of time in fixed amounts. Distributive awards shall not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code.

c. The term "marital property" shall mean all property acquired by

either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.

d. The term separate property shall mean:

(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;

(2) compensation for personal injuries;

(3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;

(4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

e. The term "custodial parent" shall mean a parent to whom custody of a child or children is granted by a valid agreement between the parties or by an order or decree of a court.

f. The term "child support" shall mean a sum paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any
unemancipated child under the age of twenty-one years.

2. Matrimonial actions. a. Except as provided in subdivision five of

this part, the provisions of this part shall be applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce, for a declaration of the validity or nullity of a marriage, and to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce, commenced on and after the effective date of this part. Any application which seeks a modification of a judgment, order or decree made in an action commenced prior to the
effective date of this part shall be heard and determined in accordance with the provisions of part A of this section.

b. With respect to matrimonial actions which commence on or after the effective date of this paragraph, the plaintiff shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy
of the automatic orders set forth in this paragraph. The automatic orders shall be binding upon the plaintiff in a matrimonial action immediately upon the filing of the summons, or summons and complaint,
and upon the defendant immediately upon the service of the automatic orders with the summons. The automatic orders shall remain in full force
and effect during the pendency of the action, unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged. The automatic orders are as follows:

(1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not

limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees
in connection with this action.

(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any
kind, without the consent of the other party in writing, or upon further order of the court; except that any party who is already in pay status may continue to receive such payments thereunder.

(3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably
using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life

insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

3. Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Notwithstanding any other provision of law, an acknowledgment
of an agreement made before marriage may be executed before any person
authorized to solemnize a marriage pursuant to subdivisions one, two and
three of section eleven of this chapter. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision
for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

4. Compulsory financial disclosure. a. In all matrimonial actions and proceedings in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective

financial states. No showing of special circumstances shall be required before such disclosure is ordered. A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said statement is not demanded, it shall be filed with the clerk of the court by each party, within ten days after joinder of issue, in the court in which the proceeding is pending. As used in this part, the term "net worth" shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever
situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth. All such sworn statements of net worth shall be accompanied by a current and
representative paycheck stub and the most recently filed state and federal income tax returns including a copy of the W-2(s) wage and tax statement(s) submitted with the returns. In addition, both parties shall provide information relating to any and all group health plans available to them for the provision of care or other medical benefits by insurance or otherwise for the benefit of the child or children for whom support is sought, including all such information as may be required to be included in a qualified medical child support order as defined in section six hundred nine of the employee retirement income security act of 1974 (29 USC 1169) including, but not limited to: (i) the name and last known mailing address of each party and of each dependent to be covered by the order; (ii) the identification and a description of each group health plan available for the benefit or coverage of the

disclosing party and the child or children for whom support is sought; (iii) a detailed description of the type of coverage available from each group health plan for the potential benefit of each such dependent; (iv) the identification of the plan administrator for each such group health plan and the address of such administrator; (v) the identification numbers for each such group health plan; and (vi) such other information
as may be required by the court. Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

b. As soon as practicable after a matrimonial action has been commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation date or dates may be anytime from the date of commencement of the action to the date of trial.

5. Disposition of property in certain matrimonial actions. a. Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment.

b. Separate property shall remain such.

c. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective

parties.

d. In determining an equitable disposition of property under paragraph c, the court shall consider:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;

(2) the duration of the marriage and the age and health of both parties;

(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) the loss of health insurance benefits upon dissolution of the marriage;

(6) any award of maintenance under subdivision six of this part;

(7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the

marriage of the enhanced earning capacity of the other spouse;

(8) the liquid or non-liquid character of all marital property;

(9) the probable future financial circumstances of each party;

(10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(11) the tax consequences to each party;

(12) the wasteful dissipation of assets by either spouse;

(13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(14) whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such act or acts;

(15) in awarding the possession of a companion animal, the court shall consider the best interest of such animal. "Companion animal", as used in this subparagraph, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law; and

(16) any other factor which the court shall expressly find to be just and proper.

e. In any action in which the court shall determine that an equitable

distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties. The court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

f. In addition to the disposition of property as set forth above, the court may make such order regarding the use and occupancy of the marital
home and its household effects as provided in section two hundred thirty-four of this chapter, without regard to the form of ownership of such property.

g. In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

h. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision.

5-a. Temporary maintenance awards. a. Except where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part, in any matrimonial action the court, upon application by a party, shall make its award for temporary maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of action.

(4) "Income" shall mean income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this article and subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of the family court act and without subtracting spousal support paid pursuant to section four hundred twelve
of such act.

(5) "Income cap" shall mean up to and including one hundred eighty-four thousand dollars of the payor's annual income; provided, however, beginning March first, two thousand twenty and every two years
thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of
labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish

the income cap.

(6) "Guideline amount of temporary maintenance" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.

(7) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

(8) "Agreement" shall have the same meaning as provided in subdivision three of this part.

c. Where the payor's income is lower than or equal to the income cap, the court shall determine the guideline amount of temporary maintenance
as follows:

(1) Where child support will be paid for children of the marriage and where the payor as defined in this subdivision is also the non-custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty-five percent of the payee's income from twenty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of temporary maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of temporary maintenance shall be zero dollars.

(f) temporary maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the
payor's income and added to the payee's income as part of the calculation of the child support obligation.

(2) Where child support will not be paid for children of the marriage, or where child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty percent of the payee's income from thirty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of temporary maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of temporary maintenance shall be zero dollars.

(f) if child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act, temporary maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the payor's income pursuant to this
subdivision and added to the payee's income pursuant to this subdivision
as part of the calculation of the child support obligation.

d. Where the payor's income exceeds the income cap, the court shall determine the guideline amount of temporary maintenance as follows:

(1) the court shall perform the calculations set forth in paragraph c of this subdivision for the income of the payor up to and including the income cap; and

(2) for income exceeding the cap, the amount of additional maintenance awarded, if any, shall be within the discretion of the court which shall take into consideration any one or more of the factors set forth in subparagraph one of paragraph h of this subdivision; and

(3) the court shall set forth the factors it considered and the reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel.

e. Notwithstanding the provisions of this subdivision, where the guideline amount of temporary maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of temporary maintenance shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no temporary maintenance is awarded.

f. The court shall determine the duration of temporary maintenance by considering the length of the marriage.

g. Temporary maintenance shall terminate no later than the issuance of the judgment of divorce or the death of either party, whichever occurs first.

h. (1) The court shall order the guideline amount of temporary maintenance up to the income cap in accordance with paragraph c of this
subdivision, unless the court finds that the guideline amount of temporary maintenance is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the guideline amount of temporary maintenance accordingly
based upon such consideration:

(a) the age and health of the parties;

(b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;

(c) the need of one party to incur education or training expenses;

(d) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child
support not been awarded;

(e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without
fair consideration;

(f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(h) the availability and cost of medical insurance for the parties;

(i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;

(j) the tax consequences to each party;

(k) the standard of living of the parties established during the marriage;

(l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage; and

(m) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the guideline amount of temporary maintenance is unjust or inappropriate and the court adjusts the guideline amount of temporary maintenance pursuant to this paragraph, the court shall set forth, in a written decision or on the record, the guideline amount of temporary maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of temporary maintenance. Such decision, whether in writing or on the record, shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the court informs the unrepresented party or parties of the guideline amount of temporary maintenance.

i. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into agreements or stipulations as defined in subdivision three of this part which deviate from the presumptive award of temporary maintenance.

j. When a payor has defaulted and/or the court is otherwise presented with insufficient evidence to determine income, the court shall order the temporary maintenance award based upon the needs of the payee or the
standard of living of the parties prior to commencement of the divorce

action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of
newly discovered evidence.

k. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

l. In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part entered into prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

m. In determining temporary maintenance, the court shall consider and allocate, where appropriate, the responsibilities of the respective spouses for the family's expenses during the pendency of the proceeding.

n. The temporary maintenance order shall not prejudice the rights of either party regarding a post-divorce maintenance award.

6. Post-divorce maintenance awards. a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action, the court, upon application by a party, shall make its award for post-divorce maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

(1) "Payor" shall mean the spouse with the higher income.

(2) "Payee" shall mean the spouse with the lower income.

(3) "Income" shall mean:

(a) income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act, without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this article and subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of the family court act and without subtracting spousal support paid pursuant to section four hundred twelve of such act; and

(b) income from income-producing property distributed or to be distributed pursuant to subdivision five of this part.

(4) "Income cap" shall mean up to and including one hundred eighty-four thousand dollars of the payor's annual income; provided, however, beginning March first, two thousand twenty and every two years
thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of

labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

(5) "Guideline amount of post-divorce maintenance" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.

(6) "Guideline duration of post-divorce maintenance" shall mean the durational period determined by the application of paragraph f of this subdivision.

(7) "Post-divorce maintenance guideline obligation" shall mean the guideline amount of post-divorce maintenance and the guideline duration
of post-divorce maintenance.

(8) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of the action.

(9) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

(10) "Agreement" shall have the same meaning as provided in subdivision three of this part.

c. Where the payor's income is lower than or equal to the income cap, the court shall determine the guideline amount of post-divorce maintenance as follows:

(1) Where child support will be paid for children of the marriage and where the payor as defined in this subdivision is also the non-custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty-five percent of the payee's income from twenty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of post-divorce maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of post-divorce maintenance shall be
zero dollars.

(f) notwithstanding the provisions of this subdivision, where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of post-divorce maintenance shall be the difference between the
payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no post-divorce maintenance is awarded.

(g) maintenance shall be calculated prior to child support because the amount of maintenance shall be subtracted from the payor's income and
added to the payee's income as part of the calculation of the child support obligation.

(2) Where child support will not be paid for children of the marriage, or where child support will be paid for children of the marriage but the payor as defined in this subdivision is the custodial parent pursuant to the child support standards act:

(a) the court shall subtract twenty percent of the payee's income from thirty percent of the payor's income.

(b) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(c) the court shall subtract the payee's income from the amount derived from clause (b) of this subparagraph.

(d) the court shall determine the lower of the two amounts derived by clauses (a) and (c) of this subparagraph.

(e) the guideline amount of post-divorce maintenance shall be the amount determined by clause (d) of this subparagraph except that, if the amount determined by clause (d) of this subparagraph is less than or equal to zero, the guideline amount of post-divorce maintenance shall be
zero dollars.

(f) if child support will be paid for children of the marriage but the

payor as defined in this subdivision is the custodial parent pursuant to the child support standards act, post-divorce maintenance shall be calculated prior to child support because the amount of post-divorce maintenance shall be subtracted from the payor's income pursuant to this
subdivision and added to the payee's income pursuant to this subdivision
as part of the calculation of the child support obligation.

(g) notwithstanding the provisions of this subdivision, where the guideline amount of post-divorce maintenance would reduce the payor's income below the self-support reserve for a single person, the guideline amount of post-divorce maintenance shall be the difference between the
payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no post-divorce maintenance is awarded.

d. Where the payor's income exceeds the income cap, the court shall determine the guideline amount of post-divorce maintenance as follows:

(1) the court shall perform the calculations set forth in paragraph c of this subdivision for the income of payor up to and including the income cap; and

(2) for income exceeding the cap, the amount of additional maintenance awarded, if any, shall be within the discretion of the court which shall take into consideration any one or more of the factors set forth in subparagraph one of paragraph e of this subdivision; and

(3) the court shall set forth the factors it considered and the

reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel.

e. (1) The court shall order the post-divorce maintenance guideline obligation up to the income cap in accordance with paragraph c of this subdivision, unless the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the post-divorce maintenance guideline obligation accordingly based upon such consideration:

(a) the age and health of the parties;

(b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;

(c) the need of one party to incur education or training expenses;

(d) the termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon
child support being awarded which resulted in a maintenance award lower
than it would have been had child support not been awarded;

(e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without
fair consideration;

(f) the existence and duration of a pre-marital joint household or a

pre-divorce separate household;

(g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(h) the availability and cost of medical insurance for the parties;

(i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;

(j) the tax consequences to each party;

(k) the standard of living of the parties established during the marriage;

(l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;

(m) the equitable distribution of marital property and the income or imputed income on the assets so distributed;

(n) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and

(o) any other factor which the court shall expressly find to be just and proper.

(2) Where the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate and the court adjusts the post-divorce maintenance guideline obligation pursuant to this paragraph, the court shall set forth, in a written decision or on the record, the unadjusted post-divorce maintenance guideline obligation, the factors it considered, and the reasons that the court adjusted the post-divorce maintenance obligation. Such decision shall not be waived by either party or counsel.

f. The duration of post-divorce maintenance may be determined as follows:

(1) The court may determine the duration of post-divorce maintenance in accordance with the following advisory schedule:

Length of the marriage	Percent of the length of the marriage for which maintenance will be payable
0 up to and including 15 years	15% - 30%
More than 15 up to and including 20 years	30% - 40%
More than 20 years	35% - 50%

(2) In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, it shall consider the factors listed in subparagraph one of paragraph e of this subdivision and shall set forth, in a written decision or on the record, the factors it considered. Such decision shall not be waived by either party or counsel. Nothing herein shall prevent the court from awarding non-durational maintenance in an appropriate case.

(3) Notwithstanding the provisions of subparagraph one of this paragraph, post-divorce maintenance shall terminate upon the death of either party or upon the payee's valid or invalid marriage, or upon modification pursuant to paragraph b of subdivision nine of this part or section two hundred forty-eight of this article.

(4) Notwithstanding the provisions of subparagraph one of this paragraph, when determining duration of post-divorce maintenance, the court shall take into consideration anticipated retirement assets, benefits, and retirement eligibility age of both parties if ascertainable at the time of decision. If not ascertainable at the time of decision, the actual full or partial retirement of the payor with substantial diminution of income shall be a basis for a modification of the award.

g. Where either or both parties are unrepresented, the court shall not enter a maintenance order or judgment unless the court informs the unrepresented party or parties of the post-divorce maintenance guideline
obligation.

h. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the post-divorce maintenance guideline obligation.

i. When a payor has defaulted and/or the court makes a finding at the time of trial that it was presented with insufficient evidence to determine income, the court shall order the post-divorce maintenance based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is

greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of substantial newly
discovered evidence.

j. Post-divorce maintenance may be modified pursuant to paragraph b of subdivision nine of this part.

k. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

l. In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part entered into prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in this subdivision shall not constitute a change of circumstances warranting modification of such agreement.

m. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in paragraphs c, d and e of this subdivision shall not apply.

n. In any action or proceeding for modification where the parties have entered into an agreement providing for maintenance pursuant to subdivision three of this part entered into prior to the effective date of the chapter of the laws of two thousand fifteen which amended this subdivision, brought pursuant to this article, the guidelines for post-divorce maintenance set forth in paragraphs c, d and e of this subdivision shall not apply.

o. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph e of this subdivision.

6-a. Law revision commission study. a. The legislature hereby finds and declares it to be the policy of the state that it is necessary to achieve equitable outcomes when families divorce and it is important to ensure that the economic consequences of a divorce are fairly shared by divorcing couples. Serious concerns have been raised that the implementation of New York state's maintenance laws have not resulted in
equitable results. Maintenance is often not granted and where it is granted, the results are inconsistent and unpredictable. This raises serious concerns about the ability of our current maintenance laws to achieve equitable and fair outcomes.

The legislature further finds a comprehensive review of the provisions of our state's maintenance laws should be undertaken. It has been thirty years since the legislature significantly reformed our state's divorce laws by enacting equitable distribution of marital property and introduced the concept of maintenance to replace alimony. Concerns that
the implementation of our maintenance laws have not resulted in

equitable results compel the need for a review of these laws.

b. The law revision commission is hereby directed to:

(1) review and assess the economic consequences of divorce on the parties;

(2) review the maintenance laws of the state, including the way in which they are administered to determine the impact of these laws on post marital economic disparities, and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple; and

(3) make recommendations to the legislature, including such proposed revisions of such laws as it determines necessary to achieve these goals and objectives.

c. The law revision commission shall make a preliminary report to the legislature and the governor of its findings, conclusions, and any recommendations not later than nine months from the effective date of this subdivision, and a final report of its findings, conclusions and recommendations not later than December thirty-first, two thousand eleven.

7. Child support. a. In any matrimonial action, or in an independent action for child support, the court as provided in section two hundred forty of this chapter shall order either or both parents to pay temporary child support or child support without requiring a showing of immediate or emergency need. The court shall make an order for temporary
child support notwithstanding that information with respect to income

and assets of either or both parents may be unavailable. Where such information is available, the court may make an order for temporary child support pursuant to section two hundred forty of this article. Such order shall, except as provided for herein, be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an
execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support. The court shall not consider the misconduct of either party but shall make its award for child support pursuant to section two hundred forty of this article.

b. Notwithstanding any other provision of law, any written application or motion to the court for the establishment of a child support obligation for persons not in receipt of family assistance must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided

for
by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section five thousand two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative
fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought. Unless the party receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law.

c. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

d. Any child support order made by the court in any proceeding under the provisions of this section shall include, on its face, a notice printed or typewritten in a size equal to at least eight point bold type informing the parties of their right to seek a modification of the child support order upon a showing of:

(i) a substantial change in circumstances; or

(ii) that three years have passed since the order was entered, last modified or adjusted; or

(iii) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted;
however, if the parties have specifically opted out of subparagraph (ii) or (iii) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply.

8. Special relief in matrimonial actions. a. In any matrimonial action the court may order a party to purchase, maintain or assign a policy of insurance providing benefits for health and hospital care and related services for either spouse or children of the marriage not to exceed such period of time as such party shall be obligated to provide maintenance, child support or make payments of a distributive award. The
court may also order a party to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage, or in the case of accident insurance, the insured spouse as irrevocable beneficiaries during a period of time fixed by the court. The obligation to provide such insurance shall cease upon the termination of the spouse's duty to provide maintenance, child support

or a distributive award. A copy of such order shall be served, by registered mail, on the home office of the insurer specifying the name and mailing address of the spouse or children, provided that failure to so serve the insurer shall not affect the validity of the order.

b. In any action where the court has ordered temporary maintenance, maintenance, distributive award or child support, the court may direct that a payment be made directly to the other spouse or a third person for real and personal property and services furnished to the other spouse, or for the rental or mortgage amortization or interest payments, insurances, taxes, repairs or other carrying charges on premises occupied by the other spouse, or for both payments to the other spouse and to such third persons. Such direction may be made notwithstanding that the parties continue to reside in the same abode and notwithstanding that the court refuses to grant the relief requested by the other spouse.

c. Any order or judgment made as in this section provided may combine any amount payable to either spouse under this section with any amount payable to such spouse as child support or under section two hundred forty of this chapter.

9. Enforcement and modification of orders and judgments in matrimonial
actions. a. All orders or judgments entered in matrimonial actions shall be enforceable pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules, or in any other manner provided by law. Orders or judgments for child support,
alimony and maintenance shall also be enforceable pursuant to article fifty-two of the civil practice law and rules upon a debtor's default as such term is defined in paragraph seven of subdivision (a) of section

fifty-two hundred forty-one of the civil practice law and rules. The establishment of a default shall be subject to the procedures established for the determination of a mistake of fact for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of the civil practice law and rules. For the purposes of enforcement of child support orders or combined spousal and child support orders pursuant to section five thousand two hundred forty-one of the civil practice law and rules, a "default" shall be deemed to include amounts arising from retroactive support. The court may, and if a party shall fail or refuse to pay maintenance, distributive award or child support the court shall, upon notice and an opportunity to the defaulting party to be heard, require the party to furnish a surety, or the sequestering and sale of assets for the purpose of enforcing any award for maintenance, distributive award or child support and for the payment of reasonable and necessary attorney's fees and disbursements.

b. (1) Upon application by either party, the court may annul or modify any prior order or judgment made after trial as to maintenance, upon a showing of the payee's inability to be self-supporting or upon a showing of a substantial change in circumstance, including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances. Where, after the effective date of this part, an agreement remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme
hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines. The court shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to

section two hundred forty-four of this article. No other arrears of maintenance which have accrued prior to the making of such application
shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears and the facts and circumstances constituting good cause are
set forth in a written memorandum of decision. Such modification may increase maintenance nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of maintenance due
shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. The provisions of this subdivision shall
not apply to a separation agreement made prior to the effective date of this part.

(2) (i) The court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances. Incarceration shall not be considered voluntary unemployment and shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment.

(ii) In addition, unless the parties have specifically opted out of
the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where:

(A) three years have passed since the order was entered, last modified or adjusted; or

(B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education,
ability, and experience.

(iii) No modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support. Such modification may increase child support nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount
of child support due shall, except as provided for in this subparagraph, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. Any retroactive amount of child support due shall be support arrears/past due support. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an immediate execution for support enforcement as

provided
for by this chapter, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support.

c. Notwithstanding any other provision of law, any written application or motion to the court for the modification or enforcement of a child support or combined maintenance and child support order for persons not
in receipt of family assistance must contain either a request for child support enforcement services which would authorize the collection of the
support obligation by the immediate issuance of an income execution for
support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of
the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section five thousand two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date

of birth of the child or children; and the name and address of the employers and income payors of the party ordered to pay child support to
the other party. Unless the party receiving child support or combined maintenance and child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law.

d. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____
----------X

Plaintiff,

Index No.:_____

-against-

SWORN STATEMENT OF REMOVAL OF BARRIERS TO REMARRIAGE

Defendant.
----------X

STATE OF _____ }
ss:
COUNTY OF _____ }

I _____ (Print Name), state under penalty of perjury that the parties* marriage was solemnized by a minister, clergyman or leader of the Society for Ethical Culture, and that;

‘ *To the best of my knowledge I have taken all steps solely within my power to remove all barriers to the Defendant’s remarriage following the divorce.*

OR

‘ *The Defendant has waived in writing the requirements of DRL §253.*

_____
Plaintiff’s Signature

Subscribed and Sworn to
before me on

_____

_____
NOTARY PUBLIC

Affidavit of Service

SUPREME COURT OF THE STATE OF NEW YORK
1 COUNTY OF _____

2 _____ being sworn, says, I am not a party to the action, and am over 18 years of age. I reside at _____.

3 On _____, I served a true copy of the within Removal of Barriers Statement on the Defendant:

‘ *personally at* _____

OR

‘ *by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, to the address designated by the Defendant at* _____

_____

4 _____
Server’s Signature

Subscribed and Sworn to
before me on

_____

_____
NOTARY PUBLIC

OR

5 Service of the within document is hereby acknowledged.

_____
‘ *Defendant’s Signature* **OR**
‘ *Defendant’s Attorney’s Signature*

Aflalo v. Aflalo

Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County

February 29, 1996, Decided ; February 29, 1996, FILED

DOCKET NO. FM-13-453-95A

Reporter
295 N.J. Super. 527 *; 685 A.2d 523 **; 1996 N.J. Super. LEXIS 459 ***

SONDRA FAYE AFLALO, PLAINTIFF, v. HENRY ARIK AFLALO, DEFENDANT.

Subsequent History: [*1]** APPROVED FOR PUBLICATION November 19. 1996.

Core Terms

religious, religion, divorce, civil court, religious belief, ketubah, parties, reconciliation, religious law, questions, creator, married, Church

Case Summary

Procedural Posture
In the divorce proceeding between plaintiff wife and defendant husband, defendant's counsel sought a motion to be relieved from representation because, as an Orthodox Jew, he had a religious problem representing defendant as defendant refused to give plaintiff a "get," a Jewish bill of divorce. Additionally, plaintiff moved to compel defendant to provide her with a "get."

Overview

Defendant husband's attorney asked the court to remove him as counsel because he had a religious problem representing a man who, at the conclusion of a divorce proceeding, refused, without reason, to give his wife a "get," a Jewish bill of divorce. Defendant testified that he would follow the recommendations of the rabbinical tribunal and would give the "get" if that was the end result of those proceedings. The court held that defendant's position clearly eliminated his counsel's concerns. Plaintiff wife asked the court to require that defendant provide her with a "get." The court held that the Establishment Clause and *Free Exercise Clause of U.S. Const. amend. I*, prohibited it from interfering. Therefore, the court held that while it might have seemed "unfair" that defendant could have ultimately refused to provide a "get," unfairness came from plaintiff's own sincerely-held religious beliefs because, when she entered into the "ketubah," she agreed to be obligated to the laws of Moses and Israel. The court held that this choice could not have been remedied by the court.

Outcome
The court denied defendant husband's counsel's motion for removal for religious reasons because the defendant's position regarding his willingness to provide a "get," a Jewish bill of divorce, eliminated counsel's concerns. The court denied plaintiff's wife request that the court require defendant to provide her with a "get" because plaintiff's choice to be bound by the religious tenets of Judaism could not have been remedied by the court.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Bill of Rights > State Application

Constitutional Law > Privileges & Immunities

HN1[] **Freedom of Religion, Free Exercise of Religion**

The "Free Exercise Clause" of U.S. Const. amend. I applies to the states through the Due Process Clause of the U.S. Const. amend. XIV. Not only does it bar a state's legislature from making a law which prohibits the free exercise of religion but it likewise inhibits a state's judiciary.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN2[] **Freedom of Religion, Establishment of Religion**

Where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, U.S. Const. amends. I, XIV mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN3[] **Freedom of Religion, Free Exercise of Religion**

Civil courts may not override a decision of a religious tribunal or interpret religious law or canons.

Counsel: *Chen Kornreich* for plaintiff (*Kornreich & Harkov,* attorneys).

Neil M. Pomper for defendant.

Judges: FISHER, J.S.C.

Opinion by: FISHER, JR.

Opinion

[*530] FISHER, J.S.C.

[524]** I

INTRODUCTION

This case requires the court to visit an issue that has previously troubled our courts in matrimonial actions involving Orthodox Jews--a husband's refusal to provide a "get". [1]

Here, the parties were married on **[***2]** October 13, 1983 in Ramle, Israel, and have one child, Samantha. Plaintiff Sondra Faye Aflalo ("Sondra") has filed a complaint seeking a dissolution of the marriage. Defendant Henry Arik Aflalo ("Henry") has answered the complaint. The matter is on the court's active trial list and should be reached for trial in the very near future. Henry does not want a divorce and has taken action with The Union of Orthodox Rabbis of the United States and Canada in New York City (the "Beth Din" [2]) to have a hearing on his attempts at reconciliation.

The issues at hand came to critical mass when the parties engaged in a settlement **[**525]** conference on February 14, 1996, while awaiting trial in this court. At that time the court was advised by counsel that the matter was "98% settled" but that Henry had placed what Sondra viewed as an insurmountable obstacle to a complete resolution: he refused to provide a "get." **[***3]** Unlike what the court faced in Segal v. Segal, 278 N.J. Super. 218, 650 A.2d 996 (App.Div.1994) and Burns v. Burns, 223 N.J. Super. 219, 538 A.2d 438 (Ch.Div.1987), Henry was not using his refusal to consent to the "get" as a means of securing a more favorable resolution of the **[*531]** issues before this court. That type of conduct the *Burns* court rightfully labelled "extortion". 223 N.J. Super. at 224, 538 A.2d

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[1] A "get" is a bill of divorce which the husband gives to his wife to free her to marry again. The word "get" apparently signifies the number 12, the "get" being a twelve-lined instrument. The word is a combination of "gimel" (which has a value of three) together with "tet" (which has a value of nine). *See* Rubin v. Rubin, 75 Misc. 2d 776, 348 N.Y.S.2d 61, 65 n.2 (Fam.Ct.1973).

[2] The "Beth Din" is a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law.

438. On the contrary, Henry's position (as conveyed during the settlement conference) was that regardless of what occurs in this court he will not consent to a Jewish divorce.

II

COUNSEL'S MOTION TO BE RELIEVED

Henry's position spun off an unexpected problem; it caused his attorney to move to be relieved as counsel. Arguing that since he, too, is a practicing Orthodox Jew, *Pomper Certification* (February 19, 1996), P4, Henry's counsel claims that he would "definitely have a religious problem representing a man who at the conclusion of a divorce proceeding refused, without reason, to give his wife a Get." *Id.*, P7.

This motion was heard on an expedited basis. At oral argument on February 20, 1996, Henry's counsel expanded on his position and indicated, upon questioning from the court, that **[***4]** *his* religious quandary comes not from Henry's use of his consent to a Jewish divorce as leverage in negotiations (which was not occurring), but in the blanket refusal of his client to give a "get" without reason.

Henry opposed his attorney's motion. He stated under oath that he seeks a reconciliation and that Sondra had been summoned to appear before the Beth Din for this purpose. The court was also advised during oral argument that should reconciliation fail the Beth Din could recommend that Henry give Sondra a "get"; Henry stated under oath that while he desires a reconciliation he would follow the recommendations of the Beth Din and give the "get" if that was the end result of those proceedings. The court finds Henry both credible and sincere in this regard; his position clearly eliminates his counsel's stated concerns [3].

[3] Contentions were also made by Henry regarding his counsel's use of a retainer. Counsel argues that the attorney/client relationship is now clouded by the distrust created by these contentions. The court, however, senses that the dispute may be one which is based on a lack of communication and nothing more. In light of the fact that trial in this matter is imminent, this and the other reasons relied upon by counsel in support of his motion to be relieved are rejected and the motion denied. R. 1:11-2.

[*5] [*532] III**

PLAINTIFF'S ATTEMPTS IN THIS COURT TO OBTAIN A "GET"

The problem, however, festers since Sondra appears unwilling to settle this case without a "get". Accordingly, this court must now lay to rest whether any order may be entered which would impact on Sondra's securing of a Jewish divorce.

Sondra claims that this court, as part of the judgment of divorce which may eventually be entered in this matter, may and should order Henry to cooperate with the obtaining of a Jewish divorce upon pain of Henry having limited or supervised visitation of Samantha or by any other coercive means. She claims that *Minkin v. Minkin, 180 N.J. Super. 260, 434 A.2d 665 (Ch.Div.1981)* authorizes this court to order Henry to consent to the Jewish divorce. That trial court decision certainly supports her view. This court, however, believes that to enter such an order violates Henry's First Amendment rights and refuses to follow the course outlined in *Minkin.*

A. *An Overview Of First Amendment Jurisprudence*

Prior to the adoption of our Nation's constitution, attempts were made in some colonies to legislate on matters of religion, including the governmental establishment of **[**526]** religion and the raising **[***6]** of taxes for the support of certain religions. Punishments were prescribed for the failure to attend religious services and for entertaining heretical opinions. *See Reynolds v. United States, 98 U.S. 145, 162-163, 25 L. Ed. 244 (1878)*. In 1784 the Virginia legislature attempted to enact a bill "establishing provision for teachers of the Christian religion." This brought to bear the determined and eloquent opposition of Thomas Jefferson and **[*533]** James Madison. Madison responded in his "Memorial and Remonstrance" that "religion, or the duty we owe the Creator" was not within the cognizance of civil authority. The next session of the Virginia legislature led to the defeat of the aforementioned bill and the passage of a bill drafted by Jefferson which established "religious freedom" and declared that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty."

Not long after the adoption of the Constitution and the

Bill of Rights, Jefferson made clear the meaning and intent of the First Amendment in his famous "reply" **[***7]** to the Danbury Baptist Association:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the Nation in behalf of the rights of conscience, I shall see, with sincere satisfaction, the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Since then the dimensions of this "wall of separation between Church and State" have been robustly debated and described frequently by our Nation's highest court.

HN1[↑] The "Free Exercise Clause" of the First Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. *Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 84 L. Ed. 1213*, **[***8]** (1940). Not only does it bar a state's legislature from making a law which prohibits the free exercise of religion but it likewise inhibits a state's judiciary. *In re Adoption of E., 59 N.J. 36, 51, 279 A.2d 785 (1971)*.

In the first instance, the Free Exercise Clause prohibits governmental regulation of religious beliefs but does not absolutely prohibit religious conduct. *Braunfeld v. Brown, 366 U.S. 599, **[*534]** 603 81 S. Ct. 1144, 1145, 6 L. Ed. 2d 563 (1961)*; *Cantwell, supra, 310 U.S. at 303-304, 60 S.Ct. at 903-904*. Second, to pass constitutional muster, a law must have both a secular purpose and a secular effect. That is, a law must not have a sectarian purpose; it must not be based upon a disagreement with a religious tenet or practice and must not be aimed at impeding religion. *Braunfeld, supra, 366 U.S. at 607, 81 S.Ct. at 1148*; *Sherbert v. Verner, 374 U.S. 398, 402-403, 83 S. Ct. 1790, 1793-1794, 10 L. Ed. 2d 965 (1963)*.

Only when state action passes these threshold tests is there a need to balance the competing state and religious interests. The court is to engage in such balancing when the conduct or action sought to be regulated has "invariably posed some substantial threat to public safety, peace or order." *Sherbert, supra, 374 U.S. at 403, 83 S.Ct. at 1793*. Here, the relief **[***9]** Sondra seeks from this court so obviously runs afoul of the threshold tests of the Free Exercise Clause that the court need never reach the delicate balancing normally required in such cases.

The court will first endeavor to describe precisely what it is that Sondra seeks. And, while it seems beyond doubt, the court will then indicate why it cannot and certainly will not provide that relief.

B. *The Jewish Divorce*

"When a man takes a wife and possesses her, if she fails to please him because he **[**527]** finds something obnoxious about her, then he writes her a bill of divorcement, hands it to her, and sends her away from his house." *Deuteronomy* 24:1-4. From this biblical verse, the Jewish law and tradition that the "power of divorce rests exclusively with the husband" has its genesis. Wigoder, *The Encyclopedia of Judaism* (1989) 210.

The "get" is written almost entirely in Aramaic on parchment, *id. at 211*, and is drawn up by a "sofer" (a scribe), upon the husband's instruction to write "for him, for her, and for the purpose of a divorce," 6 *The Encyclopedia Judaica* (1971) 131. The materials used in the creation of the "get" must belong to the **[*535]** husband; the "sorer" presents **[***10]** them as a gift to the husband before the "get" is written. *Id.* The spelling and the form of the document "are enumerated in minute detail in halakhic literature" and acknowledged by two witnesses. Wigoder, *supra* at 211. The rabbi who presides retains the "get"; he cuts it "in criss-cross fashion so that it cannot be used again," *id.*, and to "avoid any later suspicion that it was not absolutely legal", *Encyclopedia Judaica, supra* at 132. The wife is given another document ("petor") which proves that she has been divorced and the "get" is filed away in its torn state. Wigoder, *supra* at 211.

Without such a divorce, the wife remains an "agunah" (a "tied" woman) and may not remarry in the eyes of Jewish law. Wigoder, *supra* at 211. If she remarries without a "get" she is considered to be an adulteress because she is still halakhically married to her first husband; any subsequent children are considered to be "mamzerim" (illegitimate) and may not marry other Jews. Himelstein, *The Jewish Primer* (1990) 161.

C. *The Clash Of The First Amendment And Plaintiff's*

Desire For A Jewish Divorce

The court is not unsympathetic to Sondra's desire to have Henry's cooperation **[***11]** in the obtaining of a "get". She, too, is sincere in her religious beliefs. Her religion, at least in terms of divorce, does not profess gender equality. But does that mean that she can obtain the aid of this court of equity to alter this doctrine of her faith? That the question must be answered negatively seems so patently clear that the only surprising aspect of Sondra's argument is that it finds some support in the few cases on the subject.

In *Minkin,* the trial court requested the testimony of several distinguished rabbis. The court viewed the issue as whether a state court could order specific performance of the "ketubah". The "ketubah" is the marriage contract in which the couple is obligated to comply with the laws of Moses and Israel. *Minkin, supra, 180 N.J. Super. at 262 n. 2, 434 A.2d 665*. It contains the promise of the husband "to honor and support thee and provide **[*536]** for thy needs, even as Jewish husbands are required to do *by our religious law* and tradition." *See, e.g., Avitzur v. Avitzur, 58 N.Y.2d 108, 459 N.Y.S.2d 572, 576, 446 N.E.2d 136 (1983)* (emphasis added), cert. denied *464 U.S. 817, 104 S. Ct. 76, 78 L. Ed. 2d 88*, (1983). The "ketubah" also contains the parties' agreement "to **[***12]** recognize the Beth Din . . . as having authority to counsel us in the light of Jewish tradition . . . and to summon either party at the request of the other. . . ." *459 N.Y.S.2d at 576, 446 N.E.2d at 140*.

In determining that it could specifically enforce the "ketubah", *Minkin* relied on a New York decision which stated:

> Defendant has also contended that a decree of specific performance would interfere with his freedom of religion under the Constitution. Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence (paragraph Second of the complaint not denied in the answer). His appearance before the Rabbinate to answer questions and give evidence needed by them to make a decision is not a profession of faith. Specific performance herein would merely require the defendant to do what he voluntarily agreed to do.

[*Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (Sup.Ct.1954)*.]Analyzing the case against the test used to determine whether state action violates the Establishment Clause which is set forth in *Committee for Public Education and Religious Liberty v. Nyquist, **[**528]** 413 U.S. 756, 772-773, 93 S. Ct. 2955, 2965-2966, 37 L. Ed. 2d 948 (1973)*, **[***13]** , the *Minkin* court said:

> Relying upon credible expert testimony that the acquisition of a *get* is not a religious act, the court finds that the entry of an order compelling defendant to secure a *get* would have the clear secular purpose of completing a dissolution of the marriage. Its primary effect neither advances nor inhibits religion since it does not require the husband to participate in a religious ceremony or to do acts contrary to his religious beliefs. Nor would the order be an excessive entanglement with religion.
>
> [*180 N.J. Super. at 266, 434 A.2d 665.]*

Also, in reliance upon the expert testimony found credible, the *Minkin* court concluded that an order compelling a husband to acquire a "get" is "not a religious act." *Id.* The court apparently relied on one of the rabbis who testified "that Jewish law cannot be equated with religious law, but instead is comprised of two **[*537]** components--one regulating a man's relationship with God and the other regulating the relationship between man and man. The *get,* which has no reference to God but which does affect the relationship between two parties, falls into the latter category and is, therefore, civil and **[***14]** not religious in nature." *180 N.J. Super. at 265-266, 434 A.2d 665*.

Minkin's approach that the "ketubah" may be specifically enforced without violating the First Amendment is in accord with the decisional law of New York, *Avitzur, supra*, Illinois, *In re Marriage of Goldman, 196 Ill. App. 3d 785, 143 Ill. Dec. 944, 554 N.E.2d 1016 (1990)* and Delaware, *Scholl v. Scholl, 621 A.2d 808, 810-812 (Del.Fam.Ct.1992)*, and at odds with Arizona, *Victor v. Victor, 177 Ariz. 231, 866 P.2d 899, 901-902 (Ariz.App.1993)* and, now, this court. *Minkin* and its followers (including the New Jersey trial court in *Burns*) [4] are not persuasive for a number of reasons.

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[4] *Burns* is equally unpersuasive, although the wife's position therein is even more sympathetic. There, the parties were divorced years earlier and the husband had remarried. However, he refused to provide his ex-wife with a "get" unless she invested $ 25,000 in an irrevocable trust for the benefit of their daughter. *223 N.J. Super. at 222, 538 A.2d 438*. Relying upon *Minkin* and its broad equity powers, the court in *Burns*

[*15]** First, it examined the problem against the backdrop of the Establishment Clause and not the Free Exercise Clause. The Establishment Clause [5] prohibits government from placing its support behind a particular religious belief. The Free Exercise Clause [6], obviously implicated here, prohibits government from interfering or becoming entangled in the practice of religion by its citizens.

[*538] Second, the conclusion that an order requiring the husband to provide a "get" is not a religious act nor involves the court in the religious beliefs or practices of the parties is not at all convincing. It is interesting that the court was required to choose between the conflicting testimony of the various rabbis [7] to reach this conclusion. The one way in which a court may become entangled in religious affairs, which the court in *Minkin* did not recognize, was in becoming **[***16]** an arbiter of what is "religious". As Justice Brennan observed in *Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709, 96 S. Ct. 2372, 2380, 49 L. Ed. 2d 151 (1976)*:

> *HN2*[] [W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious **[**529]** issues of doctrine or polity before them.

HN3[] Accordingly, civil courts may not override a decision of a religious tribunal or interpret religious law or canons. *See also*, *Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-730, 20 L. Ed. 666 (1871)*; *Presbyterian Church v. Hull Church, 393 U.S. 440, 445, 89 S.Ct. 601, 604, 21 L.Ed.2d 658 (1969)*; *Elmora Hebrew Center, Inc. v. Fishman, 125 N.J. 404, 413-414, 593 A.2d 725 (1991)*. Of course, religious parties and organizations are entitled to the adjudication in our civil courts of "secular legal questions." *Elmore, supra, 125 N.J. at 413, 593 A.2d 725*. But in doing so the civil court cannot decide any disputed questions of religious doctrine. That is exactly what **[***17]** the *Minkin* court did when it sifted among the rabbinical testimony to find the most credible version.

Third, the conclusion that its order concerned purely civil issues is equally unconvincing. In determining to specifically enforce the "ketubah", the court recognized that "[w]ithout compliance [the wife] cannot marry in accordance with her religious beliefs." *180 N.J. Super. at 263, 434 A.2d 665*. As noted earlier the later **[*539]** children of a wife who remarries without a "get" are prohibited from marrying other Jews. No matter how one semantically phrases what was done in *Minkin,* the order directly affected the religious beliefs of the parties. By entering the order, the court empowered the wife to remarry in accordance with her religious beliefs and also similarly empowered any children later born to her. The mere fact that the "get" does not contain the word "God", which the *Minkin* court found significant, is **[***18]** hardly reason to conclude otherwise. Nor is it sound to argue that religion involves only one's relation to the creator and not one's relation to other persons, as may be obligated by religious traditions or teachings. *Minkin* might as well have said that a civil court may order a Christian to comply with the Second Great Commandment [8] but not the First [9]. The concept of "religion" certainly does have reference to one's relation to the creator but it also has relation to one's obedience to the will of the creator. In one's pursuit to comply with the creator's will one is certainly engaged in religious activity. While engaging in such conduct, one may also be subjected to civil authority but that does not remove that conduct from the scope of religious activity. *Minkin* draws too fine a line in its rejection of the latter as an area constituting "religion" to command this court's assent to its holding.

[*19]** Fourth, *Minkin* fails to recognize that coercing

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ordered the husband to "submit to the jurisdiction of the 'Bet Din' to initiate the proceedings for a 'get'." *223 N.J. Super. at 226, 538 A.2d 438*. In the alternative, the court permitted the husband "to execute the prepared document, . . . authorizing the preparation and presentation of the 'get' to the defendant by an agent on his behalf and forego the actual appearance before the 'Bet Din'." *Id.*

[5] "Congress shall make no law respecting an establishment of religion. . . ."

[6] "Congress shall make no law . . . prohibiting the free exercise thereof."

[7] One rabbi testified that the acquisition of a "get" was a religious act. *180 N.J. Super. at 266, 434 A.2d 665*.

[8] "Thou shalt love thy neighbor as thyself."

[9] "Thou shalt love the Lord thy God with thy whole heart, and with thy whole soul, and with thy whole mind, and with thy whole strength."

the husband to provide the "get" would not have the effect sought. The "get" must be phrased and formulated in strict compliance with tradition, according to the wording given in the Talmud. 6 *Encyclopedia Judaica* (1971) 131. [10] The precisely worded "get" states that **[*540]** the husband does "willingly consent, being under no restraint, to release, to set free, and put aside thee, my wife . . . ." *Id.* Accordingly, in giving his **[**530]** wife a "get" a husband must "act without constraint." Wigoder, *supra* at 210. Indeed, during the proceeding the husband is asked "whether he ordered [the "get"] of his own free will." Singer, *The Jewish Encyclopedia* at 647. What value then is a "get" when it is ordered by a civil court and when it places the husband at risk of being held in contempt should he follow his conscience and refuse to comply? Moreover, why should this court order such relief when that is something which the Beth Din will not do? If a "get" is something which can be coerced then it should be the Beth Din which does the coercing. In coercing the husband, the civil court is, in essence, overruling or superseding any judgment **[***20]** which the Beth Din can or will enter, contrary to accepted First Amendment principles. *See* Serbian Eastern, supra, 426 U.S. at 709, 96 S.Ct. at 2380.

[*21]** *Avitzur* suggests a more indirect way of providing relief to the wife. A majority of the New York Court of Appeals found that the wording of the "ketubah" suggested an agreement of the marital partners to appear before the Beth Din and held that such **[*541]** an agreement could be enforced by the civil court without running afoul of First Amendment law. The majority was careful in recognizing that it was not called upon to order the husband to provide a "get", noting that "plaintiff is not attempting to compel defendant to obtain a Get or to enforce a religious practice arising solely out of principles of religious law." 459 N.Y.S. at 574, 446 N.E.2d at 138. An order requiring defendant to appear before the Beth Din was found to be available because the majority viewed the role of the civil court as enforcing "nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum." *Id.* The three members of the court which dissented, however, in this court's view correctly ascertained that even the limited relief which the majority of four approved required "inquiry into and resolution of questions of Jewish religious law and tradition" and thus inappropriately entangled **[***22]** the civil court in the wife's attempts to obtain a religious divorce. Id. at 577-578, 446 N.E.2d at 141-142.

Even if the majority opinion in *Avitzur* were followed by this court, the circumstances of this case do not support the relief endorsed in *Avitzur.* The "ketubah" only states the parties' recognition of the Beth Din as "having authority to counsel" them and "to summon either party at the request of the other. . . ." Here, Sondra has never sought relief in the Beth Din and in fact has not appeared in response to the summons forwarded to her by the Beth Din regarding Henry's pursuit of reconciliation. Even *Avitzur,* it is suspected, would not enforce any attempt by Sondra to compel Henry to appear before the Beth Din when she has not honored a similar request. [11]

Minkin ultimately conjures **[***23]** the unsettling vision of future enforcement proceedings. Should a civil court fine a husband for every day he does not comply or imprison him for contempt for **[*542]** following his conscience? Apparently so, according to New York law.

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[10] According to the *Encyclopedia Judaica,* the following is a translation of an Ashkenazi "get":

> On the . . . day of the week, the . . . day of the month of . . ., in the year . . . from the creation of the world according to the calendar reckoning we are accustomed to count here, in the city . . . (which is also known as . . .), which is located on the river . . . (and on the river . . .), and situated near wells of water, I, . . . (also known as . . .), the son of . . . (also known as . . .), who today am present in the city . . . (which is also known as . . .), which is located on the river . . . (and on the river . . .), and situated near wells of water, do willingly consent, being under no restraint, to release, to set free, and put aside thee, my wife, . . . (also known as . . .), daughter of . . . (also known as . . .), who art today in the city of . . . (which is also known as . . .), which is located on the river . . . (and on the river . . .), and situated near wells of water, who has been my wife from before. Thus do I set free, release thee, and put thee aside, in order that thou may have permission and the authority over thyself to go and marry any man thou may desire. No person may hinder thee from this day onward, and thou art permitted to every man. This shall be for thee from me a bill of dismissal, a letter of release, and a document of freedom, in accordance with the laws of Moses and Israel.
>
> . . . the son of . . ., witness.
>
> . . . the son of . . ., witness.
>
> [Id. at 131.]

[11] During a brief hearing via telephone on February 22, 1996, Sondra's counsel indicated that Sondra had responded in writing to the summons from the Beth Din but has never provided a copy of that response to this court.

See, e.g., Megibow v. Megibow, 161 Misc. 2d 69, 612 N.Y.S.2d 758, 760 (Sup.Ct.1994); Kaplinsky v. Kaplinsky, 198 A.D.2d 212, 603 N.Y.S.2d 574, 575 (1993). Or, as suggested by Sondra, should visitation of Samantha be limited pending Henry's cooperation? That argument finds no support anywhere. Unlike *Minkin* (where a judgment of divorce had already been entered), Henry seeks the intervention of the Beth Din in order to effect a reconciliation with his wife. [12] Should this court enjoin Henry--no matter how imperfect he may be pursuing it--from moving for reconciliation in that forum and order other relief which the Beth Din apparently cannot give? This court should not, and will not, compel a course of conduct in the Beth Din no matter how unfair the consequences. The spectre of Henry being imprisoned or surrendering his religious freedoms because of action by a civil court is the very image which gave rise to the First Amendment.

[*24] [**531]** It may seem "unfair" that Henry may ultimately refuse to provide a "get". [13] But the unfairness comes from Sondra's own sincerely-held religious beliefs. When she entered into the "ketubah" she agreed to be obligated to the laws of Moses and Israel. Those laws apparently include the tenet that if Henry does not provide her with a "get" she must remain an "agunah". That was Sondra's choice and one which can hardly be remedied by this court. This court has no authority--were it willing--to choose for these parties which aspects of their religion may be embraced and which must be rejected. Those who founded this Nation knew too well the tyranny of religious persecution and the need for religious freedom. To engage even in a "well-intentioned" resolution of a religious dispute requires the making of a choice which accommodates one view and suppresses another. If that is permitted, it **[*543]** readily follows that less "well-intentioned" choices may be made in the future by those who, as Justice Jackson once observed, believe "that all thought is divinely classified into two kinds--that which is their own and that which is false and dangerous." American Communications Ass'n v. Douds, ***25] 339 U.S. 382, 438, 70 S. Ct. 674, 704, 94 L. Ed. 925 (1950) (dissenting opinion).

The tenets of Sondra's religion would be debased by this court's crafting of a short-cut or loophole through the religious doctrines she adheres to; [14] and the dignity and integrity of the court and its processes would be irreparably injured by such misuse. The First Amendment was designed to protect both institutions against such unwarranted, unwanted and unlawful steps over the "wall of separation between Church and State." This court will not assist Sondra in her attempts to lower that wall. As Justice Frankfurter said,"[i]f nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" McCollum v. Board of Education, 333 U.S. 203, 232, 68 S. Ct. 461, 475, 92 L. Ed. 649 (1948) (dissenting opinion).

[*26] [*544] IV**

CONCLUSION

For these reasons, the court has denied the motion to be relieved as counsel. Further, any relief sought by either party with respect to any proceedings either currently being maintained or contemplated in the Beth Din is denied. The parties are directed to engage in a four-way conference within seven (7) days of this date

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[12] Apparently, however, Henry has not paid the necessary fee and the matter now sits moribund at the Beth Din level.

[13] That Sondra has not cooperated with the summons of the Beth Din regarding Henry's attempts at reconciliation could also be viewed as "unfair".

[14] New York's legislature has provided such a short-cut. New York Domestic Relations Law § 253 requires that where a marriage has been solemnized by a clergyman, a party who commences a matrimonial action must verify that he or she has acted to remove all "barriers to remarriage." It has been held that this requirement places an obligation on a husband of the Jewish faith to provide his wife with a "get". Megibow v. Megibow, 161 Misc. 2d 69, 612 N.Y.S.2d 758, 760 (Sup.Ct.1994). In fact, that seems to have been the precise purpose of that statute. The then Governor of New York made the following statement upon passage of the statute:

> This bill was overwhelmingly adopted by the State Legislature because it deals with a tragically unfair condition that is almost universally acknowledged.
>
> The requirement of a get is used by unscrupulous spouses who avail themselves of our civil courts and simultaneously use their denial of a get vindictively or as a form of economic coercion.
>
> Concededly this use of our civil courts unfairly imposes upon one spouse, usually the wife, enormous anguish.

[Perl v. Perl, 126 A.D.2d 91, 94-95, 512 N.Y.S.2d 372, 375 (1987).] This statute does not appear to have yet been challenged on First Amendment grounds.

and attempt to amicably resolve the issues that are actually before this court. Thereafter, they will forthwith report any results back to the court.

Henry's consent, or refusal to consent, to the providing of a "get", and Sondra's consent, or refusal to consent, to appear before the Beth Din for proceedings relating to Henry's attempts at reconciliation, are matters which are not to be bargained for or against. *Accord, Segal, supra.* The parties are urged, having previously resolved "98%" of the case, to resolve the remaining 2% for **[**532]** their own sake and, most importantly, for Samantha's sake. [15]

[*27]**

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[15] Sondra's request for the issuance of a bench warrant due to Henry's alleged failure to timely make support payments shall be held in abeyance pending the four-way conference.

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Bierig-Kiejdan v. Kiejdan

Superior Court of New Jersey, Appellate Division

January 11, 2023, Argued; February 16, 2023, Decided

DOCKET NO. A-2945-20

Reporter
2023 N.J. Super. Unpub. LEXIS 219 *

SUSAN BIERIG-KIEJDAN, Plaintiff-Respondent, v. RALPH KIEJDAN, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Atlantic County, Docket No. FM-01-0395-16.

Core Terms

arbitrator, parties, ketubah, translation, arbitration agreement, Rabbinical, marriage, post-judgment, proceedings, religious, divorce, confirmed

Counsel: Matheu D. Nunn argued the cause for appellant (Einhorn, Barbarito, Frost & Botwinick, PC, attorneys; Matheu D. Nunn, Bonnie C. Frost, and Jessie M. Mills, on the briefs).

James P. Yudes argued the cause for respondent (James P. Yudes, PC, attorneys; James P. Yudes, of counsel; Kevin M. Mazza and Melissa R. Barrella, on the brief).

Judges: Before Judges Accurso, Firko, and Natali.

Opinion

PER CURIAM

Defendant Ralph Kiejdan appeals from a May 12, 2021 post-judgment Family Part order compelling the parties to return to arbitration to resolve the issue of securing plaintiff Susan Bierig-Kiejdan a Jewish divorce known as a "get" from a Bet Din.[1] We reverse, finding the parties did not agree to arbitrate post-judgment issues unless they entered into a new arbitration agreement following the entry of their final judgment of divorce (FJOD), which they did not agree to do.

I.

On November 2, 1992, the parties were married in an Orthodox Jewish ceremony, during which the parties entered into a marriage agreement known as a "ketubah." The ketubah was written in either Hebrew or Aramaic. On November **[*2]** 24, 2015, plaintiff filed a complaint for divorce. The parties agreed to arbitrate any issue arising of the marriage "that could be raised in the Superior Court . . . both pendente lite and final." The parties entered into a consent order/agreement for arbitration (arbitration agreement), which provided that "the arbitrator shall determine whether an issue or dispute is within the scope of his jurisdiction." The arbitration agreement also provided that once the final award was confirmed by the Family Part judge, all post-judgment applications had to be made to the court unless the parties executed another arbitration agreement.

The seven-day arbitration proceedings took place in the Fall of 2018. On December 11, 2018, the arbitrator issued his decision, in which [he/she] explained plaintiff requested defendant be compelled to provide her with a get. Defendant promised to "voluntarily commence that process" through a Bet Din following the entry of the parties' FJOD. The arbitrator addressed Jewish divorce custom in his decision as follows:

> By way of background, when a Jewish couple marries, they sign a marriage contract called a

[1] A "Bet Din" or "Beth Din" is a Jewish rabbinical court that issues a get. Without a get, a wife cannot remarry under Jewish law. *Minkin v. Minkin, 180 N.J. Super. 260, 261-62, 434 A.2d 665 (Ch. Div. 1981)*.

> ketubah. When a Jewish couple divorces, they need a Jewish **[*3]** divorce decree, known as a get, in order to dissolve the religious marriage contract, the ketubah. "Any man or woman who does not obtain a get cannot remarry, and any subsequent children born to an individual without a get are considered bastards who cannot partake in certain religious practices and rituals." Absent contractual language in the ketubah providing specific provisions and requirements for the granting of a get, a husband in the Jewish religion solely dictates whether the get will be granted.
> [(citations omitted).]

The arbitrator noted that neither party provided a translated copy of the ketubah, and they disagreed as to the interpretation of any get provision. Defendant asserted plaintiff had to pay him to receive a get, but plaintiff testified the ketubah did not contain any provision relevant to a get. The arbitrator therefore found this issue to be "a monetary dispute as opposed to something involving [defendant's] religious beliefs."

Recognizing the lack of a translated ketubah, the arbitrator concluded the Bet Din should adjudicate the get issue. "Based upon [defendant's] assurances that" he would begin seeking a get after entry of the FJOD, the arbitrator refused to **[*4]** compel defendant to give plaintiff a get. However, plaintiff retained "the right to seek judicial intervention in the future if . . . unable to obtain a get through the Bet Din."

On January 21, 2020, the judge confirmed the arbitration award and amended the award two weeks later to adjust interest charged on the equitable distribution of assets. On February 26, 2020, the FJOD was granted and incorporated the arbitration award. The FJOD provided:

> Based on . . . defendant's assurance at trial before the arbitrator that . . . defendant will voluntarily commence the process of obtaining a Jewish get from the Jewish Rabbinical Council, the Bet Din, immediately following the entry of a FJOD so that the rabbinical court could resolve the parties' respective rights and obligations under the ketubah, the arbitrator denied . . . plaintiff's request that . . . defendant be compelled to provide her with a get without prejudice. *Because the arbitrator denied . . . plaintiff's request without prejudice, . . . plaintiff reserves the right to seek post-judgment judicial intervention in the future if she is unable to obtain a get through the Bet Din*.
>
> [(emphasis added).]

In a May 21, 2020 email exchange, **[*5]** defendant told plaintiff "we are going to a Bet Din and I'll give you Rabbi [Mendel] Gold['s] number tomorrow." Plaintiff had already been in contact with Rabbi Yitzchok Meyer Leizerowski in Pennsylvania, and questioned why the parties had to "drive so far" to use defendant's preferred Rabbi. Plaintiff exchanged emails with Rabbi Gold in May and June of 2020 and refused to use his services, instead preferring to use the Beth Din of America. Plaintiff believed defendant retained Rabbi Gold to try "to extort money" from her, but Rabbi Gold certified he "did not know" either party prior to being contacted regarding the get.

On October 22, 2020, defendant filed a motion requesting the judge certify the matter as final so he could file an appeal from the FJOD. On November 5, 2020, plaintiff filed a notice of cross-motion opposing defendant's motion and seeking "to compel . . . defendant to fully cooperate with the process, including with the Beth Din, to enable . . . plaintiff to obtain a get forthwith, or alternatively to order a hearing with respect thereto." Defendant's moving certification stated he had already "engaged a highly experienced and credentialed Bet Din, Rabbi . . . Gold **[*6]** in New York City." The judge conducted oral argument on the motions on November 20, 2020, and reserved decision.

On December 3, 2020, the judge ordered defendant "to commence the get proceedings within a [forty-five] day period from November 20, 2020 through the Bet Din he has selected." The next day, plaintiff sent a letter to the judge asserting that under the terms of the ketubah, defendant was not entitled to select any Rabbinical Court of his choosing. She attached a certified English translation of the parties' ketubah to the letter. Plaintiff's translation is printed on the letterhead of the Orthodox Beth Din of Philadelphia and signed by Rabbi Leizerowski. In relevant part, plaintiff's translation reads:

> And the [parties] agreed that if one of them were to contemplate or seek the termination of their marriage or if one of them were to terminate it in civil court, then either may summon the other to appear before the Beit Din (Court) of the Rabbinical Assembly and of the Jewish Theological Seminary of America or a designate or successor; and that both of them will abide by the decisions of this Beit Din in order that both may be able to live according to the rule of Torah.

On December **[*7]** 7, 2020, defendant's attorney wrote

a letter to the court stating that plaintiff had "raised a number of issues which [defendant] cannot address until [he has] someone who has engaged in the translation and further legal analysis particularly with the Bet Din whom [defendant] has engaged." Regarding plaintiff's newly-presented translation, the letter stated plaintiff had "sought to interject something which was never presented to the court previously and . . . would require both factual and legal input."

On December 11, 2020, defendant's attorney sent a follow-up letter to the judge pointing out that the translated ketubah was "never presented" at the arbitration or in any other trial court proceedings, and plaintiff's December 4, 2020 letter referenced "issues that were never brought before the court." Defendant's counsel noted he had "no idea" whether plaintiff's ketubah translation was accurate and argued the "designate or successor" language was unclear and could support choosing any Bet Din, even if plaintiff's translation was correct. Counsel stated defendant was "already working with a Bet Din and will continue to" comply with the court's order that was still in effect.

On December **[*8]** 16, 2020, plaintiff filed a notice of motion for reconsideration, seeking to amend the December 3, 2020 order to compel defendant to obtain the get "through a Bet Din of the Rabbinical Assembly . . . of the Jewish Theological Seminary of America or a designate or successor consistent with the parties' ketubah." Defendant filed a notice of cross-motion opposing plaintiff's motion on January 7, 2021. In his cross-moving certification, defendant stated this is a "religious undertaking," which should be addressed by a qualified Bet Din, not a court. "It is certainly, in fairness, not within the auspices of a civil court."

On January 29, 2021, the judge amended the December 3, 2020 order to instruct defendant to commence the get proceedings within forty-five days of January 22, 2021, using "a Bet Din of the Rabbinical Assembly and of the Jewish Theological Seminary of America or a designate or successor" as prescribed in plaintiff's translation of the ketubah. On February 11, 2021, defendant filed a notice of motion to reconsider the January 29, 2021 order, and attached a certification with his own translation of the parties' ketubah. Defendant certified that neither party "knew whether **[*9]** or not [plaintiff's] translation was accurate," and he therefore retained his own expert whose notarized translation contains important differences from plaintiff's translation. Defendant's translation reads in relevant part:

> [The parties] agreed that should it occur to one of them to break off their marriage, or should their marriage be broken off by the state's courts, then either he or she shall be entitled to summon the other to the court of the Rabbinical Assembly and the rabbinical academy of the land that exists, or to one that comes from its authority, and that they shall both obey its judgment, so that they may both live according to the Torah's laws.

Plaintiff opposed the motion.

In a March 16, 2021 reply certification, defendant claimed although he did not have a translation as of January 29, 2021, he was not "playing games." Defendant requested the court "rescind its January 29, 2021 order" so he could proceed with Rabbi Gold, or else "simply rescind this order and take no action further because of the constitutional . . . issues relating to a civil court dealing with these very religious issues."

On May 3, 2021, defendant's attorney sent a letter to the court noting that the **[*10]** get continued "to present a conundrum." He also questioned whether the judge could order the parties to return to arbitration at that late stage of the proceedings. On May 12, 2021, the judge issued an order directing the parties to return to arbitration so the arbitrator could "continue [his] analysis of the relevant issues and provide a written opinion." In his supplemental memorandum of decision (MOD), the judge wrote:

> As noted in a previous MOD . . . , it is clear that the arbitrator did not order defendant to obtain a get based upon defendant's representation that he would do so. However, the court cannot enforce an obligation that was not ordered by the arbitrator despite defendant's statement. Therefore, that MOD confirmed that defendant was ordered to begin the process of obtaining a get.
>
> Defendant did, in fact, begin the process of obtaining the get. However, a new problem arose. The parties differ in the translation of the Jewish marriage contract, the ketubah. Plaintiff claims it is written in Hebrew and defendant claims it is written in Aramaic, or a combination of Hebrew and Aramaic. Suffice it to say, regardless of the language in the ketubah, the parties disagree as to **[*11]** its translation and who or what entity is authorized by the ketubah to issue a get.
>
> . . . .
>
> However, the court's analysis does not end there. The court is presented with the issue of whether or not the court can compel the parties to go back to

> binding arbitration. The court has reviewed the arbitration agreement.
> The court agrees that without such an agreement, this court may not compel arbitration. However, the court believes that the contractual language allows the court to do so.
> . . . .
>
> Clearly, the parties are outside the twenty-day period. However, the issue was clearly addressed by the arbitrator but simply not decided based on defendant's representation that he would go through with giving plaintiff a get. The court cannot simply find that it does not have the authority to decide an issue without providing a remedy. Therefore, this court finds that it is within its equitable powers to extend the twenty-day period to the date that the original applications were filed. If the court does not do this, it will cause an endless stalemate that could not be overcome by either party. Therefore, the parties are ordered to go back to the arbitrator and submit to binding arbitration . . . **[*12]** .

The judge did not question the finality of the arbitration agreement when ordering the parties to return to arbitration—without their mutual written consent—to address the get. Rather, the judge concluded he had the "equitable power" to extend the twenty-day deadline in the parties' arbitration agreement, which extinguished the jurisdiction of the arbitrator after the arbitrator rendered his decision.

On appeal, defendant contends the judge improperly compelled the parties to return to arbitration to resolve the question of a get and to interpret their ketubah. Defendant further argues the arbitrator's authority terminated upon confirmation of the arbitration award pursuant to the terms of the arbitration agreement and interpretation of the ketubah is a religious issue beyond the scope of the court and arbitrator's authority.

II.

"The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence," *Gnall v. Gnall, 222 N.J. 414, 428, 119 A.3d 891 (2015)*, and "because of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." *Cesare v. Cesare, 154 N.J. 394, 413, 713 A.2d 390 (1998)*. We also "accord great deference to discretionary decisions of **[*13]** Family Part judges." *Milne v. Goldenberg, 428 N.J. Super. 184, 197, 51 A.3d 161 (App. Div. 2012)*.

"As to issues of law, however, [appellate] review is de novo," and the "trial court's interpretation of the law and the legal consequences that flow from the established facts are not entitled to any special deference." *Rowe v. Bell & Gossett Co., 239 N.J. 531, 552, 218 A.3d 784 (2019)* (quoting *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995)*).

"A judgment is final for purposes of appeal if it 'dispos[es] of all issues as to all parties.'" *Wein v. Morris, 194 N.J. 364, 377, 944 A.2d 642 (2008)* (quoting *Hudson v. Hudson, 36 N.J. 549, 552-53, 178 A.2d 202 (1962)*). After a court-appointed arbitrator completes the arbitration proceedings and issues an award, "the dispute [is] subject to final resolution by the court confirming, vacating, or modifying the award." *Ibid.*

An arbitration agreement is a contract. *Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 298, 69 A.3d 127 (App. Div. 2013)*. Arbitration agreements are therefore "subject, in general, to the legal rules governing the construction of contracts." *Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276, 72 A.3d 224 (2013)* (quoting *McKeeby v. Arthur, 7 N.J. 174, 181, 81 A.2d 1 (1951)*). Arbitration involves a contractual relationship between the parties: "it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943, 945, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)*.

Here, at no time post-judgment did the parties provide written consent to return to arbitration and they did not enter into a new arbitration agreement to address the get. "Parties are not required 'to arbitrate when they have not agreed to do so.'" *Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442, 99 A.3d 306 (2014)* (quoting *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)*); *see* ***[*14]*** *also In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228, 403 A.2d 448 (1979)* ("'Only those issues may be arbitrated which the parties have agreed shall be.'").

Having reviewed the record, and considered the arguments of appellate counsel, we conclude the judge abused his discretion by invoking equitable powers to extend the twenty-day period in the parties' arbitration agreement and ordering them to arbitrate the get issue. Paragraph 41 of the parties' arbitration agreement

explicitly states: "There shall be no further jurisdiction of the arbitrator to consider any further applications of either party, absent written consent of the parties to expand the scope of arbitration." That clearly did not occur here. Moreover, the parties did not agree to confer such discretion with the judge. Since the parties did not mutually agree in writing to arbitrate the get issue post-judgment, reversal is warranted.

To the extent we have not specifically addressed any remaining arguments raised by defendant, we conclude they lack sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Reversed.

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Burns v. Burns

Superior Court of New Jersey, Chancery Division, Family Part, Camden County

December 4, 1987, Decided

No. FM-04-08884-81

Reporter
223 N.J. Super. 219 *; 538 A.2d 438 **; 1987 N.J. Super. LEXIS 1447 ***

LAWRENCE A. BURNS, PLAINTIFF, v. MICHELLE M. BURNS, DEFENDANT

Subsequent History: [*1]** Approved for Publication February 24, 1988.

Core Terms

ketubbah, divorce, married, parties, religious belief, marriage, religion, securing

Case Summary

Procedural Posture
The defendant, former wife, filed a post-judgment motion in the Superior Court of New Jersey, Camden County, against the plaintiff, former husband, in an effort to compel the plaintiff to assist her in securing a Jewish bill of divorcement, known as a get.

Overview

The defendant, former wife, filed a post-judgment motion against the plaintiff, former husband, and sought to compel him to assist her in obtaining a Jewish bill of divorcement, known as a get. The plaintiff sought to suppress the portion of the defendant's supporting affidavit, which related to the plaintiff's demand for the defendant to invest $ 25,000, in exchange for his accession to the defendant's request. The court ordered the plaintiff to submit to the jurisdiction of the "Bet Din," the Jewish ecclesiastical court, to initiate proceedings for a get. In the alternative, the court agreed to allow the plaintiff to authorize an agent to appear on his behalf. The court denied the plaintiff's motion to suppress and held that the plaintiff's monetary demand was admissible in evidence to establish that the plaintiff's refusal to secure a get was not on the basis of his religious beliefs, but instead an issue of monetary gain. Moreover, the court held that the Establishment Clause of the First Amendment, U.S. Const. amend. I, was not offended by its order that the plaintiff submit to the jurisdiction of the Bet Din.

Outcome
The court ordered the plaintiff former husband to submit to the jurisdiction of the Bet Din, the Jewish ecclesiastical court, in order to initiate proceedings for a get or Jewish bill of divorcement. In the alternative, the court agreed to allow the plaintiff to appoint an agent to initiate the proceedings on his behalf. The court held that its order did not violate the Establishment Clause of the First Amendment.

LexisNexis® Headnotes

Family Law > Marital Termination & Spousal Support > General Overview

HN1[] Family Law, Marital Termination & Spousal Support

Jewish law requires a husband to actually deliver the "get, " a Jewish bill of divorcement, to his wife. 6 Encyclopedia Judaica 125 (1971). Divorce is carried into effect by the bill of divorcement being written, signed and delivered by the husband to the wife. It is written by a scribe upon the husband's instructions to write for him, for her and for the purpose of a divorce.

Evidence > Admissibility > Statements as Evidence > Compromise & Settlement Negotiations

HN2[] Statements as Evidence, Compromise & Settlement Negotiations

N.J. R. Evid. 52 provides that evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money, or any other thing, act or service to another who has sustained or claimed to have sustained loss or damage, is inadmissible to prove his liability for the loss or damage of any part of it. Rule 52 provides that it shall not affect the admissibility of evidence of partial satisfaction of an asserted claim, or of a debtor's payment or promise to pay all or part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty.

Evidence > Admissibility > Statements as Evidence > Compromise & Settlement Negotiations

HN3 **Statements as Evidence, Compromise & Settlement Negotiations**

Under N.J. R. Evid. 52, courts admit otherwise excludable evidence, if it relates to some other issue of fact.

Family Law > Marital Termination & Spousal Support > General Overview

Family Law > ... > Proof of Marriage > Ceremonial Marriages > Solemnization of Marriage

HN4 **Family Law, Marital Termination & Spousal Support**

The get procedure, under Jewish law, is a release document devoid of religious connotation and cannot be construed as any more religious than the marriage ceremony itself.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Family Law > Marital Termination & Spousal Support > General Overview

HN5 **Freedom of Religion, Establishment of Religion**

The *Establishment Clause of the U.S. Const. amend. I*, which clearly separates state and religion, is not violated when a party is ordered to secure a "get," as mandated by Jewish law. Under the three-prong test, ordering a party to secure a "get," (1) reflects a clear secular legislative purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) avoids excessive entanglement with religion.

Contracts Law > Types of Contracts > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

HN6 **Contracts Law, Types of Contracts**

The "ketubbah," a Jewish contract of marriage, is an enforceable agreement entered into by both parties which is not unconscionable or contrary to public policy.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

HN7 **Marital Termination & Spousal Support, Dissolution & Divorce**

A husband is compelled to secure a "get," a Jewish bill of divorcement, when (1) he unjustifiably refuses conjugal rights, (2) if the husband shows unworthy conduct toward his wife such that the wife cannot be expected to live with him as his wife, (3) if the husband's unjustified refusal to maintain her when he is in the position to do so, or could be if he was willing to work and earn an income, (4) if the husband is unfaithful to his wife, or (5) if the husband habitually assaults or insults her, or is the cause of unceasing quarrels, so she has no choice but to leave the household.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Equity > Maxims > Ought to be Done Principle

Family Law > Marital Termination & Spousal Support > General Overview

HN8[] Jurisdiction, Jurisdictional Sources

For a court to compel a plaintiff to submit to the jurisdiction of the Jewish ecclesiastical court, the "Bet Din," and initiate the procedure to secure a get, or Jewish bill of divorcement, is within the equity powers of a court to do what ought to be done. In doing equity, the court has power to adapt the equitable remedies to the particular circumstances of each particular case. The ultimate decision of whether a get is to be granted is that of the "Bet Din" and not of the court.

Counsel: *James Greenberg* for Plaintiff (*Greenberg, Shmerelson, Weinroth & Etish, P.C.*).

Saverio R. Principato for Defendant (*Saverio R. Principato, P.C.*).

Judges: Natal, P.J.F.P.

Opinion by: NATAL

Opinion

[*221] [439]** This matter came before the court on a post-judgment motion by the defendant, Michelle M. Burns, for an order to compel the plaintiff to assist her in securing a Jewish bill of divorcement known as a "get." [1] The plaintiff filed a cross-motion to suppress that portion of the defendant's supporting affidavit relating to his demand for $ 25,000 to accede to the defendant's request pursuant to Rule 52 of the New Jersey Rules of Evidence.

[*222] Background facts in this case are important, as they are not in dispute and they present the basis for the final disposition.

Both the plaintiff and the **[***2]** defendant had been married prior to their marriage to each other in 1969. Since they were of the Jewish religion they felt compelled to secure "gets" from their prior spouses in order to properly enter into a Jewish contract of marriage known as a "ketubbah." Under Jewish law one cannot marry in an Orthodox or Conservative ceremony without securing a "get" from a prior spouse.

At the time the plaintiff and the defendant married, plaintiff willingly proceeded with securing a "get" from his prior spouse and then married the defendant under civil and Jewish law. The marriage did not succeed and a dual judgment of divorce was granted to the parties in 1982. Since that time the plaintiff has remarried, choosing not to proceed with first securing a "get." The defendant now plans to remarry but she believes she is bound by tenet of Jewish law to obtain a "get" terminating her prior marriage before she may marry again.

Defendant's attorney contacted the plaintiff to communicate her desire to have the plaintiff secure the "get." [2] Plaintiff stated his religious beliefs are such that he no longer believed in the necessity of securing a "get." Yet, plaintiff informed defendant's attorney, **[***3]** if the defendant would invest $ 25,000 in an irrevocable trust for the benefit of their daughter, with the plaintiff and another party of his choosing as joint trustees, he would secure the "get" for the defendant.

I. All of the facts necessary for the court to make its determination were set forth in supporting affidavits. Thus, there were no genuine issues of material fact. The court is not required to take oral testimony and may decide this matter **[*223]** without a plenary hearing. *Skillman v. Skillman, 136 N.J. Super. 348, 350 (App.Div.1975)*.

II. Plaintiff's request to suppress and exclude from **[***4]** the court's consideration that part of the defendant's supporting affidavit referring to his request for $ 25,000 pursuant to Rule 52 is denied. Plaintiff claims the discussion he had with defendant's attorney, wherein he demanded the sum of $ 25,000 to be placed in trust, was an offer to compromise the current dispute **[**440]** and should be barred from evidence in a court hearing.

HN2[] Rule 52 provides:

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[1] Under Hebraic law, evidence of the granting of a divorce. *Black's Law Dictionary Revised* 816 (4th Ed. West Publishing Co. 1968).

[2] HN1[] Jewish law requires the husband to actually deliver the "get" to his wife. See 6 *Encyclopedia Judaica* 125 (MacMillan Co. 1971). "Divorce is carried into effect by the bill of divorcement being written, signed and delivered by the husband to the wife. It is written by a scribe upon the husband's instructions to write 'for him, for her and for the purpose of a divorce'." *Id.* at 131.

> OFFER TO COMPROMISE AND THE LIKE NOT EVIDENCE OF LIABILITY OR CRIMINAL WRONGDOING
> (1) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money, or any other thing, act or service to another who has sustained or claimed to have sustained loss or damage, is inadmissable to prove his liability for the loss or damage of any part of it. This rule shall not affect the admissability of evidence (a) of partial satisfaction of an asserted claim, or (b) of a debtor's payment or promise to pay all or part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty.

HN3[]

Under this Rule the courts have admitted otherwise excludable evidence, if it relates to **[***5]** some other issue of fact. Rynar v. Lincoln Transit Co., Inc., 129 N.J.L. 525 (E. & A. 1943); Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 200 (App.Div.1978), *cert.* den. *77 N.J. 510 (1978)*.

Plaintiff's alleged offer to compromise is admissible to demonstrate that his refusal to secure defendant a "get" is not on the basis of his religious beliefs, but instead is an issue of monetary gain. Plaintiff initially claimed that granting the defendant a "get" was not necessary since it was contrary to his current religious beliefs. Plaintiff further asserted that his First Amendment right to practice his religion without interference from the State would be abridged if he were forced to compromise his religious beliefs.

A true religious belief is not compromised as the amount of money offered or demanded is increased. An offer to secure a "get" for $ 25,000 makes this a question of money not religious **[*224]** belief. This "offer," which is not denied by the plaintiff, takes this issue outside the First Amendment. This so-called "offer" is akin to extortion.

III. This court finds Minkin v. Minkin, 180 N.J. Super. 260, 266 (1981), as the only **[***6]** New Jersey law controlling in this area. Judge Minuskin found that "[HN4[] t]he get procedure is a release document devoid of religious connotation and cannot be construed as any more religious than the marriage ceremony itself."

The court analyzed whether there was a First Amendment entanglement. Judge Minuskin found HN5[] the Establishment Clause of the First Amendment which clearly separates State and religion, is not violated when a party is ordered to secure a "get." The Court applied the standard set by the United States Supreme Court in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 772-773, 93 S.Ct. 2955, 2965-66, 37 L.Ed.2d 948 (1973). Under the three-prong test established in *Nyquist*, the *Minkin* court held that ordering a party to secure a "get," (1) reflects a clear secular legislative purpose; (2) has a primary effect that neither advances nor inhibits religion, and (3) avoids excessive entanglement with religion. 180 *N.J. Super.* 265-66.

The court in *Minkin* applied the equity powers of the court and enforced the marriage contract or "ketubbah." HN6[] The "ketubbah" was held as an enforceable agreement entered into by **[***7]** both parties which was not unconscionable nor contrary to public policy. *Id. at 262*. The "ketubbah" requires both parties to conform to the provisions of the Law of Moses and of Israel. Under such law the husband is required to give his wife a "get" when the wife commits adultery. Thus, in *Minkin* the court ordered defendant to secure the "get" and deliver it to his wife. *Id.*

IV. The parties obtained a dual judgment, on the grounds of eighteen months continuous separation without a prospect of reconciliation, commonly referred to as a "no-fault" divorce. **[*225]** The plaintiff argued that *Minkin* was limited to those cases where the wife was divorced on the grounds of adultery. This court rejects plaintiff's argument and thus expands the *Minkin* decision.

Under Rule 9 of the New Jersey Rules of Evidence, this court takes judicial **[**441]** notice of *The Bible* [3] and of the *Encyclopedia Judaica*. [4] The court finds both to be learned treatises containing the laws of Moses and Israel and were consulted by the court to decipher the significance of the "ketubbah." Reference is necessary to the laws of Moses and Israel because the parties have signed **[***8]** a written contract, their "ketubbah" (exhibit 1 in evidence), committing themselves to be bound by such law.

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[3] See *Deuteronomy*, 24:1, which states, "when a man taketh a wife and marries her, then it comes to pass if she finds no favor in his eyes because he has found some unseemly thing in her that he write her a bill of divorcement and give it in her hand and send her out of the house."

[4] 6 *Encyclopedia Judaica*, (MacMillan Co. 1971).

In studying the laws of Moses and Israel this court finds there are various circumstances which would require the husband to secure a "get" from his wife. The *Minkin* court found the husband compelled to grant his wife a "get" due to her acts of adultery.

In addition, HN7[↑] a husband is compelled to secure a "get" when (1) he unjustifiably refuses conjugal rights; (2) if the husband shows unworthy conduct toward his wife such that the wife cannot be expected to live with him as his wife; (3) if the husband's unjustified refusal to maintain her when he is in the position **[***9]** to do so, or could be if he was willing to work and earn an income; (4) if the husband is unfaithful to his wife, or (5) if the husband habitually assaults or insults her, or is the cause of unceasing quarrels, so she has no choice but to leave the **[*226]** household. [5]

This list is not intended to be exclusive as there are still other circumstances under which a husband is compelled to give a "get," but merely illustrative of the fact that adultery is not the exclusive ground under the laws of Moses and Israel.

The parties no longer live together. Mr. Burns has remarried. He was the plaintiff and sought the divorce. He has chosen another for his wife and married her under civil law, yet under the Jewish law the plaintiff and the defendant are still married. The plaintiff must release the defendant from the ketubbah and put an end to that relationship. The judgment of divorce provided for the **[***10]** parties to "be divorced from the bond of matrimony . . . and each of them, be freed and discharged from the obligation thereof[.]" HN8[↑] For the court to compel the plaintiff to submit to the jurisdiction of the Jewish ecclesiastical court, the "Bet Din," and initiate the procedure to secure a "get" is within the equity powers of this court to do what ought to be done. In doing equity, the court has power to adapt the equitable remedies to the particular circumstances of each particular case. *Arabia v. Zisman, 143 N.J. Super. 168 (Ch. 1976)*, aff'd *157 N.J. Super. 335 (App.Div.1978)*. The ultimate decision of whether a "get" is to be granted is that of the "Bet Din" and not of this court.

Therefore, this court orders the plaintiff to submit to the jurisdiction of the "Bet Din" to initiate the proceedings for a "get". In the alternative, the court will permit the plaintiff to execute the prepared document, (exhibit 2 in evidence), authorizing the preparation and presentation of the "get" to the defendant by an agent on his behalf and forego the actual appearance before the "Bet Din".

An order may be entered accordingly.

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[5] Conduct of the husband as a ground for divorce. See 6 *Encyclopedia Judaica* 128 (MacMillan Co. 1971).

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Mayer-Kolker v. Kolker

Superior Court of New Jersey, Appellate Division

February 19, 2003, Argued ; March 28, 2003, Decided

A-4476-01T1

Reporter
359 N.J. Super. 98 *; 819 A.2d 17 **; 2003 N.J. Super. LEXIS 116 ***

ISABELLE MAYER-KOLKER, PLAINTIFF-APPELLANT, v. RON KOLKER, DEFENDANT-RESPONDENT.

Subsequent History: [*1]** Approved for Publication March 28, 2003. As Corrected April 28, 2003.

Certification denied by *Mayer-Kolker v. Kolker, 177 N.J. 495, 828 A.2d 922, 2003 N.J. LEXIS 1047 (N.J., July 17, 2003)*

Prior History: On appeal from the Superior Court of New Jersey, Law Division, Passaic County, FM-16-38-01.

Core Terms

ketubah, religious, parties, cooperate, civil court, marriage, divorce, obligate

Case Summary

Procedural Posture
Plaintiff wife appealed from a judgment of the Superior Court of New Jersey, Law Division, Passaic County, which entered a dual final judgment of divorce between the wife and defendant husband, but which did not require that the husband give the wife a religious divorce, or a "get."

Overview
The parties were married in a religious ceremony and at that time, they entered into a premarital document called a ketubah that, within the Jewish tradition, had characteristics of a binding contract. The wife contended that the husband was obligated to give her a "get" so that she could remarry religiously. However, the husband claimed that there was no such promise in the document signed by the parties. The court reviewed various case law holdings wherein it was determined that courts had the authority to compel a husband to perform the "get" under the proper conditions, including in divorces based on adultery and no-fault. There was no violation of the court being involved in religion by such an order because it was merely compelling the fulfillment of contractual terms that the parties had entered into. However, the court found that it had to affirm the decision not to compel the husband to perform the get because there was a lack of evidence regarding the language interpretation and specific obligations of the particular ketubah involved.

Outcome
The court affirmed the judgment of the trial court and remanded the matter for further proceedings.

LexisNexis® Headnotes

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN1[] **Marital Termination & Spousal Support, Spousal Support**

A husband must secure a release in order for his former wife to be free to remarry under Mosaic law.

Business & Corporate
Compliance > Contracts > Contract Conditions & Provisions > Forum Selection Clauses
Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > Defenses > Public Policy Violations

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Governments > Courts > Authority to Adjudicate

HN2[] Contract Conditions & Provisions, Forum Selection Clauses

New Jersey trial courts have not been in complete accord on the issue of whether a civil court has authority to compel a husband to cooperate in obtaining a get. It has been determined that by signing a ketubah, the parties agreed to conform to the provisions of the laws of Moses and Israel. Where the parties' entry into the ketubah has been voluntary and where the ketubah itself does not violate public policy, a court can enforce the ketubah on neutral contract principles. Viewed in that light, a ketubah in a sense is a counterpart in religious law to the forum selection clauses and consents to suit that are given effect by temporal courts.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Evidence > ... > Credibility of Witnesses > Impeachment > Religious Beliefs

Family Law > ... > Dissolution & Divorce > Fault Based Grounds > Adultery

HN3[] Freedom of Religion, Establishment of Religion

The acquisition of a "get" is not a religious act. The entry of an order compelling a party to secure a get would have the clear secular purpose of completing a dissolution of the marriage. Compelling a husband to specifically perform the duties which he promised to undertake in the ketubah does not violate the Establishment Clause of the Constitution. A ketubah requires compliance with Mosaic law and Mosaic law requires the husband to give his wife a get when he alleges an act of adultery on his wife's part.

Family Law > ... > Dissolution & Divorce > Fault Based Grounds > Adultery

Family Law > ... > Dissolution & Divorce > Fault Based Defenses > General Overview

Family Law > ... > Dissolution & Divorce > Fault Based Defenses > Reconciliation

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN4[] Fault Based Grounds, Adultery

Mosaic law requires a husband to obtain a "get" in at least five other circumstances in addition to alleged adultery by a wife. A civil court confronts no constitutional problem in requiring a husband to cooperate in obtaining a get in the event of a dual judgment of divorce based upon 18 months of separation with no prospect of reconciliation, commonly referred to as a "no fault" divorce. The husband can cooperate by authorizing an agent to appear before the religious body to obtain the get rather than having to appear himself.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN5[] Marital Termination & Spousal Support, Spousal Support

The precisely worded "get" states that the husband does willingly consent, being under no restraint, to release, to set free, and put aside thee, my wife. Accordingly, in giving his wife a "get" a husband must "act without constraint."

Evidence > Privileges > Marital Privileges > General Overview

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > General Overview

HN6[] Privileges, Marital Privileges

Every Jewish marriage calls for the execution by the parties of an agreement called the "ketubah." The ketubah obligates the marital partners to comply with the laws of Moses and Israel. Certain rights and privileges as defined in those laws are granted to the wife by the husband. The consideration in the contract is the giving by the wife of her dowry and the husband

obligating himself to support and care for his wife during the marriage and to comply with the laws of Moses and Israel.

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

Tax Law > Federal Income Tax Computation > Nonbusiness Expenses > General Overview

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > General Overview

Family Law > ... > Antenuptial & Premarital Agreements > Requirements > Competence of Parties

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Tax Law > ... > Nonbusiness Expenses > Charitable Contributions > General Overview

Tax Law > ... > Nonbusiness Expenses > Charitable Contributions > Religious Organizations

HN7[] **Antenuptial & Premarital Agreements, Enforcement**

Interpreting the effect of a particular ketubah, and then determining whether a party's signature on this document subjects him to Mosaic law, and further determining what Mosaic law commands on this point are not tasks which a court should assume in the first instance and in any event are not tasks for which a court is properly suited in the absence of expert testimony and other evidence. It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.

Counsel: *Stephen H. Roth* argued the cause for appellant (*Mr. Roth* and *Michelle M. DeSantis,* on the briefs).

Dale C. Krouse argued the cause for respondent.

Judges: Before Judges STERN, COLLESTER and ALLEY. The opinion of the court was delivered by ALLEY, J.A.D.

Opinion by: ALLEY

Opinion

[18]** **[*99]** The opinion of the court was delivered by

ALLEY, J.A.D.

This is an accelerated appeal in which plaintiff appeals from portions of the Dual Final Judgment of Divorce entered March 20, 2002. [1]

On August 9, 1996, plaintiff and defendant were married in a religious ceremony in Passaic, New Jersey. For both plaintiff **[*100]** (then 38) and defendant (then 41), this was their second marriage. Plaintiff has one daughter from a previous marriage, but the parties **[***2]** had no children from this marriage and as a result no disputes exist as to custody or child support. The disputes on appeal include whether defendant could be compelled to cooperate in giving plaintiff a *get.*

At the time of their marriage, the parties entered into a *ketubah,* a premarital document that within the Jewish tradition appears to have characteristics of a binding contract, at least in certain respects. Indeed, plaintiff alleges that the very act of executing a *ketubah* made their marriage subject to Mosaic law and obligated defendant to give her a *get.* According to defendant, however, the particular *ketubah* the parties signed did not have the effect of promising compliance with Mosaic law, lacked the requisite specificity for enforcement, and is silent on the issue of whether a *get* would be granted in the event of a divorce.

[At the court's direction, a preliminary discussion appearing at this point in the filed opinion has been omitted from the published opinion.]

Plaintiff requested that the court compel defendant to cooperate with those efforts. As we understand it, *HN1*[] a husband must secure a release in order for his former wife to be **[***3]** free to remarry under Mosaic law. *Minkin v. Minkin, 180 N.J. Super. 260, 261-62 & n. 1, 434 A.2d 665 (Ch.Div.1981)*, citing 6 *Encyclopedia Judaica* 132 (1971). The trial judge determined, "I'd like to **[**19]** order a *get* and see that [plaintiff is] free to

[1] We have abbreviated this opinion for publication purposes, having deleted those portions that are of particular interest to the litigants only.

remarry in [her] faith, however, I do not believe that I have the authority to do that." The judge based his decision on the reasoning in *Aflalo v. Aflalo, 295 N.J. Super. 527, 685 A.2d 523 (Ch. Div.1996)*.

HN2[↑] Our trial courts have not been in complete accord on the issue of whether a civil court has authority to compel a husband to cooperate in obtaining a *get*. *Minkin* determined that, by signing a *ketubah,* the parties "agreed to conform to the provisions of the laws of Moses and Israel." *Supra, at 262, 434 A.2d 665*. Because in *Minkin* the parties' entry into the *ketubah* had been voluntary, and because the court found the *ketubah* itself did not violate **[*101]** public policy, *Minkin* held that a court could enforce the *ketubah* on neutral contract principles. *Id. at 262-63, 434 A.2d 665*. Viewed in that light, a *ketubah* in a sense is a counterpart in religious law to the forum selection clauses and consents **[***4]** to suit that are given effect by temporal courts. *See Paradise Enterprises Ltd. v. Sapir, 356 N.J. Super. 96, 811 A.2d 516 (App.Div.2002), certif. denied, 175 N.J. 549, 816 A.2d 1050, 2003 N.J. LEXIS 290 (2003)*, where we noted the general enforceability in New Jersey of forum selection clauses.

The court in *Minkin* went on to take testimony from at least five rabbis and relied upon "credible expert testimony [to find] that HN3[↑] the acquisition of a *get* is not a religious act[.]" The court also found "that the entry of an order compelling defendant to secure a get would have the clear secular purpose of completing a dissolution of the marriage." *Id. at 266, 434 A.2d 665*. The court reasoned that compelling the husband to specifically perform the duties which he promised to undertake in the *ketubah* would thus not violate the *Establishment Clause of the Constitution*. *Ibid.* On facts different than those of the instant case, the court noted a *ketubah* required compliance with Mosaic law and that Mosaic law "require[s] the husband to give his wife a get when he alleges an act of adultery on his wife's part. In the instant case [*Minkin*] the husband counterclaimed for divorce **[***5]** on the ground of adultery, giving rise to the wife's claim to require her husband to secure a get." *Id. at 262, 434 A.2d 665*.

The holding in *Minkin* was followed in *Burns v. Burns, 223 N.J. Super. 219, 224-25, 538 A.2d 438 (Ch.Div.1987)*. Taking judicial notice of both the *Bible* and *Encyclopedia Judaica,* Burns stated that HN4[↑] Mosaic law required a husband to obtain a *get* in at least five other circumstances in addition to alleged adultery by a wife. *Id. at 225-26*. *Burns* thus expanded the holding in *Minkin* to hold that a civil court confronted no constitutional problem in requiring a husband to cooperate in obtaining a *get* in the event of a dual judgment of divorce based upon eighteen months of separation with no prospect of reconciliation, commonly referred to as a **[*102]** "no fault" divorce. *Ibid.* Burns also noted the husband could cooperate by authorizing an agent to appear before the religious body to obtain the *get* rather than having to appear himself. *Id. at 226, 538 A.2d 438*.

In the present case, the trial court relied on *Aflalo, supra, 295 N.J. Super. at 532, 685 A.2d 523*, which declined to follow *Minkin* In concluding **[***6]** he had no authority [2] **[***8]** to compel defendant to cooperate in **[**20]** obtaining a *get,* the judge in his opinion recited the following reasoning:

> [*Minkin*] fails to recognize that coercing the husband to provide the "get" would not have the effect sought. The "get" must be phrased and formulated in strict compliance with tradition, according to the wording given in the Talmud. HN5[↑] The precisely worded "get" states that the husband does "willingly consent, being under no restraint, to release, to set free, and put aside thee, my wife[.]" Accordingly, in giving his wife a "get" a husband must "act without constraint." Indeed, during the proceeding the husband is asked "whether he ordered [the "get"] of his own free will." What value then is a "get" when it is ordered by a civil court and when it places the husband at risk of being held in contempt should he follow his conscience and refuse to comply? Moreover, why should this court order such relief when that is something which the Beth Din will not do? If a "get" is something which can be coerced then it should be the Beth Din which does the coercing. In coercing the husband, the civil court is, in essence, overruling or superseding any **[***7]** judgment which the Beth Din can or will enter, contrary to

[2] We note an indication that the trial judge may since have changed his mind, in a reported opinion in which he favorably cited *Minkin* for the proposition that the Superior Court has authority to enforce a *ketubah* in support of his conclusion that he had authority to enforce an Islamic Mahr agreement by compelling a husband to pay the remainder of the $ 10,000 which he had promised at the time of marriage to pay his wife. *Odatalla v. Odatalla, 355 N.J. Super. 305, 311, 810 A.2d 93 (Ch.Div.2002)*. It appears *Odatalla* was pending at the time of this case.

accepted First Amendment principles.

[*Ibid.*]

Aflalo determined that the Free Exercise clause (U.S. Const. amend. I) did not allow the court authority to compel either husband or wife to appear before the religious tribunal, whether to obtain a *get* or to discuss reconciliation. [3] Id. at 544, 685 A.2d 523. **[*103]** Our research has not disclosed any New Jersey court decisions other than at the trial level as to the judicial power or lack of power to compel cooperation in obtaining a *get.*

Here, we conclude that we need not determine the limits of judicial authority in this field. Instead, we focus on the threshold issue, namely, whether the particular *ketubah* of the parties in this case had the effect of subjecting the parties to Mosaic law. The parties here did sign a *ketubah,* although the judge concluded there was "no such agreement[.]" [4] Indeed, the document was not before the trial court but is included in this appeal as a supplement. While we have the *ketubah*before us, we do not have the information necessary to make a determination about the effect of the agreement.

[*9]** First, the *ketubah* signed by these parties is in two languages and they do not stipulate to any translation or that the English represents a translation of the Hebrew. Second, they presented no evidence about the effects of a *ketubah* generally or this *ketubah* in particular. Plaintiff contends the very act of signing a *ketubah* binds parties to Mosaic law. Minkin and Burns support plaintiff's contention. *Minkin* describes the effect of a *ketubah* in general, again taking judicial notice of the *Encyclopedia Judaica:*

> HN6[↑] Every Jewish marriage calls for the execution by the parties of an agreement called the *"ketuba."* The *ketuba* obligates the marital partners to comply with the laws of Moses and Israel. Certain rights and privileges as defined in **[**21]** those laws are granted to the wife by the husband. The consideration in the contract is the giving by the wife of her dowry and the husband obligating himself to support and care for his wife during the marriage and to comply with the laws of Moses and Israel.
>
> [Supra, at 262 n. 2, 434 A.2d 665.]

Unfortunately, the operative language of the Minkin *ketubah* is not provided. Defendant counters, "it was not **[***10]** the type of *Ketubah* that addressed in any way what would happen in the event of **[*104]** a civil divorce, nor did it in any way obligate either party to cooperate with the other to obtain a *get.*"

Third, the parties do not present competent evidence, which we assume would consist of appropriate expert testimony, about what Mosaic law would require in this instance. Even if a civil court may properly enforce such religious premarital agreements, notwithstanding First Amendment concerns, we are not competent to determine without an evidentiary basis whether this *ketubah* effectively subjected defendant to comply with religious law and what that religious law demands here. HN7[↑] Interpreting the effect of this *ketubah,* and then determining whether defendant's signature of this document subjects him to Mosaic law, and further determining what Mosaic law commands on this point are not tasks which we should assume in the first instance and in any event are not tasks for which we are properly suited in the absence of expert testimony and other evidence. *See* Hernandez v. C.I.R., 490 U.S. 680, 699, 109 S. Ct. 2136, 2148, 104 L. Ed. 2d 766, 786 (1989) (determining that fees for **[***11]** Scientology audits were not deductible from federal income tax as "charitable contributions," the Court stated, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds[]"); and Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449, 89 S. Ct. 601, 606, 21 L. Ed. 2d 658, 665 (1969) (refusing to decide whether a local church has failed to follow tenets of a denomination, stating:

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular

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[3] In *Aflalo,* the wife asked the court to compel her husband to appear before the tribunal to obtain a *get,* while the husband asked the court to compel his wife to appear before the tribunal to work toward reconciliation. *Ibid.*

[4] Before reviewing the case law, the trial judge stated, "I can specifically enforce that portion of the *ketubah* requiring a *get.* What I am not aware of is that if there is no agreement, there's no *ketubah* . . . that I can now order someone to participate in a *get.*"

> interests in matters of purely ecclesiastical concern . . . . the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.).

See also **[***12]** *Ran-Dav's County Kosher, Inc. v. New Jersey, 129 N.J. 141, 608 A.2d 1353 (1992)* (determining that state regulatory **[*105]** scheme for kosher foods presented entanglement problems under the *Establishment Clause*).

The trial court's determination that it should not compel defendant in regard to the *get* is correct, but for different reasons than those advanced. Plaintiff has not established the effect of this particular *ketubah* nor the mandate of Mosaic law, if applicable. Without such a record we lack the necessary factual context to determine whether a New Jersey court has power to compel cooperation in obtaining a *get.*

> [**At the court's direction, its discussion of other facts and of the parties' other arguments has been omitted from the published opinion.**]

Accordingly, the judgment and orders appealed from are affirmed in all respects, **[**22]** except that we remand for the development of a more complete record as to the parties' obligations under Mosaic law in the circumstances of this case, including the *ketubah* and for a determination in light of such facts as to whether the court can compel defendant to cooperate with plaintiff in obtaining a *get.*

The judgment **[***13]** appealed from is affirmed except as specified above.

End of Document

Minkin v. Minkin

Superior Court of New Jersey, Chancery Division, Bergen County

July 22, 1981, Decided

M-11721-78

Reporter
180 N.J. Super. 260 *; 434 A.2d 665 **; 1981 N.J. Super. LEXIS 653 ***

BRENDA MINKIN, PLAINTIFF, v. BARRY MINKIN, DEFENDANT

Core Terms

religious, marriage, religion, ketuba, parties, remarry, public policy, ceremony

Case Summary

Procedural Posture
Plaintiff wife sought an order requiring defendant husband to obtain a Jewish ecclesiastical divorce after defendant filed a claim for a divorce on grounds of adultery.

Overview

Plaintiff wife filed a motion post judgment to require defendant husband to obtain and pay for a Jewish ecclesiastical divorce or "get." Under Jewish law, only the husband could obtain the get and without it the wife could not remarry. The parties were married in a Jewish ceremony, known as a "ketuba" where defendant agreed to give plaintiff a get if he alleged an act of adultery on the part of plaintiff. The court reasoned that in the ketuba, a marriage contract was entered into. The ketuba did not require anything that was against public policy. As a result, the court held the marriage contract was enforceable unless enforcement violated the U.S. Const. amend. I. The court obtained the expertise of various rabbis and concluded that a get did not require any religious ceremony, a rabbi's presence, or belief in any doctrine or creed by defendant. Because obtaining a get was not a religious act, the court found that no violation of U.S. Const. amend I would occur by ordering defendant to specifically enforce the marriage contract and obtain a get.

Outcome
The court determined that plaintiff wife and defendant husband had entered into a marriage contract where defendant agreed to obtain a Jewish ecclesiastical divorce if he alleged that plaintiff committed adultery. The court ordered the specific enforcement of the contract and found no First Amendment violation because it concluded that obtaining the divorce was not a religious act.

LexisNexis® Headnotes

Contracts
Law > Defenses > Unconscionability > General Overview

Family Law > Marital Duties & Rights > General Overview

HN1 **Defenses, Unconscionability**

A court of equity will enforce a contract between husband and wife if it is not unconscionable to do so and if the performance to be compelled is not contrary to public policy.

Contracts Law > Defenses > Public Policy Violations

HN2 **Defenses, Public Policy Violations**

An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with public morals.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

HN3[] **Freedom of Religion, Establishment of Religion**

To pass muster under the establishment clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive entanglement with religion.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN4[] **Freedom of Religion, Establishment of Religion**

The establishment clause bars a state from placing its official support behind a religious belief, while the free exercise clause bars a state from interfering with the practice of religion by its citizens. This prohibition applies to the judiciary as well as the executive and legislative branches of government.

Counsel: [*1]** *Lucianna, Bierman & Stillman*, for plaintiff (*Steven Stillman* of counsel).

Ferro, Lamb & Kern, for defendant (*Ralph Ferro* of counsel).

Judges: Minuskin, J.S.C.

Opinion by: MINUSKIN

Opinion

[*261] [665]** Plaintiff wife moved post judgment for an order requiring the defendant to obtain and pay for the costs of a Jewish ecclesiastical divorce known as a "*get*." [1]

[*262] The significance of her motion is that only a husband may secure **[***2]** the *get* and without it the wife cannot remarry under Jewish law.

The issues are:

(1) Whether the parties have entered into a contract enforceable by this court, and

(2) Whether the relief sought by plaintiff would unconstitutionally infringe upon defendant's First Amendment right of exercise of religious freedom.

The parties were married in a Jewish ceremony where they entered into a contract, called a "*ketuba*," in which they **[**666]** agreed to conform to the provisions of the laws of Moses and Israel. [2] These laws require the husband to give his wife a *get* when he alleges an act of adultery on his wife's part. In the instant case the husband counterclaimed for divorce on the ground of adultery, giving rise to the wife's claim to require her husband to secure a *get*. The husband has refused and opposes any order to compel him to do so, claiming that such an order would violate the Establishment of Religion Clause of the First Amendment. The wife asserts that without the *get* she would be effectively restrained from remarrying in a manner consistent with her religious beliefs.

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[1] Acquisition of a *get* is unique since it may only be obtained by the husband. See 6 *Encyclopedia Judaica*, 132 (1971).

> Execution of the Divorce. Divorce is carried into effect by the bill of divorcement being written, signed, and delivered by the husband to his wife. It is written by a scribe upon the husband's instruction to write "for him, for her and for the purpose of a divorce." The materials used in the writing must belong to the husband and the scribe formally presents them as an outright gift to the husband before writing the Get.

[2] Every Jewish marriage calls for the execution by the parties of an agreement called the "*ketuba*." The *ketuba* obligates the marital partners to comply with the laws of Moses and Israel. Certain rights and privileges as defined in those laws are granted to the wife by the husband. The consideration in the contract is the giving by the wife of her dowry and the husband obligating himself to support and care for his wife during the marriage and to comply with the laws of Moses and Israel. *See Encyclopedia Judaica, supra*.

[*3]** To compel the husband to secure a *get* would be to enforce the agreement of the marriage contract (*ketuba*). ***HN1***[] A court of equity will enforce a contract between husband and wife if it is not unconscionable to do so and if the performance to be compelled is not contrary to public policy. *See* *Garlinger v. Garlinger, 129 N.J. Super. 37 (Ch. Div. 1974)*; *Schlemm v. **[*263]** Schlemm, 31 N.J. 557 (1960)*; *Equitable Life Assur. Soc. of U.S. v. Huster, 75 N.J. Super. 492 (App.Div. 1962)*.

What constitutes an agreement against public policy was defined in *Garlinger, supra*, where the court said,

> ***HN2***[]
>
> An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with public morals. *17 Am.Jur.2d, Contracts, § 179* at 541. [*129 N.J. Super. at 40*].

In the instant case the *ketuba* contract requires the participants to comply with certain reciprocal obligations pertaining **[***4]** to the marriage. For example, the wife is to perform the role of homemaker and to supply a dowry; the husband is to support and care for the wife. The *ketuba* is devoid of any requirement that could be construed to be against public policy. No interest of society is affected or impaired by its provisions, nor does it conflict with public morals. On the contrary, its purpose is obviously to promote a successful marital relationship and its enforcement, therefore, actually advances public policy. The contract simply calls for defendant, in securing a *get*, to do that which he agreed to do. Without compliance plaintiff cannot remarry in accordance with her religious beliefs. For these reasons the contract should be specifically enforced.

The question of whether an order of this court for specific performance of the *ketuba* constitutes violation of defendant's First Amendment rights remains to be determined. Authority to permit the issuance of such an order appears in *Koeppel v. Koeppel, 138 N.Y.S.2d 366 (Sup.Ct. 1954)*, and *Rubin v. Rubin, 75 Misc.2d 776, 348 N.Y.S.2d 61 (Family Ct. 1973)*. In *Koeppel*, where the facts parallel the instant case, **[***5]** the court said:

> Defendant has also contended that a decree of specific performance would interfere with his freedom of religion under the Constitution. Complying with his agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence (paragraph Second of the complaint not denied in the answer). His appearance before the Rabbinate to answer questions and give evidence needed by them to make a decision is not a profession of faith. Specific performance herein would merely require the defendant to do what he voluntarily agreed to do. [at 373]

[*264] **[**667]** The *Koeppel* and *Rubin* opinions are within the standards promulgated by the U.S. Supreme Court in its landmark holding of *Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 772-773, 93 S.Ct. 2955, 2965-2966, 37 L.Ed.2d 948, 962-963 (1973)*. *See, also,* *Marsa v. Wernik, 86 N.J. 232, 246 (1980)*. The *Nyquist* court set forth a three-prong test for determining whether an act violates the Establishment Clause of the First Amendment.

> . . . ***HN3***[] [T]o pass muster under the Establishment Clause **[***6]** the law [3] in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive entanglement with religion. [*Nyquist, supra 413 U.S. at 773, 93 S.Ct. at 2965*.]

To determine whether enforcing the marriage contract would violate the three-prong test, and because "this issue is one of the most sensitive areas in the law," the court on its own motion requested the testimony of several distinguished rabbis [4] well **[*265]** versed in

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[3] ***HN4***[] The Establishment Clause bars a state from placing its official support behind a religious belief, while the Free Exercise Clause bars a state from interfering with the practice of religion by its citizens. This prohibition applies to the judiciary as well as the executive and legislative branches of government. *See* *In re Adoption of E., 59 N.J. 36, 51 (1971)*.

[4] Rabbis:

> *Rabbi Macy A. Gordon*: Master's degree from Columbia University; Ph. D., Yeshiva University, in Jewish Education; ordained rabbi in 1956; on the Religious Studies faculty at Yeshiva University; chairman of the Rabbinical Council of Bergen County; vice-president of the Rabbinical Council of New Jersey; member of the executive board of commission of the Rabbinical Council of America; member of the Beth Din Commission of the

Jewish law, and one of whom (Rabbi Richard Kurtz) is also a practicing attorney **[***7]** specializing in matrimonial law.

[*8]** Rabbi Macy Gordon defined the *get* as a written document of severance, authorized by the husband and delivered to his wife, which states that all marital bonds between them have been severed. He stated that a Jewish couple upon marriage enters into a *ketuba*, which is essentially a civil contract delineating the obligations of the parties during the marriage. The marriage is severable only by the death of one of the parties or by the acquisition of a *get*. Failure of the husband to secure the *get* places the wife in the position of an "*aguna*" so that she is precluded from remarrying. He said that the *get* does not involve a religious ceremony or require a rabbi's presence, and although the husband is required to take the initiative, he does not have to be a believer, state any doctrine or creed, or even acknowledge his Jewishness. Because of this, he concluded that the acquisition of a *get* is not a religious act, but a severance of a contractual relationship between two parties.

Rabbi Judah Washer agreed that a *get* is a civil document for the same reasons, adding that the document contains no reference to God's name. In addition, in his opinion, **[***9]** a court order requiring the husband to secure the *get* would not be an interference with religion since the *get* does not affect the religious feelings of people, but is only concerned with the right of the wife to remarry.

[668]** Rabbi Menahem Meier testified that Jewish law cannot be equated with religious law, but instead is comprised of two components -- one regulating a man's relationship with God and **[*266]** the other regulating the relationship between man and man. The *get*, which has no reference to God but which does affect the relationship between two parties, falls into the latter category and is, therefore, civil and not religious in nature.

Rabbi Richard Kurtz concurred with Rabbi Meier's opinion that Jewish law is divided into two components and that the *get* is clearly civil. He described the *get* as a general release document where the husband releases the wife and frees her to remarry in compliance with the *ketuba* contract.

Rabbi Dresner, a reform rabbi, was called by defendant and although he concluded that the acquisition of a *get* was a religious act, he said he would marry the plaintiff. However, the weight to be given to **[***10]** his testimony was weakened when he admitted that the other rabbis called to testify were "far better Jewish scholar[s] than myself."

Relying upon credible expert testimony that the acquisition of a *get* is not a religious act, the court finds that the entry of an order compelling defendant to secure a *get* would have the clear secular purpose of completing a dissolution of the marriage. Its primary effect neither advances nor inhibits religion since it does not require the husband to participate in a religious ceremony or to do acts contrary to his religious beliefs. Nor would the order be an excessive entanglement with religion. In addition to testimony to that effect, the court takes judicial notice that the Legislature has seen fit to authorize clergy to perform marriages and, in doing so, permits the use of a religious ceremony. See N.J.S.A. 37:1-13. Such conduct, as sanctioned by the Legislature, has never been considered to be an excessive entanglement with religion. The *get* procedure is a release document devoid of religious connotation and cannot be construed as any more religious than the marriage ceremony itself. Thus, the three-prong test protecting **[***11]** defendant pursuant to the First Amendment is satisfied. The court concludes that it may, without infringing on his constitutional rights, order defendant to specifically perform his contract.

Rabbinical Council of America.

Rabbi Judah Washer: Graduate of Yeshiva College; Ph. D. from University of Pittsburg; president of N.Y. Board of Rabbis; rabbi of the Jewish Center of Teaneck, N.J. since 1934.

Rabbi Menahem Meier: B.S. from the City College, New York; *Semikha*, Yeshiva University; Master's degree, Yeshiva University; Ph. D. from Brandeis University in Jewish Philosophy and Mysticism; past instructor at Yeshiva University High School; present founding principal of The Frisch School; chairman, Yeshiva University High School Principals Council of Greater New York; member, Rabbinical Council of America.

Rabbi Richard J. Kurtz: Yeshivah Ohelmoshe Elementary School; Yeshiva University (High School), Yeshiva College (received a teaching certificate); licensed teacher and principal of a Hebrew School; B.A. in Philosophy and Literature; postgraduate studies in comparative religion and semitic languages at Hunter College, Columbia and N.Y.U.; J.D. from Brooklyn Law School; rabbi of congregation 12 years; teacher at Yeshiva University; counsel to the Rabbinical Council of America.

Order may be entered accordingly.

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S.B.B. v. L.B.B.

Superior Court of New Jersey, Appellate Division

April 17, 2023, Argued; September 6, 2023, Decided

DOCKET NO. A-0305-21

Reporter
476 N.J. Super. 575 *; 302 A.3d 574 **; 2023 N.J. Super. LEXIS 95 ***

S.B.B.,[1] PLAINTIFF-RESPONDENT, v. L.B.B., DEFENDANT-APPELLANT.

Subsequent History: [*1]** Approved for Publication September 6, 2023.

Prior History: On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FV-20-1159-21.

Core Terms

video, harassment, violence, incite, privacy, press, broker's, trial court, dissemination, protections, message, communicated, credible, invasive, boycott, divorce, website, courts, alarm, predicate act, proscribed, rabbinical, imminent, restraining order, free speech, true threat, annoyance, deference, informant, religious

Case Summary

Overview

HOLDINGS: [1]-Because there was no credible evidence that a wife's video criticizing her husband's refusal to agree to a traditional religious divorce incited or produced imminent lawless action or was likely to do so, the wife's speech did not fall within the narrow category of incitement exempted from protection under the First Amendment, U.S. Const. amend. I, and N.J. Const. art. I, para. 6 but was instead a permissible means of seeking to put social pressure on the husband within the religious community; [2]-The entry of a final restraining order against the wife, based on harassment under N.J.S.A. § 2C:33-4 as a predicate offense under N.J.S.A. § 2C:25-19(a)(13), was error because a finding of a privacy violation relied upon an unsupported factual finding that the video was likely to incite acts of violence and the wife's ultimate goal of obtaining a divorce was lawful.

Outcome

Orders reversed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1[] Standards of Review, Questions of Fact & Law

An appellate court generally defers to a trial judge's findings of fact when supported by adequate, substantial, credible evidence. A Family Part judge's findings are reviewed in accordance with a deferential standard of review, recognizing the court's special jurisdiction and expertise in family matters.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Expressive Conduct

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN2[] Freedom of Speech, Expressive Conduct

In cases implicating the First Amendment, U.S. Const.

[1] We use initials to protect the parties' privacy and the confidentiality of the proceedings in accordance with Rule 1:38-3(d)(10).

amend. I, an appellate court must conduct an independent examination of the record as a whole, without deference to the trial court. This obligation springs from the reality that the ultimate constitutional decision before the court is inextricably intertwined with the underlying facts, and so the court cannot render a decision on the constitutional question without examining the facts. Thus, it is incumbent upon the appellate court to make an independent examination of the whole record, to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3 **Standards of Review, De Novo Review**

While the presence of First Amendment, U.S. Const. amend. I, issues diminishes a reviewing court's deference to a trial court's general fact-finding, the specific deference owed to the trial court's credibility findings remains unchanged. Appellate courts owe deference to the trial court's credibility determinations because it has a better perspective than a reviewing court in evaluating the veracity of a witness. However, a more exacting standard governs review of the trial court's legal conclusions. Indeed, a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. Accordingly, the appellate court reviews the trial court's legal conclusions de novo.

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Abuse, Endangerment & Neglect

Evidence > Burdens of Proof > Preponderance of Evidence

Family Law > Family Protection & Welfare > Cohabitants & Spouses > Services

HN4 **Injunctions, Temporary Restraining Orders**

In order to grant a final restraining order under the Prevention of Domestic Violence Act, N.J.S.A. §§ 2C:25-17 to 2C:25-35, a trial court must make certain findings pursuant to a two-step analysis. First, the court must determine whether the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in N.J.S.A. § 2C:25-19(a) has occurred. Harassment, under N.J.S.A. § 2C:33-4, is among the enumerated predicate offenses. § 2C:25-19(a)(13). Second, if the court finds that the defendant has committed a predicate act of domestic violence, the court must then determine whether it should enter a restraining order that provides protection for the victim. In making that determination, the guiding standard is whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. § 2C:25-29(a)(1) to (6), to protect the victim from an immediate danger or to prevent further abuse. The statutory factors include the previous history of domestic violence; the existence of immediate danger to person or property; the financial circumstances of the parties; the best interests of the victim and any child; and the existence of an out-of-state restraining order. § 2C:25-29(a).

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking

HN5 **Crimes Against Persons, Stalking**

A person commits harassment if, with purpose to harass another, he or she makes, or causes to be made, one or more communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm. N.J.S.A. § 2C:33-4(a). A violation of § 2C:33-4(a) requires the following elements: (1) the defendant made or caused to be made a communication; (2) the defendant's purpose in making or causing the communication to be made was to harass another person; and (3) the communication was in one of the specified manners or any other manner similarly likely to cause annoyance or alarm to its intended recipient.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Criminal Law & Procedure > Criminal

Offenses > Crimes Against Persons > Stalking

HN6 **Fundamental Freedoms, Freedom of Speech**

N.J.S.A. § 2C:33-4(a) does not proscribe mere speech, use of language, or other forms of expression. No statute could do so, as the First Amendment, U.S. Const. amend. I, permits regulation of conduct, not mere expression. Instead, the substantive criminal offense proscribed by § 2C:33-4(a) is directed at the purpose behind and motivation for making or causing the communication to be made. Thus, purpose to harass is critical to the constitutionality of the harassment offense.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Purpose

HN7 **Mens Rea, Purpose**

A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. N.J.S.A. § 2C:2-2(b)(1).

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Purpose

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking

HN8 **Mens Rea, Purpose**

A defendant's mere awareness that someone might be alarmed or annoyed is insufficient to establish a purpose to harass. Likewise, a victim's subjective reaction alone will not suffice; there must be evidence of the improper purpose. Still, a finding of a purpose to harass may be inferred from the evidence presented, and common sense and experience may inform that determination.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking

HN9 **Fundamental Freedoms, Freedom of Speech**

N.J.S.A. § 2C:33-4(a) is aimed not at the content of the offending statements but rather at the manner in which they were communicated. Indeed, many forms of speech are intended to annoy. Speech is not criminalized, even if intended to annoy, where the manner of speech is non-intrusive.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Vagueness

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking

HN10 **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

In order to protect against unconstitutional vagueness and overbreadth in N.J.S.A. § 2C:33-4(a), the phrase "any other manner likely to cause annoyance or alarm" has been interpreted narrowly. The three enumerated modes of prohibited communication proscribed under the harassment statute—anonymous, at extremely inconvenient hours, and in offensively coarse language—each can be classified as being invasive of the recipient's privacy. The Legislature intended the catchall provision of § 2C:33-4(a) to encompass only those types of communications that also are invasive of the recipient's privacy. Thus, in order to satisfy the catchall element, a communication must intolerably interfere with a person's reasonable expectation of privacy.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Assembly

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN11 **Fundamental Freedoms, Freedom of Assembly**

Laws may not transgress the boundaries fixed by the Constitution for freedom of expression. Thus, as with any speech-regulating statute, the reach of N.J.S.A. § 2C:33-4 is cabined by the federal and state constitutions. The First Amendment, U.S. Const. amend. I, provides in part that Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. Similarly, N.J. Const. art. I, para. 6 proclaims in part that every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. So greatly do those in New Jersey cherish the rights of free speech that the New Jersey Constitution provides even broader protections than the familiar ones found in its federal counterpart. In preserving and advancing those broad constitutional commands, New Jersey's courts have been vigilant, jealously guarding the rights of the people to exercise their right to freely speak, although their message may be one that is offensive to some, or even to many, people.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN12[] **Freedom of Speech, Advocacy of Illegal Action**

There is no categorical harassment exception to the Free Speech Clause of the First Amendment, U.S. Const. amend. I. Speech cannot be transformed into criminal conduct merely because it annoys, disturbs, or arouses contempt. The First Amendment protects offensive discourse, hateful ideas, and crude language because freedom of expression needs breathing room and in the long run leads to a more enlightened society. To that end, the right to free speech also includes the right to exhort others to take action upon that speech. It extends to more than abstract discussion, unrelated to action. The First Amendment protects the right to coerce action by threats of vilification or social ostracism.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN13[] **Fundamental Freedoms, Freedom of Speech**

Even speech designed to prompt others to act through social pressure and the threat of social ostracism does not lose its protected character under the First Amendment, U.S. Const. amend. I, simply because it may embarrass others or coerce them into action.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN14[] **Freedom of Speech, Advocacy of Illegal Action**

In general, the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time. Thus, where a call to others to act neither conveys a plan to act nor is likely to produce imminent danger, it may not be criminalized, despite its unsettling message. Although there is a narrow exception for speech that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action, even urging others to violence is shielded unless the statement is designed and likely to produce immediate action.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN15[] **Freedom of Speech, Advocacy of Illegal Action**

The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Conviction for mere advocacy, unrelated to its tendency to produce forcible action, is

unconstitutional because it intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments, U.S. Const. amends. I, XIV.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Fighting Words

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN16 **Freedom of Speech, Advocacy of Illegal Action**

True threats are not protected by the First Amendment, U.S. Const. amend. I. True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. However, evidence of an atmosphere of general intimidation is not enough to find a true threat.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN17 **Fundamental Freedoms, Freedom of Speech**

The First Amendment, U.S. Const. amend. I, does not prohibit name-calling and protects vehement, caustic, and sometimes unpleasantly sharp attacks, as well as language that is vituperative, abusive, and inexact. Similarly, threats of vilification or social ostracism do not lose their protected status.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN18 **Freedom of Religion, Free Exercise of Religion**

Civil courts may not become entangled in religious proceedings if resolution requires the interpretation of religious doctrine.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN19 **Fundamental Freedoms, Freedom of Speech**

First Amendment, U.S. Const. amend. I, protections cannot be vitiated on unsubstantiated findings of fact.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Fighting Words

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN20 **Freedom of Speech, Advocacy of Illegal Action**

Even an overt invocation of violence is insufficient to strip a statement of First Amendment, U.S. Const. amend. I, protection. Instead, to qualify as incitement and lose First Amendment protection, a communication must be both directed to inciting or producing imminent lawless action and likely to incite or produce such action. The difference between lawful and lawless action may be identified easily by reference to its purpose.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN21 **Fundamental Freedoms, Freedom of Speech**

The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. It would be quite remarkable to hold that speech by a law-abiding speaker can be suppressed in order to deter conduct by a non-law-abiding third party.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Stalking

HN22[] Crimes Against Persons, Stalking

N.J.S.A. § 2C:33-4 criminalizes only those private annoyances that are not entitled to constitutional protection.

Counsel: Jane J. Felton argued the cause for appellant (Skoloff & Wolfe, PC, attorneys; Jane J. Felton, of counsel and on the briefs; Michaela L. Cohen, Andrew J. Rhein and Steven B. Gladis, on the briefs).

LisaBeth Klein argued the cause for respondent.

Shira Wisotsky argued the cause for amici curiae The American Civil Liberties Union of New Jersey Foundation, The American Civil Liberties Union Foundation, The Jewish Orthodox Feminist Alliance, Sanctuary for Families, and Unchained at Last (The American Civil Liberties Union of New Jersey Foundation, and Vera Eidelman (The American Civil Liberties Union Foundation) of the New York and California bars, admitted pro hac vice, attorneys; Shira Wisotsky, Jeanne LoCicero, Sandra S. Park, and Vera Eidelman, on the brief).

Karin Duchin Haber argued the cause for amici curiae The Organization for the Resolution of Agunot, and Shalom Task Force (Haber Silver & Simpson, attorneys; Karin Duchin Haber, of counsel and on the brief).

Judges: Before Judges Gooden Brown, DeAlmeida and Mitterhoff.

Opinion by: GOODEN BROWN **[***2]**

Opinion

[579] [*584]** The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

Defendant L.B.B. appeals from the entry of a final restraining order (FRO) entered against her in favor of her estranged husband, plaintiff S.B.B., pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. The FRO was based on the predicate act of harassment. The communication underlying the trial judge's finding of harassment was defendant's creation and dissemination of a video accusing her estranged husband of improperly withholding a *get*, a Jewish bill of divorce, and asking community members to "press" her husband to deliver the *get*. Because defendant's communication constituted constitutionally protected free speech, we reverse.

I.

We glean these facts from the record. Following a twenty-year marriage that produced four children, the parties, both practicing members of the Orthodox Jewish faith, separated and have been in the process of obtaining a divorce since mid-2019. The process has been contentious **[**580]** and acrimonious [2] and further complicated by a dispute over a get—a religious bill of divorce.

> **[*585]** In the Orthodox Jewish tradition, a married woman cannot obtain a religious divorce until her husband provides her with a contract called a "*get*" (pluralized as "*gittin* ***[***3]***"), which must, in turn, be signed by an "*eid*," or witness. A woman who attempts to leave her husband without obtaining a *get* becomes an "*agunah*" (pluralized as "*agunot*"), which subjects her to severe social ostracism within the Orthodox Jewish community. *Agunot* may seek relief in a "*beth din*," a rabbinical court presided over by a panel of three rabbis. The *beth din* may then issue "*psak kefiah*," or contempt orders authorizing sanctions, which include, but are not limited to, the use of force against a husband to secure a *get*.
>
> [*United States v. Stimler, 864 F.3d 253, 259 (3d Cir. 2017)*, *aff'g United States v. Epstein, 91 F. Supp. 3d 573, 582 (D.N.J. 2015)*, *rev'd in part on other grounds sub nom. United States v. Goldstein, 902 F.3d 411 (3d Cir. 2018)*.]

Sometime in March 2021, defendant made a video addressing the *get* dispute. In the video, defendant asserted plaintiff had refused to give her a get and asked anyone who could to "press" plaintiff to give her a *get*. On March 19, 2021, after the video was made, plaintiff obtained a TRO against defendant based on a domestic violence complaint alleging harassment. To support the complaint, plaintiff testified at an ex parte hearing that beginning around 3:00 p.m. on March 12, 2021, he received numerous phone calls from unknown numbers, a photograph of himself identifying him as a

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[2] In April 2020, defendant obtained a temporary restraining order (TRO) against plaintiff. Following a protracted FRO hearing during the COVID-19 pandemic, the TRO was dismissed on March 11, 2021.

get refuser and calling on others **[***4]** to "tell him to free his wife," and, ultimately, the actual video defendant had composed.

When plaintiff answered one of the incoming calls, the caller identified himself as being "connected" to various protest "networks" and pressured plaintiff to turn over the *get*. During his testimony, plaintiff explained his belief that the Jewish community reacts violently to the withholding of a *get* and that identifying him as a "*get* refuser" subjected him to kidnappings and brutal beatings. Plaintiff denied withholding the *get*, claimed he had given the *get* to the Chief Rabbi of Elizabeth in June 2020, and averred that he was "terrified" of being "harm[ed]" by the "people . . . calling [him]" in response to defendant's accusation and plea in the video. To further support his complaint, plaintiff recounted a history of emotional abuse largely by name-calling throughout the course of the marriage. Subsequently, on March 25, 2021, plaintiff amended the TRO to add cyber harassment as a predicate act.

[*586] Defendant moved to dismiss the TRO, arguing any alleged dissemination by defendant was protected free speech. Relying on *State v. Burkert, 231 N.J. 257, 174 A.3d 987 (2017)*, the trial judge denied the motion. On April 8, 2021, an FRO trial was conducted **[***5]** via Zoom, during which plaintiff and defendant testified. Both parties were represented by counsel.

During his testimony, plaintiff confirmed that he and defendant were separated. He lived with his parents while defendant remained in the marital home with their children. He testified that he received a call on Friday, March 12, 2021, around 3:00 p.m., on the FaceTime videoconferencing app. Plaintiff did not answer, but was able to see that thirty separate phone numbers **[**581]** had joined the call, none of which were familiar to him. The group attempted to call back roughly ten more times before plaintiff put his phone in airplane mode. About half an hour later, when he turned his reception back on, the calls resumed. Initially, the calls seemed "weird," but then plaintiff became "alarmed" by the calls. Plaintiff continued to ignore the calls and blocked the associated numbers.

Two days later, on March 14, 2021, plaintiff received a message from his sister in Israel. The message contained a photo of himself that he had posted as his "status" on the WhatsApp messaging app. Above the photo was written:

> This man has refused to give his wife a get. His name is [S.B.B.]. He is holding his wife chained **[***6]** for over a year and a half. He lives in Elizabeth NJ. If you see him, tell him to free his wife. #FREE[L.B.B.].

In addition to his sister, plaintiff received the photo from one other person he knew.

When plaintiff saw the photo, he was "shock[ed]," "embarrassed," and "scared." Plaintiff explained that the photo would give community members the impression that he was "a *get* refuser" which "[could] be dangerous for [him]." Plaintiff testified that he had witnessed his father "[getting] beat[en] up" because "he was a *get* refuser." Additionally, plaintiff denied the accusation and was adamant that he was not a *get* refuser, having given the *get* to the Chief Rabbi of Elizabeth. His "understanding" was that **[*587]** the *get* would be provided to defendant "within [twenty-four] to [forty-eight] hours after the civil divorce [was] done in court." He also suggested that the Chief Rabbi had the discretion to give the *get* to defendant at any time. He explained his view that only a "*beth din*" could declare someone a *get* refuser.

Between March 14 and 15, 2021, plaintiff received numerous communications, including approximately ten "private or anonymous" calls, none of which he answered. In addition to the anonymous **[***7]** calls, on the afternoon of March 14, 2021, plaintiff received a message on WhatsApp from the Chief Rabbi's son. The message contained a video showing defendant speaking to the camera, saying:

> Hi. My name is [L.B.B.]. I'm a mother of four children and I live in the United States without any family for the last seventeen years. In August 2019, my husband left the house and we're trying to get an agreement. We still did not get any of that. I tried to reach . . . the community Rabbi[ ] for help, and he said he will, and he got the *get* from my husband, but he is holding it for over a year now. The only way [the Chief Rabbi] can give it to me is by my husband permission. I'm seeking for help. I'm asking whoever can, please help me. To press [the Chief Rabbi] to let go of my *get* or to press my husband to give [the Chief Rabbi] the proof to give me the *get*. To release the *get*. Please, I really need this help. I want this *get*. I want this nightmare to be behind me. Whoever gonna help me, *bracha* [3] on his head.

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[3] *Bracha* translates to "blessing." Joyce Eisenberg & Ellen Scolnic, *Dictionary of Jewish Words* 21 (2006).

Several friends also sent the video to plaintiff. Plaintiff believed defendant posted the video "[b]ecause she wanted people to press [him] to give her a ***[***8]*** *get*." When specifically asked what he thought his wife meant by asking people to "press" him for the *get*, plaintiff answered:

> It can be anything. If we go by Jewish rules, old rules . . . . [y]ou take him, get him and beat him up until he says I will **[**582]** give it, the *get*. That's the old Jewish law about it. And people take action. Today it starts with protesting and then it gets to harming people that are *get* refusers.

At 10:21 p.m. on March 15, 2021, plaintiff received another call. This time, thinking the phone number looked "familiar," he answered. Plaintiff testified the caller introduced himself as "Hiam" and said he was "calling about the *get*." He identified himself as **[*588]** someone who "[knew] a lot of people" and was part of "different networks." According to plaintiff, Hiam told him if he did not give his wife a *get*, they would "come and protest next to [his] house." Hiam added "you know what happen[s] otherwise if you don't give a *get*." After Hiam refused to explain how he obtained plaintiff's phone number, plaintiff hung up. Plaintiff testified that, a moment later, Hiam called back, screaming at plaintiff and telling plaintiff he wanted "to meet [him]." Plaintiff hung up again. Plaintiff **[***9]** testified he felt threatened by Hiam's call, which, in conjunction with the FaceTime calls, the photograph, and the video, made plaintiff "very scared." Plaintiff specified that although he was not afraid of defendant in her individual capacity, he was afraid of "others . . . influenced by her."

Plaintiff also testified about a history of verbal abuse throughout the twenty-year marriage. He recounted unspecified instances throughout the marriage when defendant had stated during arguments that he was "nothing," "a zero," or "not good," all of which made him feel "like a worthless person." According to plaintiff, the last such instance occurred "in 2019."

At the end of plaintiff's case in chief but before defendant testified, defendant moved for a directed verdict. *See R. 4:37-2(b)*. The judge denied the motion. Thereafter, defendant testified through an interpreter that it was not her intent to harass plaintiff. She testified that she did not create the "#FREE[L.B.B.]" photo image and had no part in posting either the video or the photo on social media. Additionally, she was not part of any of the calls to plaintiff and did not know who made them. Defendant testified that the first time she saw the **[***10]** "#FREE[L.B.B.]" photo image was when a friend sent it to her, but acknowledged she was not concerned by the photo image. She also admitted creating the video around March 6, 2021, at the request of a rabbinical judge, and claimed she only sent the video to the rabbinical judge. She explained that "under [the Jewish] religion [the rabbinical judges] are to press on the husband to give the *get*."

[*589] On cross-examination, defendant acknowledged that she also sent the video to a therapist "friend" but was reluctant to divulge the friend's name and contact information for fear of "potential retribution." Defendant explained she did not believe that accusing plaintiff of withholding a *get* in the video would put him in danger of being threatened or hurt. When questioned about plaintiff's father's *get* refusal, defendant testified she was not aware of him being attacked. Rather, it was her understanding that he had "sat in jail" as a result of the refusal.

Following the trial, on April 22, 2021, the judge granted plaintiff an FRO. Among other things, the FRO continued the restraints contained in the TRO, which barred defendant from having "*any* oral, written, personal, electronic, or other form of **[***11]** contact or communication with [p]laintiff," and specifically ordered defendant to "remove any and all posts from all social media platforms requesting the '*get*' " and "cease and desist . . . creating and posting on all social media platforms."

In an oral decision supporting the issuance of the FRO, the judge found plaintiff **[**583]** credible and defendant not credible based on "demeanor," "body language," and the content of the testimony. Specifically, the judge remarked that plaintiff's "demeanor was straightforward," "[h]e didn't embellish" his testimony, "[h]e didn't fidget" while testifying, and his "testimony ma[de] sense." Conversely, according to the judge, defendant's "testimony didn't make much sense," particularly since she claimed she made the video for the rabbinical judges but addressed the plea in the video to anyone who could help her. Additionally, the judge pointed out that during questioning, defendant was "looking all over the room" and "there was a blank look in her face." [4]

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[4] At the outset, the judge noted that although she had previously denied defendant's application for an FRO against plaintiff, the judge was not influenced by her prior decision. In any event, there was no request for recusal.

Based on her credibility assessment, the judge found defendant "created the video" and "sent it to the community," rather than **[*590]** "the rabbi," in order "to get the *get*." Applying the elements of *subsection (a)* of the harassment **[***12]** statute, *N.J.S.A. 2C:33-4(a)*, to her factual findings, in accordance with the first prong of *Silver v. Silver, 387 N.J. Super. 112, 903 A.2d 446 (App. Div. 2006)*, the judge concluded plaintiff "met [his] burden by a preponderance of the evidence" of proving that defendant committed harassment. Specifically, the judge found that "while the end result" of making the video and sending it out into the community "might have been to get her *get* . . . , the way in which [defendant] went about getting that *get* was with a purpose to press, harass, annoy, [and] alarm [plaintiff]."

The judge also found that the communication was "invasive" of plaintiff's privacy, as proscribed by *N.J.S.A. 2C:33-4(a)*. *See State v. Hoffman, 149 N.J. 564, 583, 695 A.2d 236 (1997)*. Specifically, the judge found that because the video was sent to "the Jewish community,"

> the purpose of that communication was to infringe upon [plaintiff's] legitimate expectation of privacy not to . . . hav[e] . . . phone calls or . . . people come to the house or picket or call or threaten. But that was the purpose because in that community, that's what happened. You either go to jail, [or] you get beat when you're a *get* refuser.
>
> So putting that video and telling people to press her husband, to press him for that *get*, under the totality of the circumstances is a clear intrusion into [ ]his expectation **[***13]** of privacy and safety.

Critically, the judge rejected defendant's free speech claims, explaining that "one cannot hide behind the *First Amendment* when that communication is invasive of the recipient's privacy. The *First Amendment* cannot protect this kind of communication to incite, which is clearly invasive of [plaintiff's] safety and privacy." In assessing the threat to plaintiff's safety associated with being labeled a *get* refuser, the judge noted:

> Now there was no expert that came into this court to explain what a *get* is or the realities of the *get*. This [c]ourt is not taking judicial notice of . . . what a *get* refuser is. But in listening to the testimony of both parties it's clear that it is something serious in the Jewish community. [Plaintiff] testified that he watched his father be beaten because he was a *get* refuser. And I believe . . . defendant testified . . . that you can go to jail for being a *get* refuser.
>
> **[*591]** So the [c]ourt does glean from the testimony that being a *get* refuser in the Jewish community is a very serious allegation with substantial consequences, **[**584]** which is clear from the testimony under the totality of this case.

Because the judge found that plaintiff had proven the predicate act of harassment **[***14]** based solely on the video, the judge elected not to address the predicate act of cyber harassment.

Next, applying the second *Silver* prong and *N.J.S.A. 2C:25-29(a)*, the judge found that an FRO was "necessary to protect . . . plaintiff from this continued behavior, . . . [and] from having . . . defendant incite the community that her husband is a *get* refuser, which clearly puts him in a very dangerous position." In her analysis, the judge once again relied on her understanding that it "can incite violence when you call someone a *get* refuser." The judge noted that "[t]he existence of immediate danger to person or property" was "clear" because when "[y]ou tell the Jewish community that your husband is a *get* refuser," then "he is subject to danger period or imprisonment."

The judge explained that although plaintiff stated he was "not necessarily in fear of defendant herself," he was "in fear of th[e] continued invasion of his privacy and his safety . . . at the hands of [defendant] by her actions" and "people are entitled to feel safe" and "to be free of this continued abuse." The judge also found that "[t]he best interest" of plaintiff and the parties' children would be served by awarding the FRO because a **[***15]** third party "acting on defendant's request while the children [were] present . . . would put not only . . . plaintiff, but the children in danger." Although the judge did not find that the previous history of domestic violence over the years "shed[ ] much light on the *Silver* decision," under "the totality of the factors," the judge determined a restraining order was warranted.

Defendant moved for reconsideration. In support, defendant submitted a May 11, 2021, certification from Rabbi Daniel Shevitz, "an expert trained in the laws of Jewish divorce." Shevitz opined that defendant is an "*agunah*" or "chained woman." He explained that:

> **[*592]** In the Jewish tradition, once the marital bond has failed and the couple is no longer living together as husband and wife, the husband is obliged to write and deliver a *get*. Until then, the wife is not free of her marital responsibilities. . . . Any delay in granting the *get* causes her to be "chained" to a marriage in form only and is, in my

opinion, a form of abuse.

He further explained that even rabbinical courts lack the power to force a husband to grant a *get* and that as a result of the husband's unchecked authority, some men use *get* withholding as a form **[***16]** of extortion. Referring to a March 5, 2020, text message exchange between the parties, which showed plaintiff telling defendant that he would only issue the *get* if she first signed a divorce settlement agreement, Shevitz suggested that just such extortionist behavior might be occurring in this case.

Shevitz stated that in the quest to obtain a *get* from an intractable husband, "[f]or centuries, the only tool at the wife's disposal was invoking public sympathy and pleading her case to the broader community." He added that in recent years, "*agunot* (the plural of '*agunah*') have turned to social media with messages asking for community support" in a " 'social justice movement' designed to liberate women . . . using one of the only tools they have at their disposal—their voices." He opined that the video created by defendant was "precisely" such an attempt and appended an article to his certification supporting his opinion.

[585]** Defendant also submitted her own certification, in which she explained that plaintiff has not authorized the Chief Rabbi "to deliver the *get* until [she] agrees to his settlement demands" and "she felt [her] only reasonable recourse was to seek public sympathy to obtain a **[***17]** *get*." She added that her understanding, as someone whose first language was not English, was that " 'press' does not mean 'physically harm' " and she "never meant it that way." She acknowledged that "there have been news reports and federal lawsuits" about "those who do physically harm *get*-refusers," but stressed that she had "never been a part of that."

Following oral argument, on August 27, 2021, the judge denied defendant's motion as not meeting the standard for reconsideration. *See R. 4:49-2*. In a written opinion, the judge pointed out that **[*593]** Shevitz's certification could have been presented at the time of the initial hearing. Further, the judge found that whether defendant "is or is not an *agunah* under Jewish law" and whether plaintiff "did or did not satisfy the giving of the [*g*]*et*" were irrelevant. The judge also awarded plaintiff attorney's fees and costs in the amount of $10,035 as compensatory damages. *See* N.J.S.A. 2C:25-29(b)(4).

In this ensuing appeal of the April 22, 2021 and August 27, 2021 orders, defendant raises the following points for our consideration:

POINT ONE
THIS COURT MUST APPLY A HEIGHTENED STANDARD OF REVIEW. (NOT RAISED BELOW).

POINT TWO

THE *FIRST AMENDMENT* PROTECTED DEFENDANT'S FREEDOM TO MAKE AND DISSEMINATE **[***18]** THE VIDEO.

A. The Video Is Protected Speech Under The *First Amendment*.
B. Nothing Defendant Said Or Did Is Punishable As Incitement.
C. Affirming The Trial Court In This Case Would Render The Harassment Statu[te] Unconstitutionally Overbroad And Vague.
D. The FRO Is An Impermissible Prior Restraint On Defendant's Future Speech.
E. The FRO Violates Defendant's Right To Freely Exercise Her Religion.

POINT THREE
INDEPENDENT OF CONSTITUTIONAL CONCERNS, DEFENDANT'S VIDEO WAS NOT HARASSMENT.

A. The Manner In Which Defendant Communicated Did Not Violate The Harassment Statute.
B. The Video Did Not Intrude Into Plaintiff's Reasonable Expectation Of Privacy, And The Trial Court's Finding To The Contrary Was Based On An Unsubstantiated, False, And Prejudicial Characterization Of The Orthodox Jewish Community.

C. The Trial Court Found That Defendant Had A Legitimate Purpose In Making The Video - *i.e.*, To Get A *Get*.
D. The Trial Court Failed To Consider The Totality Of The Circumstances, As Our Law Requires.
E. The Trial Court Prejudicially Found Defendant Had A "Purpose To Harass" Before Even Hearing Defendant Testify.

F. The Trial Court Erred By Allowing Plaintiff To Pursue A Defamation Claim Artfully

Pleaded As Harassment. **[***19]**

POINT FOUR

[586] [*594]** THE TRIAL COURT MISSTATED AND MISAPPLIED THE *SILVER* TEST, AND THE PREREQUISITES FOR AN FRO WERE NOT MET.

A. The Court Did Not Address The N.J.S.A. 2C:25-29(a) Factors As The Law Required.

B. The Trial Court Misapplied *Silver* By Allowing Plaintiff's Alleged Subjective Fear To Dictate Whether An FRO Was Necessary.

C. The FRO Was Not Necessary To Protect Plaintiff.

POINT FIVE

THE TRIAL COURT'S COUNSEL FEE AWARD VIOLATED THE ENTIRE CONTROVERSY DOCTRINE AND WAS AN ABUSE OF DISCRETION.

We subsequently granted motions by seven organizations to appear as amici curiae and participate in oral argument in support of defendant's position. The organizations are: (1) the American Civil Liberties Union of New Jersey; (2) the American Civil Liberties Union; (3) the Jewish Orthodox Feminist Alliance; (4) Sanctuary for Families; (5) Unchained at Last; (6) the Organization for the Resolution of Agunot; and (7) Shalom Task Force.

II.

Our scope of review in these matters is well-established. ***HN1***[] We generally defer to the trial judge's findings of fact "when supported by adequate, substantial, credible evidence." *Cesare v. Cesare, 154 N.J. 394, 411-12, 713 A.2d 390 (1998)*. In particular, we "review the Family Part judge's findings in accordance with a deferential standard of review, **[***20]** recognizing the court's 'special jurisdiction and expertise in family matters.' " *Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-83, 151 A.3d 545 (2016)* (quoting *Cesare, 154 N.J. at 413, 713 A.2d 390*).

HN2[] However, in cases implicating the *First Amendment*, we must "conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 567, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)* (citing *Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)*); *see also Ward v. Zelikovsky, 136 N.J. 516, 536-37, 643 A.2d 972 (1994)* (applying the same rule in New **[*595]** Jersey). This obligation springs from the reality that the ultimate constitutional decision before the court is inextricably intertwined with the underlying facts, and so the court cannot render a decision on the constitutional question without examining the facts. *Ibid.* Thus, it is incumbent upon us to " 'make an independent examination of the whole record,' to ensure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Ward, 136 N.J. at 536-37, 643 A.2d 972* (quoting *Milkovich v. Lorain J. Co., 497 U.S. 1, 17, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990)*); *see also State v. Carroll, 456 N.J. Super. 520, 532, 196 A.3d 106 (App. Div. 2018)* (applying the same standard to Facebook posts to determine "whether [the] defendant's speech is protected by the *First Amendment*" in a cyber harassment and witness retaliation prosecution); *Rutgers 1000 Alumni Council v. Rutgers, 353 N.J. Super. 554, 567, 803 A.2d 679 (App. Div. 2002)* ("Independent review of the record below is required because this case involves a *First Amendment* question.").

HN3[] While the presence of *First Amendment* issues diminishes a reviewing court's deference to a trial court's general fact-finding, the specific deference owed to the trial **[***21]** court's credibility findings remains **[**587]** unchanged. *Hurley, 515 U.S. at 567, 115 S. Ct. 2338* (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989)*). "Appellate courts owe deference to the trial court's credibility determinations . . . because it has 'a better perspective than a reviewing court in evaluating the veracity of a witness.' " *C.R. v. M.T., 248 N.J. 428, 440, 259 A.3d 830 (2021)* (quoting *Gnall v. Gnall, 222 N.J. 414, 428, 119 A.3d 891 (2015)*). However, "[a] more exacting standard governs our review of the trial court's legal conclusions." *Thieme, 227 N.J. at 283, 151 A.3d 545*. Indeed, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Rowe v. Bell & Gossett Co., 239 N.J. 531, 552, 218 A.3d 784 (2019)* (quoting *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995)*). "Accordingly, we review the trial **[*596]** court's legal conclusions de novo." *Thieme, 227 N.J. at 283, 151 A.3d 545*.

HN4[] In order to grant an FRO under the PDVA, a

trial court must make certain findings pursuant to a two-step analysis delineated in *Silver, 387 N.J. Super. at 125-27, 903 A.2d 446*. First, the court "must determine whether the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in *N.J.S.A. 2C:25-19(a)* has occurred." *Id. 387 N.J. Super. at 125, 903 A.2d 446*. Harassment, *N.J.S.A. 2C:33-4*, is among the enumerated predicate offenses. *N.J.S.A. 2C:25-19(a)(13)*.

Second, if the court finds that the defendant has committed a predicate act of domestic violence, the court must then determine whether it "should enter a restraining order that provides protection for the victim." *Silver, 387 N.J. Super. at 126, 903 A.2d 446*. In making **[***22]** that determination, "the guiding standard is whether a restraining order is necessary, upon an evaluation of the factors set forth in [*N.J.S.A. 2C:25-29(a)(1) to (6)*], to protect the victim from an immediate danger or to prevent further abuse." *Id. 387 N.J. Super. at 127, 903 A.2d 446*. The statutory factors include "[t]he previous history of domestic violence . . . ;" "[t]he existence of immediate danger to person or property;" "[t]he financial circumstances of the [parties];" "[t]he best interests of the victim and any child;" and "[t]he existence of" an out-of-state restraining order. *N.J.S.A. 2C:25-29(a)*.

Here, the judge's finding of the predicate act of harassment in violation of *N.J.S.A. 2C:33-4(a)* was based exclusively on defendant's creation and dissemination of the video. ***HN5***[↑] A person commits harassment if, "with purpose to harass another, he [or she] . . . [m]akes, or causes to be made, one or more communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm." *N.J.S.A. 2C:33-4(a)*.

> A violation of *subsection (a)* requires the following elements: (1) defendant made or caused to be made a communication; (2) defendant's purpose in making or causing the communication to be made was to harass another person; and (3) the communication **[*597]** was **[***23]** in one of the specified manners or any other manner similarly likely to cause annoyance or alarm to its intended recipient.
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> [*Hoffman, 149 N.J. at 576, 695 A.2d 236*.]

HN6[↑] Our courts have decreed that *N.J.S.A. 2C:33-4(a)* "does not proscribe mere speech, use of language, or other forms of expression." *State v. L.C., 283 N.J. Super. 441, 450, 662 A.2d 577 (App. Div. 1995)* (citing *State v. Fin. Am. Corp., 182 N.J. Super. 33, 36-38, 440 A.2d 28 (App. Div. 1981)*). No statute could do so, **[**588]** as "[t]he *First Amendment to the federal Constitution* permits regulation of conduct, not mere expression." *Ibid.* (citing *State v. Vawter, 136 N.J. 56, 65-67, 642 A.2d 349 (1994)*); see, *e.g.*, *Murray v. Murray, 267 N.J. Super. 406, 410-11, 631 A.2d 984 (App. Div. 1993)* (holding that words alone, without "purposeful alarm or serious annoyance," were insufficient to sustain a domestic violence restraining order for harassment).

Instead, "the substantive criminal offense proscribed by *subsection (a)* 'is directed at the purpose behind and motivation for' making or causing the communication to be made." *Hoffman, 149 N.J. at 576, 695 A.2d 236* (quoting *State v. Mortimer, 135 N.J. 517, 528, 641 A.2d 257 (1994)*). Thus, "purpose to harass is critical to the constitutionality of the harassment offense." *R.G. v. R.G., 449 N.J. Super. 208, 226, 156 A.3d 1074 (App. Div. 2017)* (quoting *State v. Castagna, 387 N.J. Super. 598, 606, 905 A.2d 415 (App. Div. 2006)*); *see also D.C. v. T.H., 269 N.J. Super. 458, 461-62, 635 A.2d 1002 (App. Div. 1994)* (reversing an FRO issued against a father who made a threat to beat up the mother's boyfriend because the defendant's purpose "was to dissuade plaintiff's boyfriend from inflicting further corporal punishment upon his child" rather than to harass the plaintiff).

HN7[↑] "A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage **[***24]** in conduct of that nature or to cause such a result." *N.J.S.A. 2C:2-2(b)(1)*. ***HN8***[↑] A defendant's "mere awareness that someone might be alarmed or annoyed is insufficient." *J.D. v. M.D.F., 207 N.J. 458, 487, 25 A.3d 1045 (2011)* (citing *State v. Fuchs, 230 N.J. Super. 420, 428, **[*598]** 553 A.2d 853 (App. Div. 1989)*). Likewise, a "victim's subjective reaction alone will not suffice; there must be evidence of the improper purpose." *Ibid.* (citing *State v. Washington, 319 N.J. Super. 681, 691-92, 726 A.2d 326 (Law Div. 1998)*); *see Franklin v. Sloskey, 385 N.J. Super. 534, 544, 897 A.2d 1113 (App. Div. 2006)* (concluding that the evidence established only a "dispute between a couple in the midst of a breakup, disagreeing over the future of their unborn child" rather than intent to harass). Still, "[a] finding of a purpose to harass may be inferred from the evidence presented," and "[c]ommon sense and experience may inform that determination." *Hoffman, 149 N.J. at 577, 695 A.2d 236*.

The judge found that by creating and disseminating the video, defendant communicated in a manner proscribed by N.J.S.A. 2C:33-4(a) with a purpose to harass plaintiff. Further, according to the judge, defendant's communication was not protected by the First Amendment. The judge's holding was predicated on her determination that being identified as a *get* refuser was inherently dangerous and defendant's purpose in asking members of her community to "press" plaintiff to give her a *get* was to incite violence. Conversely, defendant argues that in creating and disseminating the video, she engaged in **[***25]** constitutionally protected speech. She contends her speech did not rise to the level of incitement and thus retained its constitutional protection under the First Amendment.

HN9[] Subsection (a) of the harassment statute "is 'aimed, not at the content of the offending statements but rather at the manner in which they were communicated.' " Id. 149 N.J. at 583, 695 A.2d 236 (quoting Fin. Am. Corp., 182 N.J. Super. at 39-40, 440 A.2d 28). Indeed, "[m]any forms of speech . . . are intended to annoy. Letters to the editor of a newspaper are sometimes intended to annoy their subjects. We do not criminalize such speech, even if intended to **[**589]** annoy, because the manner of speech is non-intrusive." *Ibid.*

[*599] Here, the judge found that the manner of communication fell under the so-called "catchall provision" of subsection (a) in that it was made in "any other manner likely to cause annoyance or alarm." Id. 149 N.J. at 581-83, 695 A.2d 236; N.J.S.A. 2C:33-4(a). HN10[] In order to protect against unconstitutional vagueness and overbreadth in the statute, the phrase "any other manner likely to cause annoyance or alarm" has been interpreted narrowly. Hoffman, 149 N.J. at 581-83, 695 A.2d 236. In Hoffman, our Supreme Court explained that the three enumerated modes of prohibited communication proscribed under the harassment statute—anonymous, at extremely inconvenient hours, and in offensively coarse language—each "can be classified as being invasive **[***26]** of the recipient's privacy." Id. 149 N.J. at 583, 695 A.2d 236. Likewise, the Court concluded that "the Legislature intended the catchall provision of subsection (a) [to] encompass only those types of communications that also are invasive of the recipient's privacy." *Ibid.* Thus, in order to satisfy the catchall element, a communication must "intolerably interfere with a person's reasonable expectation of privacy." Burkert, 231 N.J. at 283, 174 A.3d 987.

HN11[] Critically, "[l]aws may 'not transgress the boundaries fixed by the Constitution for freedom of expression.' " Id. 231 N.J. at 275, 174 A.3d 987 (quoting Winters v. New York, 333 U.S. 507, 515, 68 S. Ct. 665, 92 L. Ed. 840 (1948)). Thus, as with any speech-regulating statute, the reach of N.J.S.A. 2C:33-4 is cabined by the federal and state constitutions. The First Amendment to the United States Constitution provides in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." Similarly, Article I, Paragraph 6, of the New Jersey Constitution proclaims in part that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

> So greatly do we in New Jersey cherish our rights of free speech that our Constitution provides even broader protections than the familiar ones found in its federal counterpart. In preserving **[***27]** and advancing those broad constitutional commands, **[*600]** we have been vigilant, jealously guarding the rights of the people to exercise their right to "freely speak," although their message may be one that is offensive to some, or even to many, of us.
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> [Borough of Sayreville v. 35 Club L.L.C., 208 N.J. 491, 494, 33 A.3d 1200 (2012) (citation omitted) (quoting *N.J. Const.* art. I, ¶ 6).]

HN12[] As such, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." Burkert, 231 N.J. at 281, 174 A.3d 987 (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001)). "Speech . . . cannot be transformed into criminal conduct merely because it annoys, disturbs, or arouses contempt." *Ibid.* "The First Amendment protects offensive discourse, hateful ideas, and crude language because freedom of expression needs breathing room and in the long run leads to a more enlightened society." *Ibid.* To that end, the right to free speech also includes the right to exhort others to take action upon that speech. "It extends to more than abstract discussion, unrelated to action." Thomas v. Collins, 323 U.S. 516, 537, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (" 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe **[**590]** facts."). In fact, "[t]he First Amendment protects the right to coerce action by 'threats of vilification or social ostracism.' " Carroll, 456 N.J. Super. at 537, 196 A.3d 106 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)).

In Claiborne Hardware Co., Black activists in Claiborne County, Mississippi, organized a boycott of white-owned businesses when local civic and **[***28]** business leaders refused to assent to demands for equality and racial justice. 458 U.S. at 899-900, 102 S. Ct. 3409. "The boycott was supported by speeches and nonviolent picketing." Id. at 907, 102 S. Ct. 3409. Additionally, "store watchers" stood outside the targeted businesses and took down the names of those who violated the boycott. Id. at 903-04, 102 S. Ct. 3409. Those names were then "read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the 'Black Times.' . . . [T]hose persons were branded as traitors to the [B]lack cause, called demeaning names, and socially ostracized." **[*601]** *Ibid.* In very public speeches, an organizer stated that violators would be "disciplined," and warned: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." Id. at 902, 102 S. Ct. 3409. The boycott went on for years, during which several decentralized acts of violence occurred, including shots fired into the homes of boycott violators, beatings, property damage, and threatening phone calls. Id. at 904-06, 102 S. Ct. 3409.

The Supreme Court ruled that the speech, both identifying and castigating boycott violators and promising retribution, was protected by the First Amendment. Id. at 915, 929, 102 S. Ct. 3409. **HN13**[↑] The Court explained that even speech designed to prompt others to act through "social pressure and the 'threat' of **[***29]** social ostracism . . . . does not lose its protected character . . . simply because it may embarrass others or coerce them into action." Id. at 910, 102 S. Ct. 3409. Even the organizer's speech, which invoked the specter of violence and "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence," was protected because "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." Id. at 927-29, 102 S. Ct. 3409. The Court noted that no actual violence occurred directly following the statements, and there was "no evidence—apart from the speeches themselves—that [the organizer] authorized, ratified, or directly threatened acts of violence." Id. at 929, 102 S. Ct. 3409. The Court cautioned that if such acts of violence did occur, there might be a question of whether the organizer was derivatively liable, but until then, the speech retained its protected status. Id. at 928-29, 102 S. Ct. 3409.

Similarly, in Organization for a Better Austin v. Keefe, 402 U.S. 415, 415-16, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971), the Court addressed "a racially-integrated community organization['s]" actions "to 'stabilize' the racial ratio in the . . . area" by influencing a real estate broker who allegedly engaged in "blockbusting" or "panic peddling" tactics to scare white owners out of Chicago's Austin neighborhood. **[***30]** Id. at 415-16, 91 S. Ct. 1575. The broker acted as the **[*602]** fleeing sellers' agent to profit from the transactions. *Ibid.* In an effort to curtail the practice, the organization began a campaign against the broker. Id. at 417, 91 S. Ct. 1575. The organization traveled to the broker's hometown, some seven miles from Austin, and began distributing leaflets that were critical of the broker's practices. Id. at 415-17, 91 S. Ct. 1575. Some leaflets "requested recipients to call [the broker] at his home phone number and urge him" to sign an agreement to stop his real estate practices. Id. at 417, 91 S. Ct. 1575. **[**591]** One leaflet promised to stop the campaign once he signed the agreement. *Ibid.* The organization distributed the leaflets at a shopping center, passed them to parishioners on their way home from the broker's church, and left them at the homes of the broker's neighbors. *Ibid.*

Finding that the organization's activities were an "invasion of privacy," the state courts enjoined the organization from distributing the leaflets or picketing in the broker's hometown. *Ibid.* The appellate court reasoned that the activities were "coercive and intimidating, rather than informative and therefore . . . not entitled to First Amendment protection." Id. at 418, 91 S. Ct. 1575. The Supreme Court reversed, concluding that the organization's activities were **[***31]** protected by the First Amendment. Id. at 419-20, 91 S. Ct. 1575. The Court emphasized that the fact that the organization's intent was "to exercise a coercive impact on [the broker] does not remove" the First Amendment's protections. Id. at 419, 91 S. Ct. 1575. Additionally, since the injunction was "not attempting to stop the flow of information into [the broker's] household, but to the public," the invocation of the broker's right to privacy was unavailing. Id. at 419-20, 91 S. Ct. 1575.

HN14[↑] In general, "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." Ashcroft v. Free Speech Coal., 535 U.S. 234, 253, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). "The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.' " *Ibid.* (quoting Hess v. Indiana, 414 U.S. 105, 108, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973)). Thus, **[*603]** "[w]here a call to others to act neither conveys a plan to act nor is likely to produce

imminent danger, it may not be criminalized, despite its unsettling message." Carroll, 456 N.J. Super. at 543, 196 A.3d 106. Although there is a narrow exception for speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), we have acknowledged that "[e]ven urging others to violence is shielded unless the statement is designed and likely to produce immediate action." Carroll, 456 N.J. Super. at 545, 196 A.3d 106.

In Brandenburg, the Supreme Court reversed the conviction of a Ku Klux **[***32]** Klan leader for statements made at a rally. 395 U.S. at 444-45, 89 S. Ct. 1827. At the rally, a group of hooded Klansmen, several carrying firearms, gathered around a burning cross. Id. at 445-47, 89 S. Ct. 1827. Following a series of anti-Black and antisemitic remarks and slurs from the group, a single individual began to speak. Id. at 446, 89 S. Ct. 1827. Among other things, he said: "[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken." *Ibid.* He promised to march on Congress and elsewhere on July Fourth. *Ibid.*

The speaker was convicted of violating a statute which proscribed "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." Id. at 445, 89 S. Ct. 1827 (alteration in original). ***HN15***[↑] The Supreme Court summarily invalidated the statute, explaining that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id. at 447, 89 S. Ct. 1827. "[C]onviction for **[***33]** mere advocacy, unrelated **[**592]** to its tendency to produce forcible action," is unconstitutional because it "intrudes upon the freedoms guaranteed by the **[*604]** First and Fourteenth Amendments." Id. at 447 n.2, 448, 89 S. Ct. 1827.

In United States v. Carmichael, 326 F. Supp. 2d 1267, 1285 (M.D. Ala. 2004), the court explained that a "general history" of violence was insufficient to vitiate First Amendment protections. In that case, a criminal defendant facing drug distribution charges published a website with the putative goal of spreading awareness of his case and seeking information about individuals involved. Id. at 1271-72. The website displayed names and photographs of individuals labeled as "Agents" and "Informants" beneath a caption reading, "Wanted," in large, red letters. Id. at 1272. The government sought a protective order requiring the defendant to remove the website from the internet on the ground that the website constituted harassment of the government's witnesses or served to intimidate or threaten the witnesses. Id. at 1274. At an evidentiary hearing, a witness called by the government testified that the terms "wanted" and "informant" were "threatening" because the term "informant" had a "bad connotation among criminals and is equivalent to 'snitch.' " Id. at 1275. The witness also suggested that "the website [was] meant to encourage others to inflict harm" on informants **[***34]** and agents. Id. at 1286.

Specifically citing four cases decided by federal circuit courts in the prior two years for context, the court acknowledged "numerous cases involving the murder of informants in drug-conspiracy cases." Id. at 1284. Nevertheless, the court explained that the proper focus of the inquiry was defendant's website itself, "not whether the site calls to mind other cases in which harm has come." Id. at 1285. Thus, while the court acknowledged that the "broad social context ma[de] the case closer," the "background facts" relied upon by the government were too "general" to rob the website of its First Amendment protections, particularly since the court could not find that the website served "no legitimate purpose" or "cross[ed] the line separating insults from 'true threats.' " Id. at 1278, 1282.

[*605] ***HN16***[↑] As to the latter, the court acknowledged that " 'true threats' are not protected by the First Amendment." Id. at 1280 (quoting Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)); *see also* Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969) (originating the true threats doctrine). " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Black, 538 U.S. at 359, 123 S. Ct. 1536. "The 'prohibition on true threats protects individuals from the fear of violence and **[***35]** from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.' " Carmichael, 326 F. Supp. 2d at 1280 (quoting Black, 538 U.S. at 360, 123 S. Ct. 1536). However, "evidence of an atmosphere of general intimidation is not enough to find . . . a 'true threat.' " Id. at 1285.

Applying these principles, we are convinced that the video, whether viewed on its own or in the context in which it was disseminated, does not fall outside the First Amendment's protection. The judge concluded that the video was not protected by the First Amendment because members of the Jewish community would respond violently to plaintiff being identified as a *get* refuser. The judge stated that "[t]he First Amendment cannot protect this type of communication to incite, which **[**593]** is clearly invasive of [plaintiff's] safety and privacy." However, such an unspecified general history of violent treatment to which get refusers were subjected was insufficient to render defendant's video a true threat or an imminent danger to satisfy the incitement requirement. On the contrary, in Epstein, the court explained that disseminating the names of *get* refusers "so that the reading public will hold them in disrepute," and otherwise taking steps to "shun and embarrass a recalcitrant husband . . . do[es] **[***36]** not violate the criminal laws of the United States." 91 F. Supp. 3d at 582.

[*606] HN17[↑] Critically, the First Amendment "does not prohibit name[-]calling" and "protects 'vehement, caustic, and sometimes unpleasantly sharp attacks' as well as language that is 'vituperative, abusive, and inexact.' " Carmichael, 326 F. Supp. 2d at 1282 (quoting Watts, 394 U.S. at 708, 89 S. Ct. 1399). Similarly, "threats of vilification or social ostracism" do not lose their protected status. Claiborne Hardware Co., 458 U.S. at 910, 102 S. Ct. 3409. If the literal threat "to break . . . necks" in Claiborne, against a backdrop of actual acts of retaliation and violence committed by boycott supporters against boycott violators, was not outside the First Amendment's protection, it is hard to see how defendant's video, with, at most, only nonspecific threatening connotations, could be unprotected. Id. at 902, 102 S. Ct. 3409.

The judge's suggestion that plaintiff had a right to not be subjected to anonymous phone calls, threats, or picketing at his house—especially absent evidence that defendant made calls herself or distributed plaintiff's contact information—is likewise insufficient to render defendant's speech unlawful. Only the #FREE[L.B.B.] photo image, which the judge did not attribute to defendant, identified plaintiff's hometown, not the video. Moreover, there was no direct evidence of a link between the creation of the video, **[***37]** the dissemination of the video, and plaintiff's receipt of anonymous phone calls. In any event, the acts of identifying an individual, encouraging others to call them and urge them to change their behavior, and picketing in their hometown are protected activities under Keefe, 402 U.S. at 417, 419, 91 S. Ct. 1575.

Although the judge found that *get* refusers, like plaintiff's father, were at risk of imprisonment, there is no such offense in our penal code. Israeli courts—where marriage and divorce are governed exclusively by religious law—retain the power to impose sanctions including fines or jail sentences for get refusal. Jodi M. Solovy, Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate, 45 DePaul L. Rev. 493, 501 n.59 (1996). "Israeli law gives rabbinical courts the authority to issue certain sanctions to pressure a non-consenting **[*607]** spouse to give consent to a *get."* Ben-Haim v. Edri, 453 N.J. Super. 526, 530, 183 A.3d 252 (App. Div. 2018). No such risk exists in state courts, as it is a fundamental principle that HN18[↑] civil courts may not become entangled in religious proceedings "if resolution requires the interpretation of religious doctrine." Ran-Dav's Cnty. Kosher v. State, 129 N.J. 141, 162, 608 A.2d 1353 (1992); *see also* Satz v. Satz, 476 N.J. Super. 536, 552-54, 301 A.3d 847 (App. Div. 2023) (rejecting the ex-husband's argument that the trial court violated his First Amendment rights by enforcing the provisions of a marital settlement agreement, rather than a religious contract, in which the parties agreed to participate in a *beth din* proceeding to obtain **[***38]** a get that the ex-wife sought).

Because calls to exhort social pressure on plaintiff would necessarily fall under the aegis of First Amendment protection **[**594]** and the specter of imprisonment for refusing a *get* is unrealistic, harassment must be found—if at all—in the threat of violence. However, the judge's conclusion that such threats were real and imminent is simply not supported by the record. HN19[↑] First Amendment protections cannot be vitiated on unsubstantiated findings of fact. The video itself, which was not even directed to plaintiff, contained no overt call for or reference to violence. *See* Carroll, 456 N.J. Super. at 539, 196 A.3d 106 (citing United States v. Dinwiddie, 76 F. 3d 913, 925 (8th Cir. 1996)) (listing "whether the threat was communicated directly to its victim" as among the indicia of a "true threat"). HN20[↑] Even an overt invocation of violence, however, would be insufficient to strip the statement of First Amendment protection. *See* Claiborne Hardware Co., 458 U.S. at 902, 102 S. Ct. 3409; Brandenburg, 395 U.S. at 446-47, 89 S. Ct. 1827.

Instead, to qualify as incitement and lose First Amendment protection—as the judge tacitly found—a

communication must be both "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg, 395 U.S. at 447, 89 S. Ct. 1827*. However, such is not the case on this record. The difference between lawful and lawless action **[*608]** "may be identified easily by reference to its purpose." *Claiborne Hardware Co., 458 U.S. at 933, 102 S. Ct. 3409*. Defendant's ultimate **[***39]** objective was unquestionably legitimate—it was to get a get. We are persuaded that under the circumstances of this case, the means employed by defendant to achieve her goal is entitled to *First Amendment* protection.

Of course, should plaintiff ever be subjected to the threat of violence at the hands of a third party, he will not be without recourse. In *Stimler*, a small group of rabbis were convicted of kidnapping-related charges when, ostensibly on behalf of *agunot*, they "worked with 'tough guys' or 'muscle men' in exchange for money to kidnap and torture husbands in order to coerce them to sign . . . *gittin*." *864 F.3d at 259-60*. ***HN21***[↑] Thus, as evidenced in *Stimler*, the violent, unlawful pursuit of *gittin* can be prosecuted. *864 F.3d at 259*. But "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Bartnicki v. Vopper, 532 U.S. 514, 529, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001)*. "[I]t would be quite remarkable to hold that speech by a law-abiding [speaker] . . . can be suppressed in order to deter conduct by a non-law-abiding third party." *Id. at 529-30, 121 S. Ct. 1753*.

In sum, the judge's finding that the Jewish community was prone to violence against *get* refusers—and the implicit holding that defendant was aware of and intentionally availed herself of such violent tendencies—is not supported **[***40]** by the record. The video was intended to get a *get*. The video did not threaten or menace plaintiff, and nothing in the record suggests that plaintiff's safety or security was put at risk by the video. Neither plaintiff's testimony that his father had been beaten for being a *get* refuser at an unspecified time and place nor defendant's vague testimony that plaintiff's father had been imprisoned for being a *get* refuser sufficed.

Without credible evidence that the video incited or produced imminent lawless action or was likely to do so, defendant's speech does not fall within the narrow category of incitement exempted **[*609]** from *First Amendment* protection. Likewise, because the judge's finding of a privacy violation relied upon the same factual finding, the record does not support the finding that the manner of defendant's communication violated *subsection (a)* of the harassment statute. ***HN22***[↑] As our Supreme Court explained, *N.J.S.A. 2C:33-4* criminalizes only **[**595]** those "private annoyances that are not entitled to constitutional protection." *Hoffman, 149 N.J. at 576, 695 A.2d 236*. Defendant's communication does not meet that criteria.

Therefore, we reverse the April 22, 2021, and August 27, 2021, orders. In so doing, we vacate the FRO and the restraints contained therein as well as the **[***41]** counsel fee award. In light of our disposition, the TRO should not be reinstated and we need not address defendant's or amici curiae's remaining arguments.

Reversed. We do not retain jurisdiction.

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Satz v. Satz

Superior Court of New Jersey, Appellate Division

July 18, 2023, Argued; August 18, 2023, Decided

DOCKET NO. A-3535-21

Reporter
476 N.J. Super. 536 *; 301 A.3d 847 **; 2023 N.J. Super. LEXIS 87 ***

AVA SATZ, PLAINTIFF-RESPONDENT, v. ALLEN SATZ, DE FENDANT-APPELLANT.

Subsequent History: [*1]** Approved for Publication August 18, 2023.

Decision reached on appeal by, Costs and fees proceeding at *Satz v. Satz, 2023 N.J. Super. Unpub. LEXIS 1443, 2023 WL 5319798 (App.Div., Aug. 18, 2023)*

Related proceeding at *Satz v. Siragusa, 2023 N.J. Super. Unpub. LEXIS 1448, 2023 WL 5339671 (App.Div., Aug. 21, 2023)*

Related proceeding at *Satz v. Marion B. Solomon & Arons & Solomon, P.A., 2023 N.J. Super. Unpub. LEXIS 2268, 2023 WL 8595773 (App.Div., Dec. 12, 2023)*

Certification denied by *Satz v. Satz, 2024 N.J. LEXIS 141 (N.J., Feb. 2, 2024)*

Prior History: On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FM-02-2630-18.

Core Terms

din, parties, trial court, orders, counsel fees, proceedings, religious, divorce, obligations, courts, provisions, summons, rights, arbitration, matrimonial, principles, rabbinical, sanctions, awarding, notice of appeal, settlement

Case Summary

Overview

HOLDINGS: [1]-The plain language of the marital settlement agreement (MSA) was that defendant agreed to submit to the jurisdiction of the beis din and to accept its judgment because the provision specifically stated that both parties would timely participate in the proceeding and the parties agreed their submission to the beis din would constitute an agreement to be bound; [2]-The trial court did not violate defendant's *U.S. Const. amend. I* rights by ordering him to fulfill his contractual duties under the MSA to sign an arbitration agreement implementing the results of independent beis din proceedings, because the orders served the secular purpose of enforcing the parties' contractual obligations under the MSA.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1 **Appellate Jurisdiction, Interlocutory Orders**

Litigants do not have a right to appeal an interlocutory order. *R. 2:2-3*. Rather, leave to appeal an interlocutory order is granted only in the interest of justice. *R. 2:2-4*. As a general rule, interlocutory appellate review runs counter to a judicial policy that favors an uninterrupted proceeding at the trial level with a single and complete review. There is a general policy against piecemeal review of trial-level proceedings.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2 **Standards of Review, Questions of Fact &**

Law

The scope of the appellate court's review is narrow. Reviewing courts accord particular deference to the Family Part because of its special jurisdiction and expertise in family matters. Generally, findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Courts will not disturb the factual findings and legal conclusions that flow from them unless convinced they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN3[] **Standards of Review, Abuse of Discretion**

The appellate court accords great deference to discretionary decisions of Family Part judges. Discretionary determinations, supported by the record, are examined to discern whether an abuse of reasoned discretion has occurred. An abuse of discretion occurs when a trial court makes findings inconsistent with or unsupported by competent evidence, utilizes irrelevant or inappropriate factors, or fails to consider controlling legal principles. An abuse of discretion can also be found if the court fails to take into consideration all relevant factors, and when its decision reflects a clear error in judgment.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN4[] **Standards of Review, De Novo Review**

Reviewing courts do not accord special deference to the Family Part's interpretation of the law, and review legal determinations de novo.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

HN5[] **Dissolution & Divorce, Procedures**

Settlement of disputes, including matrimonial disputes, is encouraged and highly valued in the legal system. Indeed, there is a strong public policy favoring stability of arrangements in matrimonial matters. The Supreme Court has observed that it is shortsighted and unwise for courts to reject out of hand consensual solutions to vexatious personal matrimonial problems that have been advanced by the parties themselves. Ibid. Therefore, fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed. The Supreme Court has also instructed that a court should not rewrite a contract or grant a better deal than that for which the parties expressly bargained.

Contracts Law > Types of Contracts > Settlement Agreements
Business & Corporate Compliance > Contracts > Types of Contracts > Settlement Agreements

HN6[] **Types of Contracts, Settlement Agreements**

Matrimonial settlement agreements are governed by basic contract principles and, as such, courts should discern and implement the parties' intentions. It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear. An agreement that resolves a matrimonial dispute is no less a contract than an agreement to resolve a business dispute. The task of the court, then, is to discern and implement the common intention of the parties, and enforce the mutual agreement as written.

Evidence > Burdens of Proof > Clear & Convincing Proof

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Requirements

Family Law > ... > Property Distribution > Equitable Distribution > Property Settlements

Family Law > ... > Postnuptial & Separation Agreements > Defenses > Fraud

HN7[] **Burdens of Proof, Clear & Convincing Proof**

Marital agreements are essentially consensual and voluntary, and as a result, they are approached with a predisposition in favor of their validity and enforceability. Accordingly, marital settlement agreements (MSA) should be enforced so long as they are consensual, voluntary, conscionable, and not the result of fraud or overreaching. However, if an MSA was wholly unconscionable when made, the agreement may be set aside. Before any settlement agreement will be vacated, the moving party must demonstrate proof of fraud or other compelling circumstances by clear and convincing evidence.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN8 **Freedom of Religion, Establishment of Religion**

The First Amendment's Establishment Clause bars a state from placing its support behind a religious belief, while the Free Exercise Clause bars a state from interfering with the practice of religion. *U.S. Const. amend. I*. It is a fundamental principle that civil courts may not become entangled in religious proceedings.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN9 **Freedom of Religion, Free Exercise of Religion**

Civil courts may resolve controversies involving religious groups if resolution can be achieved by reference to neutral principles of law, but they may not resolve such controversies if resolution requires the interpretation of religious doctrine. Neutral principles may be particularly suited for adjudications of civil contract actions, so long as the dispute does not involve interpretations of religious doctrine itself.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

HN10 **Freedom of Religion, Establishment of Religion**

The United States Supreme Court has recognized that the Establishment Clause is violated where there is clearly no secular purpose for the state action being challenged and the activity was motivated wholly by religious considerations.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN11 **Standards of Review, Abuse of Discretion**

The appellate court will disturb a trial court's determination on counsel fees only on the rarest occasion, and then only because of clear abuse of discretion.

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

Family Law > Marital Termination & Spousal Support > Costs & Attorney Fees

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

HN12 **Discovery, Misconduct During Discovery**

An allowance for counsel fees is permitted following the filing of a motion in aid of litigant's rights, *R. 1:10-3*, or to any party in a divorce action, *R. 5:3-5(c)*, subject to the provisions of *Rule 4:42-9*. To determine whether and to what extent such an award is appropriate, the court must consider:(1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award. *R. 5:3-5(c)*.All applications or motions seeking an award of attorney

fees must include an affidavit of services at the time of initial filing. R. 5:3-5(c).

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Family Law > Marital Termination & Spousal Support > Costs & Attorney Fees

HN13 **Judges, Discretionary Powers**

R. 1:10-3 provides a means for securing relief and allows for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order. Relief under R. 1:10-3, whether it be the imposition of incarceration or a sanction, is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of the court order.

Counsel: Allen Satz, appellant, argued the cause Pro se.

Angelo Sarno argued the cause for respondent (Synder Sarno D'Aniello Maceri & da Costa, LLC, attorneys; Angelo Sarno, of counsel and on the brief; Michelle Wortmann, on the brief).

Judges: Before Judges Whipple, Susswein and Gummer. The opinion of the court was delivered by SUSSWEIN, J.A.D.

Opinion by: SUSSWEIN

Opinion

[851]** **[*542]** The opinion of the court was delivered by

[*543] SUSSWEIN, J.A.D.

In this post-judgment matrimonial matter,[1] defendant Allen Satz appeals from various Family Part orders enforcing provisions of the marital settlement agreement (MSA) and awarding counsel fees to plaintiff Ava Satz.[2] After carefully reviewing the record in light of the arguments of the parties and the applicable legal principles, we conclude the trial court did not abuse its discretion in ordering defendant to comply with explicit and detailed provisions of the MSA. Nor did the trial court abuse its discretion in awarding counsel fees to plaintiff based on defendant's failure to comply with the MSA and the court's orders. We therefore affirm **[***2]** all orders defendant challenges in this appeal.

I.

Plaintiff and defendant married in February 2006. They have four children together, born between February 2007 and May 2015. After twelve years of marriage, plaintiff and defendant separated in 2018. Plaintiff filed a complaint for divorce in June 2018.

The parties engaged in two years of contentious litigation prior to the divorce trial, which began in September 2020. They continued attempts to settle their dispute throughout the duration of the trial. A critical area of dispute centered on plaintiff's desire to **[*544]** obtain a *get*—a divorce recognized under Jewish religious law.[3] Before a verdict was reached in the Family Part divorce trial, the parties tentatively reached an agreement on all issues, including each party's obligations with respect to a *beis din* proceeding to obtain the *get* that plaintiff sought.

With the consent of both parties, the trial court took testimony from defendant before the final MSA was drafted to confirm his agreement with respect to the *beis din* provision. Defendant testified that he would respond to any summons received **[**852]** from the *beis din* and would be bound by any decision the rabbinical court made regarding **[***3]** the *get*, which was to be decided by that body in accordance with Jewish law. Defendant

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[1] We heard argument in this appeal back-to-back with argument in another appeal brought by defendant in which he challenges the fees awarded to the court-appointed guardian ad litem. Because the present appeal involves different issues and different parties in interest, we have not consolidated the appeals and instead issue separate opinions.

[2] Defendant, who is self-represented, filed numerous notices of appeal. In this opinion, we address: (1) his appeal from paragraph four of an October 20, 2021 order enforcing Article IX of the MSA and requiring him to sign an arbitration agreement pursuant to paragraph one of the MSA; (2) paragraph six of a December 6, 2021 order directing him to participate in *beis din*—rabbinical court—proceedings pursuant to Article IX of the MSA; and (3) paragraphs four and eleven of a March 25, 2022 order enforcing paragraph six of the December 6, 2021 order and granting plaintiff's application for counsel fees.

[3] Only a husband may secure a *get*, and, without it, the wife cannot remarry under Jewish law.

further testified that he understood he would be subject to sanctions imposed by the Family Part in the event that he did not cooperate with the *beis din* in accordance with his agreement, which would be memorialized in writing and entered in the Family Part.

Thereafter, an MSA was drafted. Article IX of the MSA is titled, "*Beis Din* Proceedings/*Get* Issue." That article provides in its entirety:

> Both parties agree to respond to any summons from a *[b]eis [d]in* regarding the *[g]et* which shall be decided in accordance with Jewish [l]aw. By virtue of this agreement the parties are not waiving any religious beliefs, rights or remedies they each may have under Jewish law in the *[b]eis [d]in* process (except with respect to the process of identifying a choice of *[b]eis [d]in* by the [defendant] now, as provided in the next to last sentence of this paragraph). The parties have freely and voluntarily entered into the custodial and financial terms of their legal settlement. Neither party shall seek to alter any provisions of the custody and financial aspects of their legal settlement before the *[b]eis [d]in*. Nothing herein, however, **[***4]** shall prevent either party from seeking whatever other relief that may be available to either party including damages. By way of example, neither party may seek to change a term of the agreement however, they both have the right to assert any financial claims for relief that they may have before the *[b]eis [d]in*. Both parties shall timely participate in the *[b]eis [d]in* proceeding. Both parties will answer any summons in a prompt manner. [Defendant] represents that he may be opposing the [plaintiff]'s request for a *[g]et*. The parties agree that their submission to the *[b]eis [d]in* shall constitute an agreement to be bound by the *[b]eis [d]in* **[*545]** [d]ecision on any issue the *[b]eis [d]in* addresses, and the *[b]eis [d]in* shall have the authority to order monetary awards relating to the Jewish law matters before it, which awards may be confirmed in a court of law. Both parties shall participate in this process freely and voluntarily. Both parties shall abide by the recommendations of the *[b]eis [d]in*. Any violation of this section will result in sanctions to be ordered by the court, including but not limited to monetary sanctions, arrest and the [parties] shall be permitted to seek any relief **[***5]** available to her/him in the [c]ourt with regard to this issue. The [defendant] agrees that he has freely and voluntarily chosen to select as a *[b]eis [d]in* for this process, which selection he makes shall be at his sole option, which will be either the Rabbinical Court of New City or Mechon Lihoyra'ah. This paragraph was an essential term of this Agreement, without which this term sheet would not have been agreed upon.

The MSA was signed by the parties on October 6, 2020. On that date, the final judgment of divorce was entered. Also on that date, both parties appeared before the trial court and testified as to their understanding of the MSA. They both confirmed their agreement to be bound by its terms.

Defendant specifically testified that he was not coerced into signing the MSA and that he believed it to be fair and reasonable under the circumstances. During that testimony, defendant was again questioned about the *get/beis din* provisions in the MSA. He testified that he agreed to those provisions being included in the MSA, he was not forced or coerced to include them in the MSA, and he agreed to sign the **[**853]** MSA with those provisions in order to resolve the divorce litigation. Defendant **[***6]** further testified that he would timely cooperate with the *beis din* proceedings, comply with and respond to any summons or subpoena issued to him by the *beis din*, and abide by the recommendations of the *beis din*. He also acknowledged that if he did not cooperate or comply, he would be subject to sanctions by the Family Part.

The court was thereafter advised at a case management conference that defendant had not complied with his obligations under the MSA. The trial court entered a case management order dated December 6, 2021. Paragraph six of that order states that "[d]efendant Allen Satz shall participate in the *[b]eis [d]in* proceedings pursuant to Article IX of the [p]arties' MSA." At the December 6, 2021 hearing, the trial court explained:

> **[*546]** When parties agree to do certain things and the [c]ourt makes a determination that the agreement in and of itself should not be void because it was not unjust, then . . . we enforce.
> I don't re-write agreements; I enforce them as long as they're not found to be unjust and unfair and unreasonable. And when I read the MSA there's nothing unreasonable, unfair, or unjust about what the agreement says.
>
> The [*beis din*] issue is still up in the air. It hasn't been resolved. It needs to be **[***7]** resolved because a determination has yet to be made. And I have a party that's seeking enforcement.

> Now you may disagree on how it happened and what was said, okay, but that's separate and distinct from ["]you need to go and participate in the process.["]

On January 25, 2022, plaintiff moved for enforcement. Defendant cross-moved, seeking the denial of plaintiff's application and a stay of any order enforcing Article IX of the MSA. Defendant also opposed the issuance of any sanctions against him, including a fee award to plaintiff.

The trial court heard those motions on March 25, 2022, at which time it denied defendant's application for a stay of the December 6, 2021 order, granted plaintiff's request that defendant be obligated to "participate in the *[b]eis [d]in* proceedings pursuant to Article IX of the parties' MSA," and ordered both parties to actively participate in the *beis din* proceedings by May 31, 2022. Regarding counsel fees, the court noted that a moving party may request an award of counsel fees pursuant to *Rule 4:42-9*, *Rule 5:3-5*, and *Rule of Professional Conduct (RPC) 1.5(a)* and recognized that it had received certifications of services. In determining the amount of the fee award, the court considered the factors set forth in *Rule 5:3-5(c)*, including the parties' financial **[***8]** circumstances and any bad faith. The court found defendant had acted in bad faith in moving for a stay of the court's enforcement order and by not complying with the court's previous orders regarding his participation in the *beis din* proceedings. The trial court granted plaintiff's motion for counsel fees related to the enforcement of the court's prior orders.

On April 5, 2022, defendant filed a notice of motion for leave to appeal certain paragraphs of the March 25, 2022 order. On May 31, 2022, defendant's motion for leave to appeal was denied.

[*547] On May 30, 2022—before learning of the denial of his motion for leave to appeal the March 25, 2022 order—defendant sought to file a notice of appeal from two paragraphs of an order dated June 30, 2021. That notice of appeal was rejected by the Appellate Division Clerk's Office as untimely.

On June 8, 2022, defendant filed a notice of appeal challenging various paragraphs **[**854]** of trial court orders dated October 20, 2021, December 6, 2021, and March 25, 2022.

On June 28, 2022, defendant filed a third notice of appeal from certain paragraphs of orders dated June 25, 2021—which was later amended and replaced by the June 30, 2021 order—and May 27, 2022. **[***9]**

On July 18, 2022, defendant filed a fourth notice of appeal from certain paragraphs of orders dated October 20, 2021, December 6, 2021, March 25, 2022, and May 27, 2022.

We note that a *beis din* hearing occurred on May 11, 2022. On July 6, 2022, the *beis din* issued a fifteen-page ruling finding that defendant had not properly responded to summonses from rabbinical courts, that defendant is "obligated to divorce [plaintiff] forthright and immediately," and that his refusal to provide plaintiff a *get* "is a form of abuse." It noted defendant had been summoned to arbitration before numerous rabbinical courts and had "been deemed like he is refusing to appear." The decision explained that defendant had signed an arbitration agreement in which he agreed to a hearing and to accept the *beis din's* rules and procedures, allowing the rabbinical court to arbitrate in his absence. The decision also sets forth sanctions that can be assessed for his failure to comply with the ruling.

Defendant raises several arguments on appeal in his initial and reply briefs. He first argues that his appeal is timely and not interlocutory as plaintiff contends. Second, he argues that the trial court should not have **[***10]** sanctioned him for filing his stay motion and abused its discretion in awarding counsel fees to plaintiff. Defendant's remaining arguments pertain to the legitimacy of the trial **[*548]** court's enforcement of the MSA. He argues: the trial court had no authority to order him to arbitrate in the *beis din*; the trial court erred by relying on a "religious document" and by requiring defendant's participation in *beis din* proceedings; and the trial court violated the *First Amendment* by ruling on a religious agreement.

II.

We first address plaintiff's contention that defendant's appeal should be dismissed on procedural grounds because it was untimely filed, includes interlocutory orders, and fails to appeal from the final order entered on the issues.

HN1[↑] Plaintiff is correct that litigants do not have a right to appeal an interlocutory order. *See R. 2:2-3*. Rather, leave to appeal an interlocutory order is granted only "in the interest of justice." *R. 2:2-4*. As a general rule, "[i]nterlocutory appellate review runs counter to a judicial policy that favors an 'uninterrupted proceeding at the trial level with a single and complete review.'" *State v. Reldan, 100 N.J. 187, 205, 495 A.2d 76 (1985)*

(quoting In re Pa. R.R. Co., 20 N.J. 398, 404, 120 A.2d 94 (1956)). There is a "general policy against piecemeal review of trial-level proceedings." Brundage v. Est. of Carambio, 195 N.J. 575, 599, 951 A.2d 947 (2008).

In **[***11]** this instance, however, we deem it to be in the interests of justice—and judicial economy—to address and definitively resolve defendant's contentions related to the enforcement of Article IX of the MSA. We therefore elect to consider the merits of those contentions in this opinion.

III.

HN2[] The scope of our review is narrow. Cesare v. Cesare, 154 N.J. 394, 412, 713 A.2d 390 (1998). Reviewing courts "accord particular deference to the Family Part because of its 'special jurisdiction and expertise' in family matters." Harte v. **[**855]** Hand, 433 N.J. Super. 457, 461, 81 A.3d 667 (App. Div. 2013) (quoting Cesare, **[*549]** 154 N.J. at 412). Generally, "findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare, 154 N.J. at 411-12, 713 A.2d 390 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484, 323 A.2d 495 (1974)). Courts will not disturb the factual findings and legal conclusions that flow from them unless convinced they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ricci v. Ricci, 448 N.J. Super. 546, 564, 154 A.3d 215 (App. Div. 2017) (quoting Elrom v. Elrom, 439 N.J. Super. 424, 433, 110 A.3d 69 (App. Div. 2015)).

HN3[] We also "accord great deference to discretionary decisions of Family Part judges." Milne v. Goldenberg, 428 N.J. Super. 184, 197, 51 A.3d 161 (App. Div. 2012) (citing Donnelly v. Donnelly, 405 N.J. Super. 117, 127, 963 A.2d 855 (App. Div. 2009)). "Discretionary determinations, supported by the record, are examined to discern whether an abuse of reasoned discretion has occurred." Ricci, 448 N.J. Super. at 564, 154 A.3d 215 (citing Gac v. Gac, 186 N.J. 535, 547, 897 A.2d 1018 (2006)). An abuse of discretion occurs when a trial court makes "findings inconsistent with or unsupported **[***12]** by competent evidence," utilizes "irrelevant or inappropriate factors," or "fail[s] to consider controlling legal principles." Elrom, 439 N.J. Super. at 434, 110 A.3d 69 (internal citations omitted). An abuse of discretion can also be found if the court "fails to take into consideration all relevant factors[,] and when its decision reflects a clear error in judgment." State v. C.W., 449 N.J. Super. 231, 255, 156 A.3d 1088 (App. Div. 2017) (quoting State v. Baynes, 148 N.J. 434, 444, 690 A.2d 594 (1997)).

HN4[] Reviewing courts do not accord special deference to the Family Part's interpretation of the law, D.W. v. R.W., 212 N.J. 232, 245, 52 A.3d 1043 (2012), and review legal determinations de novo, Ricci, 448 N.J. Super. at 565, 154 A.3d 215.

HN5[] Turning to substantive legal principles that guide and inform our analysis, "[s]ettlement of disputes, including matrimonial **[*550]** disputes, is encouraged and highly valued in our system." Quinn v. Quinn, 225 N.J. 34, 44, 137 A.3d 423 (2016) (citing Konzelman v. Konzelman, 158 N.J. 185, 193, 729 A.2d 7 (1999)). "Indeed, there is a 'strong public policy favoring stability of arrangements in matrimonial matters.'" *Ibid.* (quoting Konzelman, 158 N.J. at 193, 729 A2d 7). Our Supreme Court has "observed that it is 'shortsighted and unwise for courts to reject out of hand consensual solutions to vexatious personal matrimonial problems that have been advanced by the parties themselves.'" *Ibid.* (quoting Konzelman, 158 N.J. at 193, 729 A2d 7). "Therefore, 'fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed.'" *Ibid.* (quoting Konzelman, 158 N.J. at 193-94, 729 A2d 7). Our Supreme Court has **[***13]** also instructed that "a court should not rewrite a contract or grant a better deal than that for which the parties expressly bargained." Id. 225 N.J. at 45, 137 A3d 423 (citing Solondz v. Kornmehl, 317 N.J. Super. 16, 21-22, 721 A.2d 16 (App. Div. 1998)).

HN6[] Matrimonial settlement agreements are governed by basic contract principles and, as such, courts should discern and implement the parties' intentions. J.B. v. W.B., 215 N.J. 305, 326, 73 A.3d 405 (2013). "It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear." Quinn, 225 N.J. at 45, 137 A3d 423 (citing J.B., 215 N.J. at 326, 73 A.3d 405). "An agreement **[**856]** that resolves a matrimonial dispute is no less a contract than an agreement to resolve a business dispute." *Ibid.* The task of the court, then, is to "discern and implement 'the common intention of the parties[,]' and 'enforce [the mutual agreement] as written.'" Id. 225 N.J. at 46, 137 A.3d 423 (first quoting Tessmar v. Grosner, 23 N.J. 193, 201, 128 A.2d 467 (1957); and then quoting Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43, 161 A.2d 717 (1960)).

HN7[] "Marital agreements are essentially consensual

and voluntary[,] and as a result, they are approached with a predisposition in favor of their validity and enforceability." Massar v. Massar, 279 N.J. Super. 89, 93, 652 A.2d 219 (App. Div. 1995) **[*551]** (citing Petersen v. Petersen, 85 N.J. 638, 642, 428 A.2d 1301 (1981)). Accordingly, MSAs should be enforced so long as they are consensual, voluntary, conscionable, and not the result of fraud or overreaching. Weishaus v. Weishaus, 180 N.J. 131, 143-44, 849 A.2d 171 (2004). However, if an MSA was wholly unconscionable when made, the agreement may be set aside. Guglielmo v. Guglielmo, 253 N.J. Super. 531, 541, 602 A.2d 741 (App. Div. 1992). Before any settlement agreement will be vacated, **[***14]** the moving party must demonstrate proof of fraud or other compelling circumstances by "clear and convincing evidence." Nolan v. Lee Ho, 120 N.J. 465, 472, 577 A.2d 143 (1990).

IV.

We agree with the trial court that nothing in the MSA is unconscionable or contrary to public policy as to render it unenforceable. As the trial court aptly found, the parties entered into a comprehensive agreement to resolve their contentious marital dispute. Both sides made concessions as consideration for the benefit of resolving the divorce litigation. Both parties were represented by counsel. The MSA, moreover, was carefully drafted after extensive negotiation. Revisions to the initial draft were exchanged. The parties ultimately agreed to and executed the MSA, and both testified they had entered into it voluntarily and free from coercion or duress. On two separate occasions, defendant testified under oath regarding the obligations he agreed to with respect to the *beis din* proceedings. This was done with full awareness that obtaining a *get* was extremely important to plaintiff because, absent a *get*, she would continue to be viewed as married under Jewish law, thereby preventing her from remarrying within her faith.

We are satisfied on this record the MSA is **[***15]** a legally binding contract based on ample consideration from both parties and entered into knowingly and voluntarily. The Family Part judge—who was intimately familiar with this protracted litigation and the **[*552]** litigants—thus had the lawful authority to enforce the agreement as written.

Defendant argues that he agreed in the MSA only to "respond to a summons" issued by the *beis din*, not to participate in its proceedings. He claims that he complied with his contractual obligations under the MSA when he responded to a *beis din* summons by asserting that the *beis din* had no jurisdiction over him. We reject that argument and agree with the trial court that defendant agreed to participate in the *beis din* proceedings. Importantly, the MSA provision specifically states that "[b]oth parties shall timely participate in the *[b]eis [d]in* proceeding" and "[t]he parties agree that their submission to the *[b]eis [d]in* shall constitute an agreement to be bound by the *[b]eis [d]in* [d]ecision on any issue the *[b]eis [d]in* addresses." The clear import of the plain language of the MSA is that defendant agreed to **[**857]** submit to the jurisdiction of the *beis din* and to accept its judgment.

V.

We turn next to defendant's **[***16]** argument that the trial court violated his First Amendment rights by ordering him to participate in *beis din* proceedings and to sign an arbitration agreement with the *beis din*. **HN8**[] The First Amendment's Establishment Clause bars a state from placing its support behind a religious belief, while the Free Exercise Clause bars a state from interfering with the practice of religion. U.S. Const. amend. I. It is a fundamental principle that civil courts may not become entangled in religious proceedings.

Our trial courts have not been in complete accord on the issue of whether a civil court has authority to enforce a *ketubah*—a Jewish marriage contract. Mayer-Kolker v. Kolker, 359 N.J. Super. 98, 100-03, 819 A.2d 17 (App. Div. 2003). *Compare* Minkin v. Minkin, 180 N.J. Super. 260, 434 A.2d 665 (Ch. Div. 1981), *and* Burns v. Burns, 223 N.J. Super. 219, 538 A.2d 438 (Ch. Div. 1987), *with* Aflalo v. Aflalo, 295 N.J. Super. 527, 685 A.2d 523 (Ch. Div. 1996). In this case, however, the trial court was asked to enforce a civil **[*553]** contract, not a religious one. Nor did the trial court substantively review or affirm the *beis din* ruling. For purposes of this appeal, the *beis din* ruling is essentially a report confirming plaintiff's assertion that defendant failed to participate in the *beis din* proceeding in violation of his obligations under the MSA.

HN9[] As our Supreme Court has recognized, "civil courts may resolve controversies involving religious groups if resolution can be achieved by reference to neutral principles of law, but that they may not resolve such controversies if **[***17]** resolution requires the interpretation of religious doctrine." Ran-Dav's Cnty. Kosher v. State, 129 N.J. 141, 162, 608 A.2d 1353 (1992). The Court specifically noted that "[n]eutral principles may be particularly suited for adjudications of . . . civil contract actions," so long as the dispute does not "involve interpretations of religious doctrine itself."

Ibid.

Defendant agreed in the MSA to abide by the *beis din* ruling, whatever that might be. In enforcing that agreement, the trial court in no way interpreted religious doctrine. The orders entered in this case scrupulously avoid entanglement with religion because the trial court applied well-established principles of civil contract law, not rabbinical law. The latter body of law remained solely within the province of the *beis din* and was not interpreted or applied by the Family Part judge, nor by us.

HN10[↑] The United States Supreme Court has recognized that the Establishment Clause is violated where there is clearly no secular purpose for the state action being challenged and the "activity was motivated wholly by religious considerations." *Lynch v. Donnelly, 465 U.S. 668, 680, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984)*. In this instance, the orders defendant challenges served the secular purpose of enforcing the parties' contractual obligations under the MSA, which in turn serves the secular purpose of encouraging **[***18]** divorce litigants to resolve their disputes by negotiating and entering an MSA. Accordingly, the trial court did not violate defendant's constitutional rights by ordering him to fulfill his contractual obligation under the MSA to sign an arbitration **[*554]** agreement implementing the results of the independent *beis din* proceedings.

VI.

Lastly, we address defendant's contention the trial court abused its discretion by awarding counsel fees to plaintiff. HN11[↑] "We will disturb a trial court's determination **[**858]** on counsel fees only on the 'rarest occasion,' and then only because of clear abuse of discretion." *Barr v. Barr, 418 N.J. Super. 18, 46, 11 A.3d 875 (App. Div. 2011)* (quoting *Strahan v. Strahan, 402 N.J. Super. 298, 317, 953 A.2d 1219 (App. Div. 2008)*).

HN12[↑] An allowance for counsel fees is permitted following the filing of a motion in aid of litigant's rights, *R. 1:10-3*, or to any party in a divorce action, *R. 5:3-5(c)*, subject to the provisions of *Rule 4:42-9*. To determine whether and to what extent such an award is appropriate, the court must consider:

> (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties . . . ; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; **[***19]** (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.
>
> [*R. 5:3-5(c)*.]

All applications or motions seeking an award of attorney fees must include an affidavit of services at the time of initial filing. *R. 5:3-5(c)*.

HN13[↑] Specifically, "*Rule 1:10-3* provides a 'means for securing relief and allow[s] for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order.'" *N. Jersey Media Grp., Inc. v. State, 451 N.J. Super. 282, 296, 166 A.3d 1181 (App. Div. 2017)* (alteration in original) (quoting *In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17-18, 110 A.3d 31 (2015)*). "Relief under *[Rule] 1:10-3*, whether it be the imposition of incarceration or a sanction, is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of the **[*555]** court order." *Ridley v. Dennison, 298 N.J. Super. 373, 381, 689 A.2d 793 (App. Div. 1997)*.

Importantly, the MSA explains when counsel fees and costs may be imposed upon breach of the agreement. Article VII, paragraph five of the MSA provides:

> In the event that either [party] is required to file an application with the [c]ourt to enforce any provision in this Agreement, the breaching party shall indemnify the non-breaching party for all reasonable counsel fees and costs that the nonbreaching party **[***20]** incurred and the [c]ourt shall enforce this paragraph to enter an award of reasonable counsel fees and costs. In addition, if a default by one party subjects the other party to a lawsuit by a third party, the defaulting party shall likewise be responsible for attorneys' fees and costs. The rights granted in this paragraph shall be in addition to, and without prejudice, to any other rights and remedies to which the aggrieved party may be entitled.

The trial court found that defendant had acted in bad faith in failing to comply with his obligations under the MSA, which was a "compelling factor in awarding the fees." For reasons we explained in the preceding section, we reject defendant's attempt to frame the trial

court's award of counsel fees as a penalty or sanction for not participating in the *beis din* proceeding in violation of his religious rights. The record makes clear the trial court awarded counsel fees based on defendant's noncompliance with the MSA. The record also shows the trial court reviewed the certification of services with respect to all applicable factors, *see* R. 5:3-5(c), and made a determination that defendant had the financial **[**859]** ability to pay plaintiff's fees. We have no basis **[***21]** upon which to overturn or modify the trial court's decision to grant plaintiff's request for counsel fees.

To the extent we have not specifically addressed them, any remaining contentions raised by defendant lack sufficient merit to warrant discussion. *R. 2:11-3(e)(1)(E)*.

Affirmed.

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Cautionary Case Law –

Ethics for All Practitioners

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CAUTIONARY CASE LAW

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THE RISK OF ELEVENTH HOUR ELECTRONIC FILING

Peraino v. County of Winnebago

2018 IL APP (2d) 170368

THE TRAGEDY OF SUBSTANCE ABUSE

In re Hasbrouck

152 N.J. 366 (1998)

THE ETHICAL OBLIGATION TO REPORT ANOTHER LAWYER'S MISCONDUCT

Estate of Spencer v. Gavin

400 N.J. Super. 220 (App. Div. 2008)

ATTORNEY CLIENT PRIVILEGES

Edwards Wildman Palmer v. The Superior Court

231 Cal. App. 4th 1214, 2014 Cal. App. LEXIS 1081. (Does the attorney client privilege attach to intrafirm communications among the firm's attorneys concerning disputes with a current client, after that client subsequently sues the firm for legal malpractice? The answer is maybe.)

THE DUTY OF COMMUNICATION

Garris v. Severson

252 Cal. Rptr. 204 (Cal. App. 1988) (Failure to communicate in the litigation setting)

Conklin v. Hannoch Weisman

145 N.J. 395 (1996)(An attorney in a counseling situation must advise a client of the risks of the transaction in terms sufficiently clear to enable the client to assess those risks. The care must be commensurate with the risks of the undertaking and tailored to the needs and sophistication of the client.)

ATTORNEY/CLIENT TRANSACTIONS AND DIVIDED LOYALTIES

RPC 1.8(a)

REFERRALS and ASSOCIATES

Tormo v. Yormank

398 Fed. Supp. 1159 (D.N.J. 1975) (How not to refer a case)

RPC 1.5e)

R 1:39-6(d)

NEGLIGENT SETTLEMENT

Ziegelheim v. Apollo

128 N.J. 250 (1992) (Doctrine of Judgmental Immunity disregarded.)

CONFIDENTIALITY

Maritrans v. Pepper, Hamilton & Scheetz

602 A.2d 1277 (Pa. 1992)(Classic example of a law firm being sued for civil damages because of the alleged disclosure of confidential information to the Plaintiff's business competitors.)

In Re Goebel

703 N.E.2d 1045 (Ind. 1998) (Breaching confidentiality when under duress)

A v. B

158, N.J. 51 (1999) (Is there confidentiality between two joint clients?)

ENTITY THEORY OF REPRESENTATION

McCarthy v. John T. Henderson, Inc.

246 N.J. Super. 225 (App. Div. 1991) (An example of a New Jersey court enforcing the entity theory)

Egan v. McNamara

467 A.2d 733 (D.C. App. 1983) (How to avoid a conflict of interest charge when having represented both the entity and its constituent)

From TV Drama to Legal Insight:

High-Profile Trials in Focus

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HIGH PROFILE TRIALS IN FOCUS

A View From the Bench

Honorable James J. Guida, J.S.C. (Ret.)

1

CONTEMPT

- The authority for a judge to hold an attorney, indeed anyone, in contempt is derived from both statutory and Court Rule. In addition, both the Code of Judicial Conduct and the Attorney Code of Ethics establish general guardrails to maintain decorum and public confidence in the criminal justice system.

- The power to sanction an attorney for contempt must be used sparingly and with caution. The judge must establish that he or she is the general and that inside the courtroom, the orders and procedures are followed and adhered to and that this command authority is not undermined. Attorneys have the right, indeed the obligation to defend their clients, make objections and point out to the court errors or misapplications of the law. However, there is a bright line which cannot be crossed. The court must act if an attorney's words or conduct has the capacity to undermine the court's authority and to interfere with or obstruct the orderly administration of justice.

What is Contempt?

- Contempt can occur when disobeying a court order, hindering court proceedings, violating protective orders, misbehavior in the presence of the court, misbehavior by a court officer in their official capacity, and disobedience or resistance by an attorney. party, juror, witness.

Statute

• N.J.S.A. 2A:10-1 provides that the power of any court of this state to punish for contempt shall not be construed to extend to any case except the colon
•
• a. misbehavior of any person in the actual presence of the court;
• b. misbehavior of any officer of the court in his official transactions; and
• c. disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever or any lawful rich, process, judgment, order, or command of the court.

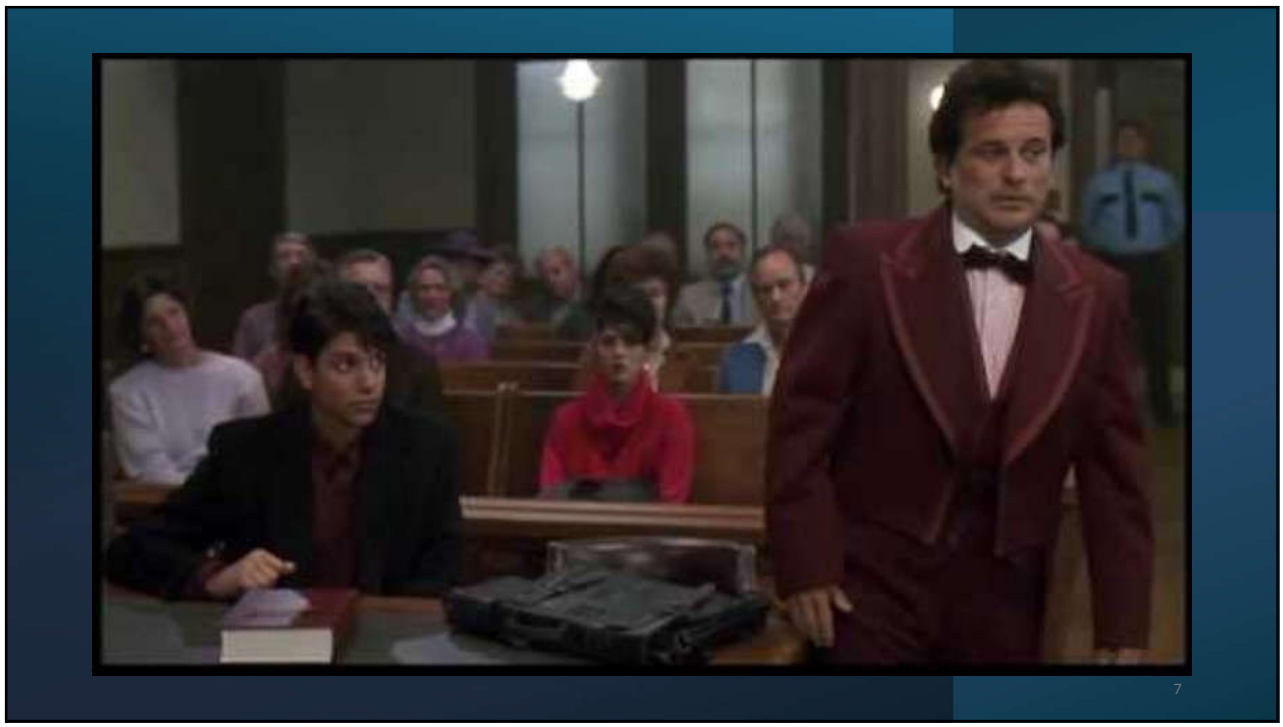
• Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the Superior Court to punish for contempt.

5

N.J.S.A. 2C:29-9 Contempt

a. A person is guilty of the crime of the 4th degree if he purposely or knowingly disobeys a judicial order or protective order, pursuant to N.J. S.A. 2C: 28-5.1, or hinders, obstructs or impedes the effectuation of a judicial order or the exercise of jurisdiction over any person, thing or controversy by a court, administrative body for investigative entity.

6



7

Court Rule

- Rule 1:10-1 Summary Contempt Proceedings

- A judge conducting a judicial proceeding may adjudicate contempt summarily without an order to show cause if

a. The conduct has obstructed, or if continued would obstruct, the proceeding;
b. conduct occurred in the actual presence of the judge, and was actually seen or heard by the judge;
c. the character of the conduct or its continuation after an appropriate warning unmistakably demonstrates its willfulness;
d. immediate adjudication is necessary to permit the proceeding to continue in an orderly and proper manner; and
e. the judge has afforded the alleged contemnor an immediate opportunity to respond.

- The order of contempt shall recite the facts and contain a certification by the judge that he or she saw or heard the conduct constituting the contempt and that the contemnor was willfully contumacious.
- Punishment may be determined forthwith or deferred. Execution of sentence shall be stayed for five days following imposition and, if an appeal is taken, during the pendency of the appeal, provided, however that the judge may require bail if that's reasonably necessary to assure the contemnor appearance .

9

Code of Judicial Conduct

- CANON 3. A judge shall perform the duties of judicial office impartially and diligently.
-
- Rule 3.4 Decorum
-
- A judge shall maintain order and decorum in judicial proceedings.

10

- Rule 3.5 Demeanor

- A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity and shall not permit lawyers, court officials and others subject to the judge's direction and control to display in patients or discourtesy or to detract from the dignity of the court.

11

Rule 3.7 Ensuring the Right to be Heard

A judge shall accord to every person who is legally interested in a proceeding, or to that person's lawyer, the right to be heard according to law or court rule.

12

- Rule 3.15 Responding to Judicial or Lawyer Misconduct

- A judge who receives reliable information indicating a substantial likelihood that a lawyer has committed a violation of the rules of professional conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to the lawyers honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority

13

Civil Contempt

While the purpose of criminal contempt is to punish conduct, the purpose of the civil contempt order is to compel compliance with an order or judgment; to restore the rights of the party wronged by the failure to satisfy the court's order; or to move an underlying proceeding toward resolution. Civil contempt occurs when a person violates a court order, to the detriment of a party or another person. For example, among other actions, the failure to pay court-ordered child support or spousal support, failure to abide by the terms of a Marital Settlement Agreement incorporated into a Final Judgment of Divorce, or the failure to comply with the terms of a civil judgment will trigger an order of contempt.

- Civil contempt sanctions often end when the party in contempt complies with the court order or upon the resolution of the underlying case. The court may order the incarceration of a contemnor in civil contempt. However, unlike in criminal contempt, in general contemnors in civil contempt cases are not given the same constitutional rights guaranteed to criminal defendants. For instance, the court will notify those held in civil contempt of the sanctions and allow them to be heard, but they aren't guaranteed a jury trial. In addition, proving civil contempt proceedings doesn't require the burden of proof to be beyond a reasonable doubt.

15

N.J.S.A. 2A:10-5 – (Civil contempt) provides:

• Any person who shall be adjudged in contempt of the Superior Court by reason of his disobedience to a judgment, order or process of the court, shall, where the contempt is primarily civil in nature and before he is discharged therefrom, pay to the clerk of the court, for every such contempt, a sum not exceeding $50 as a fine, to be imposed by the court, together with the costs incurred.

16

Ex Parte Communications

17

Court Rule

- Rule 1:2-1(a) Open Court Requirements

- All trials, hearings of motions and other applications, first appearances, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by rule or statute.

18

• Comment
• General Principles.

• The open court requirement is integral to procedural due process and thus prohibits *ex parte* communications between judges and litigants in chambers or otherwise. Citations omitted. Obviously, a judge should not confer or meet with one party or attorney to the exclusion of the adversary unless there is express consent, or unless necessary on an aspect or matter having nothing to do with the merits or ultimate disposition of any issue. But, even in the latter situation the adversary should be advised and the appearance of impropriety avoided.
•
• A procedural due process violation perhaps even more egregious than *ex parte* communications with parties or their attorneys are *ex parte* communications with persons having presumed knowledge of the facts of the controversy and the judge then in relying on the hearsay so collected. In re Dubov, 410 N.J. Super. 190, 199-202 (App. Div. 2009).

19

Code of Judicial Conduct

- CANON 2. A judge shall avoid impropriety and the appearance of impropriety.
- Rule 2.1 A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
- Official Comment 3. With regard to the judicial conduct of a judge, an appearance of impropriety is created when a reasonable, fully informed person observing the judge's conduct would have doubts about the judges impartiality.

CANON 3. A judge shall perform the duties of judicial office impartially and diligently.

Rule 3.8 *Ex parte* communications

Except as authorized by law or court rule, a judge shall not initiate or consider *ex parte* or other communications concerning a pending or impending proceeding.

21

- Official Comment.

1. this rule does not prohibit a judge from appointing an independent expert in accordance with the rules of court
2. the proscription against communications concerning a proceeding generally includes communications with or from lawyers and other persons who are participants in the proceeding. It does not preclude a judge from consulting with other judges on pending matters, provided that the judge avoids *ex parte* discussions of a case with judges who have been previously been disqualified from hearing the matter and with judges who have appellate jurisdiction over the matter, or from consulting with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities.
3. A judge may initiate, permit or consider *ex parte* communications appropriate to service in the recovery court (formally drug court) or other similar programs.
4. In that general, settlement discussions, discussions regarding scheduling and a judges handling of emergent issues are not considered to constitute *ex parte* communications in violation of this rule.

22

Brady Violations

- Three elements must be established to prove a Brady violation: "(1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and (3) the evidence must be material to the defendant's case." State v. Brown, 236 N.J. 497, 518 (2019) (citing State v. Nelson, 155 N.J. 487, 497 (1998)).

- There is no set remedy for a Brady violation. See Brown, 236 N.J. at 527-28. Instead, a Brady violation constitutes an abuse of the discovery process, and the remedy should be designed to protect the defendant's due process rights. Ibid.; see also State v. Scherzer, 301 N.J. Super. 363, 432 (App. Div. 1997) (noting the trial court "properly handled" each of the alleged Brady violations and "fashioned remedies sufficient to ensure that defendant's due process rights were not contravened").

25

- Consequently, like other discovery violations, a Brady violation can be addressed by a range of remedies, which include excluding certain evidence, precluding witnesses from testifying, or ordering a new trial. See, e.g., United States v. Struckman, 611 F.3d 560, 570-71 (9th Cir. 2010); Gov't of V.I. v. Fahie, 419 F.3d 249, 252-54 (3d Cir. 2005). In most situations, the remedy for a Brady violation is a new trial because the violation usually comes to light at or after trial. See Brown, 236 N.J. at 520. In Brown, the Court discussed dismissal of an indictment with prejudice as a potential remedy for a Brady violation. Id. at 528. The Court, however, did not impose that remedy. Ibid. Nor did the Court set forth the standard for determining whether an indictment should be dismissed with prejudice for a Brady violation. Ibid. Instead, the Court noted that in Brown there was no evidence that the State had willfully or intentionally withheld the discovery from the defense. Ibid. Accordingly, we must address what standard should be used to determine if a Brady violation warrants dismissal of the indictment with prejudice.

26

- Several federal courts have suggested that dismissal with prejudice "may be appropriate in cases of deliberate misconduct." Fahie, 419 F.3d at 254; see also United States v. Lewis, 368 F.3d 1102, 1107 (9th Cir. 2004). Federal courts have also recognized that dismissal of an indictment with prejudice is an extreme remedy that is only warranted where the "prejudice of a Brady violation has removed all possibility that the defendant could receive a new trial that is fair" and dismissal must be employed because "no other remedy would cure [the] prejudice against a defendant." United States v. Pasha, 797 F.3d 1122, 1139 (D.C. Cir. 2015). Ultimately, "the decision whether to dismiss an indictment lies within the discretion of the trial court." State v. Hogan, 144 N.J. 216, 229 (1996); see also Brown, 236 N.J. at 521 (applying an abuse of discretion standard to the trial court's evidentiary ruling following a Brady violation). The purpose of the Brady rule "is not to punish society for a prosecutor's conduct but to avoid an unfair trial of an accused." Hyppolite, 236 N.J. at 168 (quoting State v. Vigliano, 50 N.J. 51, 61 (1967)). Consequently, at a minimum, before an indictment is dismissed with prejudice, there needs to be a showing that the State had acted intentionally or willfully in withholding the evidence and defendant was prejudiced in a way that precludes him or her from receiving a fair trial.

27

- The key consideration in fashioning a remedy for a Brady violation is whether the discovery violation can be cured to ensure that defendant has a fair trial.

28

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I. What happens if the witness refuses to testify and invokes his Fifth Amendment right against self-incrimination? Is that done outside the presence of the jury? What if the testimony begins before the jury and then the witness invokes? What inferences can be drawn from the assertion?

A. Subpoena - A court can *compel a witness* to testify at a criminal trial in New Jersey by issuing a subpoena. R. 1:9-1. The right of an accused to present witnesses in his own defense is a fundamental element of due process of law. Taylor v. Illinois, 484 U.S. 400, 409 (1988). In fact, criminal defendants possess not only the right to call witnesses, *but also the right to the government's assistance in compelling the attendance of favorable witnesses at trial*. State v. Garcia, 195 N.J. 192, 195-196 (2008).

B. The Right Against Self Incrimination.

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

Our State Constitution does not contain a parallel provision to the Fifth Amendment right against self-incrimination, but the privilege is firmly established in this state's common law and is codified in statute and in the Rules of Evidence. See N.J.S.A. 2A:84A-19; N.J.R.E. 503 (Self-Incrimination). State v. Knight, 256 N.J. 404, 417 (2024).

C. Who can claim the right?

The right against self-incrimination "applies only when the accused is compelled to make a testimonial communication that is incriminating." Fisher v. United States, 425 U.S. 391, 408 (1976).

Where a valid Fifth Amendment privilege is available to a prospective witness, only that witness, and not the attorney, may claim it. State v. Jamison, 64 N.J. 363, 375 (1974).

D. How do you invoke the right?

Whenever it is possible that a prospective witness may invoke the Fifth Amendment, the trial court should conduct a preliminary hearing under oath and outside the presence of the jury to attempt to determine whether the witness will testify, and whether there is a valid basis for the Fifth Amendment claim. State v. Burns, 192 N.J. 312, 332 (2007); State v. Crews, 208 N.J. Super. 224, 230 (App. Div. 1986). This is most likely to be necessary in a criminal trial when a witness, who is an accomplice to a defendant, or someone known to have a connection with the crime, is called to testify.

If a valid basis for the Fifth Amendment claim is found, the judge may permit the witness to refuse to testify at trial. However, if the court determines that the witness has no valid right to refuse to testify, the court should order the witness to testify and, if the witness refuses, the witness may be held in contempt and imprisoned until he or she testifies. State v. Jamison, 64 N.J. 363, 373 (1974).

Notably, in State v. Jamison, 64 N.J. 363, 373 n. 1 (1974), the Court explained that "[w]hen the State calls as a witness an accomplice of the defendant or one known to have had some connection with the crime, knowing the witness will plead his privilege against self-incrimination, it is ordinarily preferable first to examine the witness on voir dire, as otherwise the circumstances may lead the jury to draw unfavorable inferences against defendant." In dicta, the Court speculated that "no similar policy considerations would seem to apply in the reverse situation, where the defense desires to call a witness who is expected to decline to testify, asserting his privilege." State v. Jamison, 64 N.J. 363, 373 n. 1(1974).

E. Can you call a witness that you know will assert his right against self-incrimination?

The short answer is no. The same rule applies to both the State and the defense. The prosecution cannot call a witness when he knows in advance that he is likely to invoke the Fifth Amendment because it would place before the jury

innuendo evidence or inferences of evidence which the State could not get before the jury by the direct testimony of the witness. State v. Nunez, 209 N.J. Super. 127, 132 (App. Div. 1986).

A defendant also cannot call a witness solely for the purpose of having him assert his *Fifth Amendment* rights before the jury. State v. Nunez, 209 N.J. Super. 127, 132 (App. Div. 1986).

I found only one case – a Law Division case of limited precedential value, that interpreted the dicta in State v. Jamison, 64 N.J. 363, 373 n. 1(1974) (set forth above) to mean that "it would be error to deny a defendant the right to call before a jury a witness who asserts in advance his intention to exercise the Fifth Amendment if the trial court knows that the witness has evidence which could have some impact on the facts in issue or the innocence of the defendant." State v. Cito, 196 N.J. Super. 220, 227 (Law Div. 1984), aff'd, 213 N.J. Super. 296, 301 (App.Div.1986), certif. denied, 107 N.J. 141 (1987). Nonetheless, in Cito, the court ultimately found no evidence that the witness had any knowledge or information which could bear on the facts in issue or the innocence of the defendant and thus held that the defense could not call the witness. The Supreme Court cited Cito, in State v. McGraw, 129 N.J. 68, 77 (1992), but did not address the issue.

F. Can the witness assert the right in front of the jury?

No. A witness expected to invoke his Fifth Amendment privilege should not do so in the presence of a jury. State v. McGraw, 129 N.J. 68, 70 (1992).

G. What happens if the witness, unbeknownst to the attorneys, asserts the right during the trial?

If a witness asserts the privilege during his testimony before the jury, the trial court should give the jury a cautionary instruction in accord with N.J.R.E. 532 (Reference to Exercise of Privileges).

G. What inferences can be drawn from the assertion?

No adverse inference may be drawn from the invocation of the privilege against self-incrimination. N.J.R.E. 532 (Reference to Exercise of Privileges).

Once the court permits the witness to invoke the privilege, the jury can draw no inference *against either party* from that witness's failure to testify, and thus neither the State nor a defendant can capitalize on the absence of a witness who has

invoked the privilege. State v. McGraw, 129 N.J. 68, 77 (1992). It is improper to suggest to a jury that it can draw an adverse inference against a party for failing to produce a witness that has invoked the privilege and refuses to testify. State v. Crews, 208 N.J. Super. 224, 230 (App. Div. 1986).

II. Research for CLE Criminal Law Presentation – Ethical Obligations -The Prosecutor's Duty in Returning an Indictment and in Making Extrajudicial Statements

A. Special Responsibilities of a Prosecutor

1) New Jersey Rules of Professional Conduct (RPCs)

Prosecutors routinely screen and investigate criminal complaints to determine whether there is probable cause to support the return of an indictment, and are ethically bound not to seek an indictment in the absence of probable cause. RPC 3.8 (Special Responsibility of a Prosecutor) provides in relevant part that:

> The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

2) ABA Standards

Similarly, ABA Standards for Crim. Just.: Functions and Duties of the Prosecutor § 3-1.2(b) (4th ed. 2020) provides that:

> The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

3) Case Law

"New Jersey courts have commented repeatedly on the special role filled by those entrusted with the responsibility to represent the State in criminal matters, observing that the primary duty of a prosecutor is not to obtain convictions but to see that justice is done." State v. Smith, 212 N.J. 365, 402-03 (2012).

"Prosecutors are required to turn square corners because their overriding duty is to do justice." State v. Garcia, 245 N.J. 412, 418 (2021).

In representing the State in a criminal action, the prosecutor is endowed with a solemn duty -- "to seek justice, not merely to convict." State v. Williams, 113 N.J. 393, 447 (1988) (quoting ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.1(c) (2d ed. 1980)).

B. **Trial Publicity**

1) **New Jersey Rules of Professional Conduct (RPCs)**

RPC 3.6(a) (Trial Publicity) provides that:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The Official comments to RPC 3.6(a) (emphasis added) explain that:

> A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
>
> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, or the expected testimony of a party or witness;
>
> (2) in a criminal case or proceeding that could result in incarceration, *the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement*;
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation, and that the defendant is presumed innocent until and unless proven guilty.

Notwithstanding RPC(a), under RPC 3.6(b) and (c), a lawyer (including a prosecutor) may state:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the

lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

2) **ABA Standards**

ABA Standards for Crim. Just.: Functions and Duties of the Prosecutor § 3-6 (4th ed. 2020), is almost identical to RPC 6.6.

3) **Ethics Opinions**

In Advisory Committee on Professional Ethics Opinion 731 (Feb 17, 2017), the Committee determined that extrajudicial statements featuring displays of seized drugs, weapons, or other contraband do not accord with RPC's 3.6 and 3.8 and are not permitted.

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Public Records Challenges for Litigators –

OPRA 2.0

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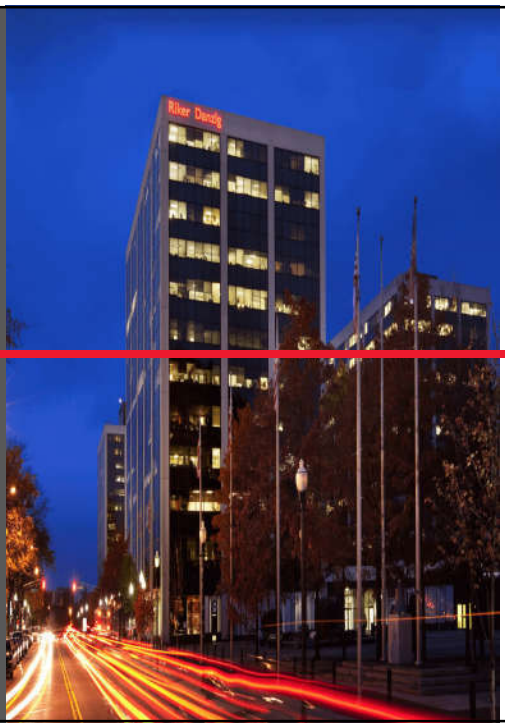

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Public Records Challenges for Litigators-OPRA 2.0

Jordan M. Asch

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Table of Contents

The Open Public Records Act, N.J.S.A. 47:1A-1, et seq.

- OPRA expands the public's right of access to government records
- OPRA creates an administrative appeals process
- OPRA defines the scope of "government records"

Public Policies Underlying OPRA

- Access to government records is necessary for the protection of the public interest
- Interpretation of limitations on the right of records access must favor the right of access
- There is a competing obligation to protect personal information when disclosure would violate the reasonable expectation of privacy. Burnett v. Cnty of Bergen, 198 N.J. 408 (2009) ("…neither a preface not a preamble…").

Filing an OPRA Request

- Anyone may file an OPRA request. Scheeler v. Atlantic Cnty. Mun. Joint Ins. Fund, 454 N.J. Super. 621 (App. Div. 2018).
- Requests can be made anonymously. N.J.S.A. 47:1A-5(i)
  - Anonymous requests cannot be made for victims' records. N.J.S.A. 47:1A-2.2(c).
- Specific Agency request forms (may be required)
- In writing invoking and citing to OPRA

"Government Records"

- "Any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored of maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file … or that has been received in the course of … official business …" N.J.S.A. 47:1A-1.1
- Unless specifically exempted under OPRA (or other law)

Exemptions to Government Records

- 27 specific exemption under OPRA
  - (1) Privacy interest
  - (2) Inter-agency or intra-agency advisory, consultative or deliberative materials
  - (3) Legislative records
  - (4) Medical examiner records
  - (5) Criminal investigatory records
  - (6) Victims' records
  - (7) Personal firearms records
  - (8) Trade secrets and proprietary commercial or financial information
  - (9) Records within the attorney-client privilege
  - (10) Administrative or technical information that would jeopardize computer security

Exemptions to Government Records

- 27 specific exemption under OPRA (cont.)
  - (11) Emergency or security information or procedures that would jeopardize building, facility or personnel security
  - (12) Security measures and surveillance techniques which would create risk to safety
  - (13) Information that would give an advantage to competitors or bidders
  - (14) Employment information in connection with sexual harassment, personal grievances or collective negotiations
  - (15) Communications between agency and insurer, administrative service organization or risk management office
  - (16) Confidential information per court order
  - (17) Certificate of honorable discharge issued by US Gov't
  - (18) Copy of allegiance or oath of office
  - (19) Personal identifying information

Exemptions to Government Records

- 27 specific exemption under OPRA (cont.)
  - (20) List of persons needing special assistance during an emergency
  - (21) Certain records of higher education institutions
  - (22) Biotechnology trade secrets
  - (23) Personal information relating to victim's of crimes
  - (24) Ongoing investigations
  - (25) Public defender records relating to the handling of any case
  - (26) Exemptions contained in other laws, Executive Orders, Rules of Court, Constitution or case law
  - (27) Personnel and pension records

Exemptions to Government Records

- Executive Orders
  - E.O. No. 21 (Gov. McGreevey 2002)
    - E.O. Nos. 9 (Hughes), 11 (Byrne), 79 (Byrne), 69 (Whitman)
  - E.O. No. 26 (Gov. McGreevey 2002)

Public Agencies and Custodians

- Only "Public Agencies" are subject to OPRA
  - The executive branch and all independent state agencies (including state colleges and universities)
  - The Legislature and creations thereof
  - All counties, municipalities, school districts, fire districts, planning and zoning boards, etc. N.J.S.A. 47:1A-1.1
  - The Judicial branch is NOT a Public Agency
  - Private businesses and not-for-profits are NOT Public Agencies

Public Agencies and Custodians

- A "Custodian of a government record" or "custodian" is an official designated by formal action that has custody or control of government records of a specific agency. N.J.S.A. 47:1A-1.1
- Agencies may have multiple custodians
- Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2014) (court used "creation" and "government function" tests to determine that the Firemen's Association is a "public agency").

OPRA Request Mechanics

- Must be in writing and delivered to the appropriate custodian. N.J.S.A. 47:1A-5(g)
- Should be as specific as possible
  - General requests for information or requests that ask a question are not valid
  - Broad and unclear requests may be rejected. N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007)
  - A custodian must search files to find records, but is not required to research files
- Requestor may request records in a specific medium and by method of delivery
- Certain smaller agencies (i.e., municipalities under 5,000 population) may limit OPRA records access hours

OPRA Request Mechanics

- Custodians must respond to OPRA requests within seven (7) business days. N.J.S.A. 47:1A-5(i)
  - This response may be delivery of the records; invitation to access the records; or request for extension (with valid reason)
  - Failure to respond in seven (7) constitutes a denial of the request
- Certain records (budgets, bills, vouchers, contracts, public salary and overtime information) require immediate access. N.J.S.A. 47:1A-5(e)
- Redactions or denials must be specific with reasons provided
  - A request may be denied if access would substantially disrupt agency operations, but only after first attempting to reach reasonable solution. N.J.S.A. 47:1A-5(g); Caggiano v. N.J. Dep't of Law & Public Safety, Div. of Consumer Affairs, GRC Complaint. No. 2007-69 (Sept. 2007)
- The requestor may be charged copy fee or "special service" charge

OPRA Request Denials and Appeals

- A denial of any OPRA request must be in writing with reason(s) provided. N.J.S.A. 47:1A-(g)
- A person who is denied access to a government record may appeal either by filing suit in Superior Court or filing a complaint with the Government Records Council (GRC) – but not both. N.J.S.A. 47:1A-6
  - Superior Court – must file within 45 days of denial. Mason City v. Hoboken, 196 N.J. 51 (2008)
  - GRC – must fil within 60 days of denial

Fee Shifting and the Big Change

- Previously, the "prevailing party" in an OPRA dispute in Superior Court or before the GRC was entitled to recover attorney's fees. N.J.S.A. 47:1A-6 and 7.f
  - A complainant was a "prevailing party" if the desired result was achieved because of the complaint. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006)
  - A complainant was a "prevailing party" if it could demonstrate: (1) a factual causal nexus between the litigation and the relief achieved; and (2) the relief secured had a basis in law. Mason v. City of Hoboken and City Clerk of Hoboken, 196 N.J. 51 (2008)

Fee Shifting and the Big Changes

- S2930/A4045 signed June 5, 2024, effectively amending OPRA, N.J.S.A. 47:1A-1 et seq.
  - Mandatory attorney's fees are limited to matters where "the public agency has been determined to have unreasonably denied access, acted in bad faith, or knowingly or willfully violated" the statute.
  - Rebuttable presumption that copy and special service fees are reasonable
  - Custodian may refuse request for letters, emails, text messages, other correspondence or social media posts if request excludes job title or account, specific subject matter and time frame

Fee Shifting and the Big Changes

- (cont.)
  - Government may file litigation against requestors for seeking records with "the intent to substantially impair the performance of government function"
  - Prohibits multiple requests for same records from different custodians
  - Prohibits requests in connection with ongoing proceedings

Fee Shifting and the Big Changes

- (cont.)
  - $4M appropriated for support of placement of records on agency websites for accessibility without need for OPRA request
  - $6M appropriated for GRC
  - Codifies Supreme Court's holding in Gilleran v. Twp. of Bloomfield, 227 N.J. 159 (2016), governing access to security camera footage and expands such access to be available under OPRA
  - Codifies and enhances protections of individual privacies, such as contact information provided to receive updates from government. Rise Against Hate v. Cherry Hill Twp., A-1440-21 (App. Div. Mar. 29, 2023)

Looking ahead …

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Business & Real Estate Transactions
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Jordan M. Asch is an associate in Riker Danzig's Environmental Group. He has strong experience representing clients in a wide range of environmental regulatory, transactional, and litigation matters.

Jordan guides clients through environmental permitting and compliance issues, and other administrative matters. For example, he works with clients in navigating permitting and compliance issues under the Federal Clean Water Act, the New Jersey Freshwater Wetlands Act, and the Flood Hazard Area Control Act. He defends clients against regulatory enforcement actions by the New Jersey Department of Environmental Protection for regulatory violations, and for remediation and cleanup costs under the broad liability of the New Jersey Spill Compensation and Control Act. In the site remediation area, Jordan counsels clients on federal regulatory compliance and enforcement matters including under the Comprehensive Environmental Response, Compensation and Liability Act, and the Toxic Substances Control Act.

Jordan represents clients on corporate and real estate transactions involving environmental liability, indemnification issues, and funding for remediation and redevelopment projects. He regularly assists on deals requiring navigation of the economic and other incentives available under the New Jersey Brownfields Program and the New York Brownfields Cleanup Program.

Jordan has also provided effective counsel in dispute resolution and litigation matters concerning environmental liabilities stemming from corporate transactions and legacy liability, the purchase and sale of real estate, contractual indemnification disputes, and for the release of hazardous substances under statutory law. In addition, environmental organizations seeking to impact legislative processes and administrative rulemakings often rely on Jordan for counsel.

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Handling International Custody Disputes

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A Watchful Eye?

Considerations on Staff and Office Security

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Social Media Chatter at Work

Alix R. Rubin, Esq.

The boring legal stuff

- This presentation is for informational and educational purposes only.
- It is not offered as legal advice.
- Nor is it intended to create an attorney-client relationship with any of you.
- Consult with competent local employment counsel to determine how the matters addressed here may affect you or your clients.

What we're going to cover

- What types of confidential information employers may protect from online exposure.
- What types of information they may discipline an employee for disclosing online.
- When an employer may and may not monitor its employees' social media activity.
- Who owns an employee's business-related social media contacts – the employer or the employee?

Statistics

- In late 2021, 93.33% of people with access to the internet used social media, which equals 56.8% of the entire global population (4.48 billion people).
- *Highest traffic is midweek between 1 and 3 p.m.*
- In 2021, people spent 2 hours and 24 minutes on social media every day.
- 43% of internet users use social media for work.
- The average social media user has 8.4 different accounts.

More Statistics

- Facebook had 2.9 billion monthly users as of February 2021.
- In 2021, 69% of U.S. adults said they used Facebook, and 74% of users visited it daily.
- YouTube had more than 2.3 billion users visiting every month in early 2021.
- 51% of U.S. adults reported using YouTube.
- 51% said they visited YouTube daily, watching 1 billion hours of video.

Still More Statistics

- In early 2021, Instagram had more than 1.3 billion monthly active users.
- Snapchat had 332 million **daily** users.
- Twitter had 229 million **daily** users.
- TikTok had 73.7 million monthly active users.
- LinkedIn had more than 310 million monthly members, gaining two new users every second.
- 29% of young adults are concerned they will get fired due to their social media posts.
- 21% of young adults have removed posts because of this concern.

What Type of Company Information Is Confidential?

Confidential information is any information the company designates and protects as confidential, provided the company is specific in its policy.

Such information may include:

- Trade secrets
- Copyrighted materials
- Trademarks
- Proprietary software
- Marketing strategies
- Financial information

Published information is not confidential.

What About Compensation and Benefits?

Under federal law, non-supervisory employees may request and discuss compensation and benefits.

National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157, 158(a).

In New Jersey, all employees may request and discuss compensation and benefits.

New Jersey Law Against Discrimination, N.J.S.A. § 10:5-12(r).

What Types of Information May a Company Discipline an Employee for Disclosing Online?

- Company confidential information
- Other employees' medical information
- Racial, ethnic or sexual slurs directed toward other employees
- Defamatory comments about the company, other employees or customers

- Personal, individual gripes that violate harassment, discrimination or non-disparagement policies
- Illegal activity
- Information prohibited from being disclosed under SEC regulations

Note: The First Amendment does not protect private-sector employees.

An employer should be careful about disciplining non-supervisory employees for:

- Criticizing the company or its products or services with **co-workers**
- Telling **co-workers**, "My boss is a f***ing jerk."
- Posting **customer** complaints
- Criticizing **customers**

- Requesting or disclosing **compensation** and **working conditions**
- Posting the company logo
- Sharing photos or videos of the workplace (unless offensive or confidential)
- Telling a fired employee to hire an **attorney** or contact the **labor board**

NLRA, 29 U.S.C. § § 157, 158(a).

Should a Worker Be Fired For Calling her CEO Stingy?

You may have heard about *Lady Murderface*, the Yelp employee fired for her public blog posts directed at the CEO, complaining about her $24,000 salary. Here are some excerpts:

> *I wonder what it would be like if I made $24,000 more annually. I could probably get the headlight fixed on my car. . . You could probably cut back on a lot of the drinks and snacks that are stocked on every single floor. I mean, I could live without the pistachio nuts if I was paid enough to afford groceries. . . .*

So here I am, 25-years old, balancing all sorts of debt and trying to pave a life for myself that doesn't involve crying in the bathtub every week. Every single one of my coworkers is struggling. . . . [Y]ou can let customers choose a donation amount during checkout and divide those proceeds among your employees who spend more than 60% of their income on rent? The ideal percent is 30%. As I said, I spend 80%. What do you spend 80% of your income on? I hear your net worth is somewhere between $111 million and $222 million. That's a whole lotta rice.

Within two hours of the post going live, Yelp fired her.

Lady Murderface then tweeted:

> *i love to get fired because i said out loud that i can't afford to pay my rent, this has solved all of my problems!*

Did *Lady Murderface* deserve to get fired, or does she have a claim against Yelp?

The answer depends on her intent.

The National Labor Relations Act ("NLRA") protects her right to complain about wages and other terms and conditions of employment, provided she intended to engage her co-workers in a discussion about Yelp's pay practices.

But if she were a lone wolf spouting her discontent to *anyone*, probably not.

Pier Sixty

Pier Sixty employee posts on Facebook:

> *Bob is such a NASTY MOTHER F**KER don't know how to talk to people!!!!! F**k his mother and his entire f**king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!*

Vulgarity was common at Pier Sixty. Was this statement "egregious" enough to lose NLRA protection?

A Word About 'Protected Concerted Activity'

- The National Labor Relations Board ("NLRB") is an independent federal agency that enforces the NLRA.
- The NLRA guarantees the right of most private-sector employees – whether or not they belong to a union – to engage in group efforts to improve their wages and working conditions ("protected concerted activity").

NLRA, 29 U.S.C. § 157.

- The NLRA also prevents private-sector employers – unionized or not – from interfering with these rights.

NLRA, 29 U.S.C. § 158(a).

The Standard Has Changed

When the *Pier Sixty* decision came down in 2017, the NLRB's position was that employees could say (or post) whatever they wanted and employers could not discipline them, no matter how vulgar or offensive, when the employees were expressing their dissatisfaction with their wages and working conditions to or with their co-workers. Mentioning the union or labor laws sufficed.

Nat'l Labor Relations Bd. v. Pier Sixty, LLC, 855 F.3d 115 (2d Cir. 2017).

It Will Now Be Easier To Discipline Employees

Now, the standard has changed. Here's the new mixed-motive test:

1. The NLRB General Counsel first must prove that the employee's protected activity was a motivating factor in the discipline.
2. If so, the burden of persuasion shifts to the employer, who then must prove that it would have taken the same action absent the protected activity.

General Motors LLC and Charles Robinson, 14-CA-197985 and 14-CA-208242, 369 NLRB No. 127 (July 21, 2020).

It appears that the previous conflict between the NLRA and the antidiscrimination laws is now eliminated.

Although *General Motors* was retroactive and thus overruled all previously decided relevant cases inconsistent with its holding, the *Pier Sixty* ruling still stands, because Pier Sixty had not met its burden of persuasion.

The company consistently tolerated profanity among its workers and thus could not show that it would have fired this employee for his vulgar post even if he had not written "*Vote YES for the UNION!!!!!!*"

YouTube, You Lose

Did you hear the one about the Miami neurology resident who attacked an Uber driver? A bystander recorded the attack and posted the video on YouTube. The video went viral, and the resident was placed on administrative leave. Take a look.

http://youtu.be/s8zvpFhgZUc

One bad night could cost an employee her job and her reputation. Employers should remind their employees that:

- Where business is concerned, anything an employee says or does (intentionally or unintentionally) on social media could impact his job.
- While we all make mistakes, avoid making your worst ones in public. You never know who's going to capture it and post it.
- The internet does not forget. Ever.

Social Media Policies

Having and enforcing social media policies that prohibit online profanity, harassment, discrimination, inciting violence and the damaging of the company's reputation or business interest go a long way toward justifying disciplinary action, up to and including employment termination, of any employee who violates these policies.

Following are examples of social media activities that likely would warrant firing under these circumstances.

An ambulance driver whose ambulance had not broken down posted on Facebook:

*Hey everybody! I'm f***in broke down in the same sh*t I was broke in last week because they don't wanna buy new sh*t! Cha-Chinngg - at Sheetz Convenience Store.*

Apparently frustrated by the lack of news during his shift, a police reporter for the Arizona Daily Star posted on Twitter:

What?!? No overnight homicide… You're slacking, Tuscan. Stay homicidal, Tuscan.

This employee was justifiably fired for violating journalistic ethics and the America Society of Newspaper Editors ("ASNE") best practices for social media.

ASNE best practices for social media include:

- Traditional ethics rules still apply online.
- Assume everything you write online is public.
- Use social media to engage with readers, but professionally.
- Be aware of perceptions.

Hohmann, James and the 2010-11 ASNE Ethics and Values Committee, "ASNE 10 Best Practices for Social Media, Helpful guidelines for news organizations," May 2011.

Unhappy about not receiving a raise in five years, a bartender in Illinois vented on Facebook:

I hope my redneck customers choke on glass as they drive home drunk.

Firing was justified because this post certainly could cause the bar to lose business. However, if the post included a call to coworkers to protest their low wages, then the company may have violated the NLRA by firing him.

A worker in a downtown Philadelphia bar displayed a Heineken chalkboard with the message:

I like my beer like I like my violence... domestic.

A passerby tweeted the photo to a local news station.

Before boarding a plane to South Africa, a public relations executive tweets on her personal account:

Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!

Her tweet goes viral while she's in the air. Despite her later online apology...

This PR executive did the exact opposite of what her position required her to do: instead of bolstering her company's reputation, she damaged it and therefore deserved to be fired. And if the company enforces a nondiscrimination policy, she violated that, too.

- Chili's cook posts shirtless pictures of himself labeled "Sexy Cooks of Chili's" and tagged restaurant.

- PGA President tweets about pro golfer Ian Poulter:

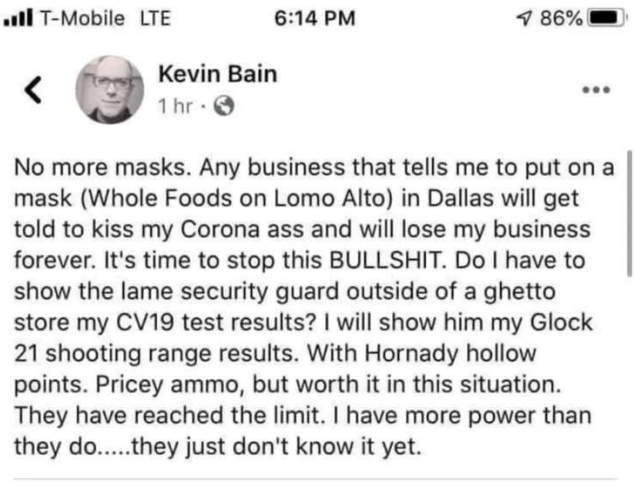
Really? Sounds like a little school girl squealing during recess.

- Police officer posts Facebook photo of himself modeling Confederate Flag underwear.
- College professor tweets:
  Whiteness is most certainly and inevitably terror.

COVID-19 Rant

Law firm administrative employee in Texas

expresses his distaste for face masks on Facebook
by threatening violence.



Here's what the law firm posted on its Facebook page:

> *This afternoon we learned that an administrative employee of the Firm issued a threatening and offensive post on a personal social media account related to COVID-19 mask protections. This post is a complete violation of the values of our Firm, including our commitment to the health and safety of the communities we serve. We have terminated this individual's employment and notified the proper authorities about the post as a precaution. We are deeply sorry for this situation. This type of post is not and never will be tolerated by our Firm.*

- Veterinarian posts picture of a cat on Facebook with the caption:

  My first bow kill, lol. The only good feral tomcat is one with an arrow through its head! Vet of the year award ... Gladly accepted.

The phones rang off the hook with complaints of outrage at the animal clinic where the veterinarian worked.

Web traffic crashed its website.

Violent Threats

A Harvard graduate who was interning at a large accounting firm and supported the Black Lives Matter protests posted a TikTok video in which she threatened to stab the next person who told her “all lives matter” and then watch that person bleed out. The video went viral.

More Violent Threats

A new police detective posted a pro-Black Lives Matter image to her personal Instagram account while off duty.

The image showed her niece protesting in Atlanta, with flames leaping up in the background, holding a sign that read:

"Shoot the F– Back."

A friend's sign read:

"Who do we call when the murderer wears a badge?"

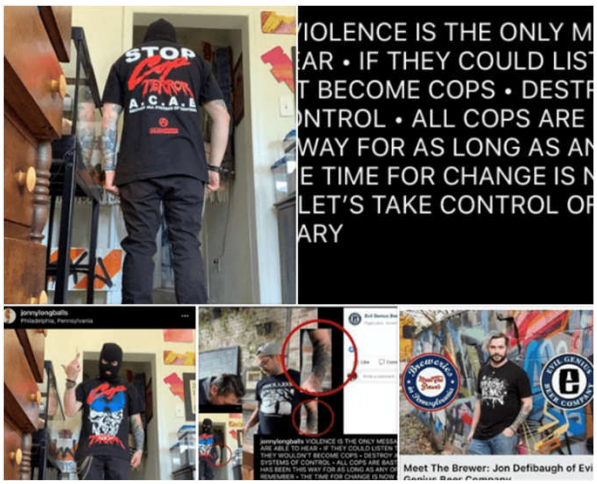
Ignorant COVID and Protest Posts

- Kaplan, LA police officer posted on Facebook that it was "unfortunate" that more black people did not die of COVID-19.
- Shift sergeant at a detention center posted on Facebook:

  If he can scream he can breath [sic], something else was going on. I've been pepper sprayed with CS gas and it messes with your breathing but you can definitely still breath [sic].
- Trombonist in Austin Symphony Orchestra posted:

  The BLACKS are looting and destroying their environment. They deserve what they get.

Brewmaster Advocates Violence Against Police on Instagram



More Ignorant COVID and Protest Posts

- South Carolina court clerk posted on Facebook:

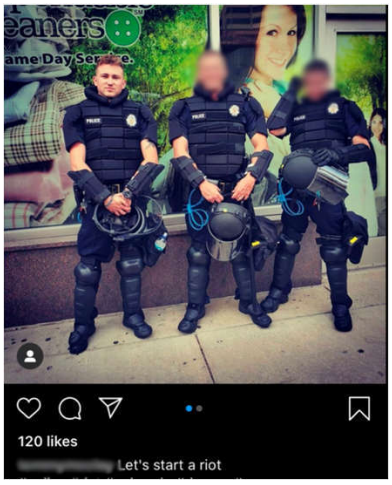
  *Anyone protesting are obviously unhappy with their own life . . . Shoot their a**, lock them up, stop their food stamps . . . Take their children . . . They are showing their true colors . . . I'm upset about what happened but I would not destroy someone's property . . . They are a piece of s***!!!!*

- South Florida prosecutor posted:

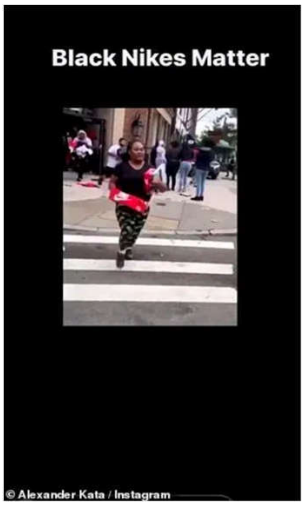
  When will people learn that their criminal acts and obnoxious protesting actually gets you nowhere? Act civilized and maybe things will change. I've never seen such animals except at the zoo.

NY Police Officer Posted This:

A Denver Police Officer Posted This:

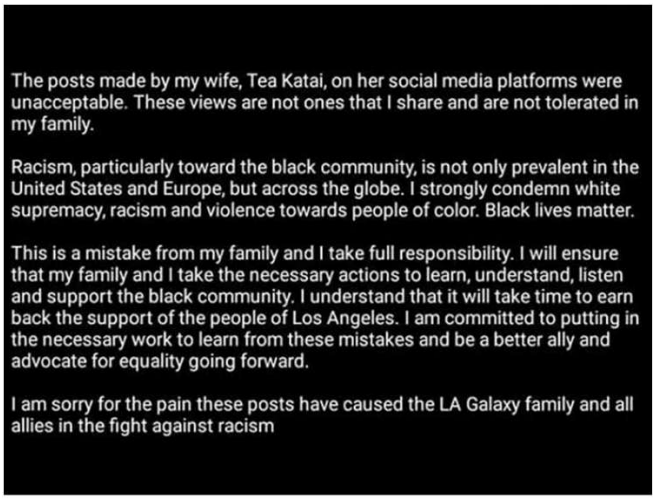


LA Galaxy Midfielder's Wife Posts Inflammatory Messages



Translation: "Kill the sh****!"

Midfielder Issues Apology



Should a Black Waitress Be Fired For Posting Customer's Racist Message?

An African-American waitress at a Tennessee Red Lobster restaurant posted on Facebook a receipt with a racist message left by a customer:

This is what I got as a tip last night...so happy to live in the proud southern states. God Bless America, land of the free and home of the low class racists of Tennessee.

Although this waitresses' post may have alienated certain Red Lobster customers, if the restaurant had fired her for this post, it could have been faced with a retaliation claim for interfering with her right to report discrimination in the workplace.

Is this protected, concerted activity?

Former sports bar employee complains about incorrect income deductions from his paycheck on Facebook:

Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money ... WTF!!!

One then-current employee clicks on the "Like" button, and another comments:

*I owe too. Such an a**hole.*

Is this online speech protected, even though it contains obscenities that customers view?

The likelihood is yes, because coworkers are complaining about their wages, one of the terms and conditions of their employment, and thus engaging in protected, concerted activity.

NLRA, 29 U.S.C. § 157.

A Word About Freedom of Speech

- Free speech doesn't mean entitlement to employment.
- Free speech doesn't mean freedom from the consequences of hateful words.
- In their social media policies, training and in practice, employers must draw the line at discrimination, threats of violence, and other illegal activity online.

A Twist on Free Speech

Shortly after the police shooting and death of 12-year-old Tamir Rice, a Black boy who was carrying a toy gun, a public-sector employee made the following comments on his private Facebook page:

> *Let me be the first on record to have the balls to say Tamir Rice should have been shot and I am glad he is dead. I wish I was in the park that day as he terrorized innocent patrons by pointing a gun at them walking around acting bad. I am upset I did not get the chance to kill the criminal f****r.*

The employee was fired, and he sued his public-sector employer, alleging retaliation for exercising his First Amendment free speech rights.

Although public-sector employees do have limited First Amendment protections when speaking out online, they are subject to a two-part test:

1. The speech must address a "matter of public concern."
2. The employee's free speech interests must outweigh the efficiency interests of the government as an employer.

The Sixth Circuit of Appeals held that, even though the post was “an expression of pleasure at Rice’s death” that was “intermixed with profanity and racially insensitive language” and reflected “the author’s desire to kill a twelve-year-old boy,” it was a matter of public concern and therefore satisfied the first prong of the test.

How about the second prong? Did the employee's free speech rights outweigh the government's efficiency interests? The Sixth Circuit remanded to the district to answer this question, but not without opining that the government may regulate its employees' speech to a greater extent than private employers.

Marquardt v. Carlton, 971 F.3d 546 (6th Cir. Aug. 19, 2020).

Employer Liability under ADA

Employee posts snarky message on private Facebook account on own time:

> *Isn't [it] amazing how Jimmy experienced a 5 way heart bypass just one month ago and is back to work, especially when you consider George Shoun's shoulder injury kept him away from work for 11 months and now he is trying to sue us.*

Q: Is the employer here liable for violating the privacy of an employee's protected health information under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") Privacy Rule?

A: No, because under the regulations implementing HIPAA, employers are not covered entities under the HIPAA Privacy Rule.

See 45 C.F.R. §§ 160.102, 160.103.

Q: Is the employer liable for breaching confidentiality of Jimmy and George Shoun's medical conditions under the regulations implementing the Americans with Disabilities Act (the "ADA")?

A: It may be, depending on how the employee who posted this message learned about their co-workers' medical conditions. If they learned about Jimmy's heart bypass from Jimmy and about George Shoun's shoulder injury from George, then the employer is not liable. But if the employee who posted the message learned about their co-workers' medical conditions from another source within the company, then it is likely the employer would be held liable for breaching confidentiality under the ADA.

See 29 C.F.R. § 1630.14 (c).

True Remediation

Often, employees' apologies for engaging in discriminatory behavior ring hollow, and these employees don't deserve a second chance. Not so with Utah Jazz guard Justin Wright-Foreman, who retweeted a social media post supporting anti-Semitic comments actor Nick Cannon had made. The tweet said:

> *Nick cannon said nothing wrong. Everyone just sensitive and hates the truth.*

Wright-Formann subsequently explained his actions and apologized publicly, stating that he "wasn't educated enough on the topic." So he got himself educated about Jewish culture and anti-Semitism by a Salt Lake City rabbi. And he personally contacted a Jewish fan who had been hurt by his original retweet. The fan forgave him.

Lawful Social Media Policy

In 2012, the NLRB issued its third memorandum on social media policies. At the end of the memorandum is one example of a social media policy the NLRB deemed lawful.

Report of the Acting General Counsel Concerning Social Media Cases, May 30, 2012

Should a Company Monitor Employees' Online Activities?

Employers should monitor their employees' online activities conducted on company devices or networks or on company-sponsored websites, regardless of when the activity takes place -- whether at work, during breaks or outside of work.

But employers must first put their employees on notice that they have no expectation of privacy when they go online using a company device or network, or they post on a company-sponsored website.

When May Employers Monitor Employees' Personal Social Media Activity?

More than a dozen states, including New Jersey, prohibit employers from requesting that an applicant or employee provide access to any personal account on a social media website such as Facebook, Twitter and LinkedIn.

See, e.g., N.J.S.A. § 34:6B-6.

New Jersey employers are also prohibited from retaliating or discriminating against any individual who refuses to provide such access or who reports an alleged violation of the law.

N.J.S.A. § 34:6B-8.

These laws protect employees and are not all bad for employers.

They do not apply to:

1) Social media sites used for business
   or
2) Public content

And, at least in New Jersey, if an employee's Facebook friend, LinkedIn connection or Twitter follower voluntarily brings to the company's attention posts that violate the company's policy, the employer may access those posts to investigate.

N.J.S.A. § 34:6B-10.

A New Jersey nurse's co-worker and Facebook friend saw this post by the nurse and forwarded it to the hospital manager:

An 88 year-old sociopath white supremacist opened fire in the Washington DC Holocaust Museum this morning, killing an innocent guard. Other guards opened fire. The gunman was shot but survived.

I blame the DC paramedics for saving this maniac.
WHAT WERE YOU THINKING?
And to the guards…go to target practice.

The hospital fired the nurse. She sued and lost, because the co-worker had not been coerced or even asked to forward the post.

‘Unite the Right’ Marcher Outed On Twitter and Fired

At least one attendee at a white nationalist rally in Charlottesville, VA that resulted in one fatality returned home to find himself jobless.

- A Twitter user, “Yes You’re Racist,” identified marchers on the social media platform to publicly shame them.
- A California hot dog restaurant employee was fired after a picture of him brandishing a tiki torch during the march went viral.
- Still, the restaurant’s Facebook page received several angry one-star reviews, citing the tiki-torch bearer as the reason.

What's an Employer to Do?

- Thank those who reported the employee. Confirm publicly that you're looking into the situation.
- Don't rush to judgment. Not everything on the internet is true. Investigate.

- If the investigation confirms the reports, fire the employee, publicly announce the outcome, and issue a statement denouncing the (former) employee's views.
- However, if you're in California, Colorado, Louisiana, New York, North Dakota, or another state with off-duty conduct laws that prohibit any adverse employment action against an employee because of their legal political or recreational activities outside of working hours, off the employer's premises, and without use of the employer's equipment or property, do not discipline or fire the employee. You still may issue a public statement that the employee's views are their own and not the company's views.

See, e.g., New York Labor Law § 201-D.

Flipping Off the President's Motorcade

After this photo went viral, Julie Briskman made it her profile picture on her social media accounts. She then told her employer, a government contractor, that she was the unidentified bicyclist.

Lewd and Obscene Posts

The following day, Ms. Briskman was called into a meeting and told she had violated the company's social media policy by using the photo as her profile picture on Twitter and Facebook.

Disparate Treatment?

A male colleague had recently posted obscene comments on his Facebook page that featured the same employer as his cover photo.

While this colleague was reprimanded for calling someone a “f***ing Libtard a**hole,” he was allowed to delete the post and keep his job.

Assuming Ms. Briskman was fired for flipping off the President’s motorcade, she may have a claim for disparate treatment based on her gender.

Porn at Work

Fox News reporter Brit Hume carelessly tweeted out the fact that he had been looking at internet porn at work. When sharing a story on updated election odds, he tweeted a photo of his screen that showed his list of open tabs – one being "Sexy Vixen Vinyl." It's hardly an innocent mistake to view porn at work.

Note: A company may be held liable for illegal pornographic activity, i.e., child pornography, that an employee engages in at work.

Doe v. XYC Corp., 382 N.J. Super. 122 (2005).

Takeaways

- Publicly identify the problem, your company's solution, and an explanation.
- Treat similarly situated employees evenly and consistently.
- More often than not, you can discipline, or even fire, an employee for egregious conduct on social media – even on her own time.
- Have social media and internet use policies (including porn) that you enforce equitably.

Is it legal for a supervisor to pretend to be someone else to "friend", "connect" or "follow" an employee to gain access to his or her social media site?

"Will you 'friend' me?"

A male U.S Border Patrol manager created a fake Facebook profile – posing as a woman – and sent his employee a friend request. The employee accepted the request. The manager gained access to his employee's FB page, found inappropriate comments and filed a charge of poor judgment against the employee.

The Border Patrol fired the manager for violating the Stored Communications Act.
18 U.S.C. § 2701.

Had this happened in NJ, the employer could have legally monitored the employee's FB page to investigate any allegations of misconduct.

N.J.S.A. § 34:6B-10.

These laws prohibiting employer access to employees' personal, private social media accounts help prevent employers from:

1. Invading employees' privacy

and

2. Learning information that could affect employment decisions.

An employer visits an employee's Facebook page
and finds out he is gay.
Even if that employee is fired for other reasons,
he can sue the employer for
sexual orientation discrimination.

What About Employees' Personal Devices?

They should never be monitored -- whether at work or outside of work -- unless they are:

- used for business purposes,

or

- monitoring is necessary to investigate misconduct.

But employers may discipline employees for spending excessive working time on personal devices if the activity is not business related.

Clear policies are needed to ensure that employees are on notice that the company is monitoring all business-related activity on personal devices.

In addition, employers should:

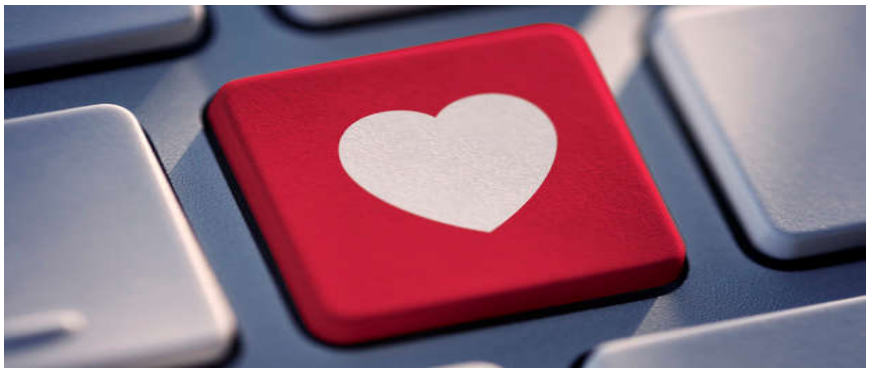
- Sync all company information on the personal device with its network.
- Have the employee password protect the device and keep a record of the password.
- Be able to wipe the device clean remotely if it is lost or stolen.
- Segregate the employee's personal information on the device.

Every BYOD Policy Should Contain:

- Explanation of purpose
- List of what, if any, items or services the company will purchase
- Privacy disclaimer
- Reference to company's electronic use policy
- Liability disclaimer
- Password requirement

- Search/access agreement
- Limitation on access/use
- Lost/stolen reporting requirement
- Employee's written acknowledgment/verification
- Description of personal device

Online Dating Is a Risk for Employers



Studies show that 48% of 18-to-29-year-olds use online dating sites and apps. Chances are, they're using their personal smartphones or company-provided devices to access dating sites at work.

This could mean:

- Data loss
- Privacy issues
- Liability for harassment

What's a "love-weary" employer to do?

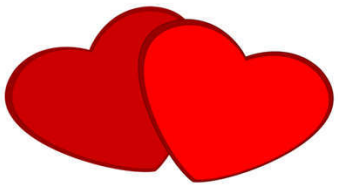
- Implement policies that govern how employees may use company-provided smart phones.
- Prohibit or restrict employees from downloading apps that are not business related.
- Educate employees on these policies.
- Inform employees of the extent to which you are monitoring the device.

Workplace Romance Policies

In addition to a sexual harassment policy, consider implementing policies outlining expectations of employee conduct with respect to romantic relationships with coworkers, supervisors and even customers and vendors.

Employers may decide to prohibit these relationships altogether, or just between workers and their supervisors.

THE LOVE CONTRACT



The last resort in an employer's arsenal is the "love contract." This is an agreement signed by employees engaged in a romantic relationship that acknowledges that their relationship is consensual, reminds them of the company's sexual harassment policy and the employer's expectations as to appropriate behavior in the workplace.

Who Owns an Employee's Business-Related Social Media Contacts?

Anna worked as a broker for a commercial lender that loaned money to doctors buying medical practices. She left the lender to work as a broker to sellers of medical practices. She has a one-year non-compete, non-solicit agreement with the lender. While at the lender, Anna connected on LinkedIn with numerous referral sources as well as doctors who were her customers.

- Could the lender have required Anna to divulge these connections for marketing purposes while she worked there?

- May the lender now force her to disconnect from these referral sources and customers on LinkedIn? Or may it only prevent her from doing business with them for one year?

It depends on:

- Whether Anna's connections were made before Anna's employment at the lender or during her employment at the lender.
- If she made these connections before her employment at the lender, then Anna owns them and should not be prevented from doing business with them. But she could be required to divulge them for marketing purposes while she worked for the lender.
- If they were made during her employment, then the lender may prevent her from contacting them or doing business with them for one year, regardless of who owned the social media account.

Key Takeaways

- There's no privacy online.
- Don't put anything online that you wouldn't want a judge (or your grandmother) to see.
- Conduct difficult or sensitive conversations face-to-face.
- If it's offensive, it's not a joke.
- Don't share personal or medical information online.

More Key Takeaways

- Don’t mix personal with business online.
- Don’t post when you’re angry or upset.
- If you can’t say anything nice, shut up.
- Have written social media and internet use policies.
- Enforce these policies consistently.
- Call your employment attorney before you fire an employee for posting online.

[Share next screen] Free video “5 Ways Employers Can Get Sued”

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Are you afraid one of your employees will go postal?

by Alix R. Rubin, Esq.

Do you know what to do if this happens? More importantly, do you know what signs to look for so you can prevent violence in YOUR workplace?

Each year, nearly two million U.S. workers report having been a victim of violence at work, according to the Occupational Safety and Health Administration ("OSHA"). The U.S. Bureau of Labor Statistics puts the number of annual workplace homicides at about 400. Threats, bullying, and intimidation are common causes of violence in the workplace affecting employees, customers, and vendors.

So how do you recognize these causes and stop them from turning into violent acts?

First and foremost, take immediate action when an employee is suddenly:

- disruptive, aggressive, or hostile,
- showing prolonged anger,
- holding grudges,
- hypersensitive to criticism,
- blaming others,
- preoccupied with violence, or
- sad or withdrawn for a long period of time.

Second, if you are that employee's manager, talk to them to see if you can help. If you are that employee's co-worker, report what you observe to their manager.

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Third, if the behavior doesn't improve, get Human Resources or upper management involved. Finally, if a crime has been or is about to be committed, call the police immediately.

Case in point: Payton Gendron, the 18-year-old man accused of shooting 13 Black individuals and killing 10 in a Buffalo, New York supermarket, previously had posted online thousands of lines of racist, antisemitic and often rambling remarks, including details on how he apparently planned and practiced for his attack.

Employers and individual supervisors are potentially liable if they know or should know about conduct that may erupt into violence in the workplace and do nothing about it. Therefore, you could be liable if Mr. Gendron were one of your employees, you knew about his online remarks, and you did nothing to try to stop him.

To help prevent violence in your workplace:

1. Create a zero-tolerance policy concerning threats, bullying, and intimidation – both online and offline.
2. Always have an effective line of communication open.
3. Recognize behavioral cues and act on them.
4. Learn violence de-escalation techniques.
5. Conduct active-shooter and diversity training on a regular basis.

This blog is for informational purposes only. It is not offered as legal advice, nor is it intended to create an attorney-client relationship with any reader. Consult with competent local employment counsel to determine how the matters addressed here may affect you.

How to Prevent a Hostile Work Environment

by Alix R. Rubin, Esq.

Workplaces are constantly changing. In recent years, increased remote work and use of technology have led to increased digital harassment. Employers and supervisors need to be more vigilant than ever to eradicate all types of harassment from their workplace.

Here are three ways you can actively discourage a hostile work environment and help your employees feel safe and thus be happier at work and more productive:

1. Update your policies.

Address workplace harassment and discrimination in your electronic communication and social media policies. Be sure to enforce these policies diligently. Just because your employees are engaging in this type of conduct online or through virtual media, like texts or messaging, doesn't mean it's not taking place in the "workplace".

In addition, digital communication may be more informal and usually provides a peek into the private lives of employees. For example, seeing religious objects and family members due to work-from-home arrangements may lead to harassment based on protected characteristics that may not have been known otherwise.

2. Set the right example.

Provide your managers and supervisors with the tools they need through training to not only behave appropriately and set an example but also to recognize inappropriate conduct and

know what to do about it. In fact, ALL staff members should be trained in how to prevent workplace harassment and discrimination, including online behavior that impacts the workplace. Set a good example from the top down.

3. Use a robust complaint and investigation process.

Whether online or offline, whenever an employee complains about harassment or discrimination, be sure to take all aspects of the issue into consideration and have a good retention policy for workplace emails, text messages and other messaging platforms.

No matter how minor the conduct may appear, bullying and harassment at work are never acceptable. Take employees' concerns about such conduct seriously, and take all reasonable steps to stop any inappropriate behavior. Not only is this the right thing to do, but your business will benefit, too. Your employees will be happier and thus more productive, and you'll likely avoid hostile work environment lawsuits.

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NJBAC | New Jersey Business Action Center

A Watchful Eye? Considerations on Staff and Office Security

Business Continuity Planning

Greetings!

Tahesha Way, Esq.

Lt. Governor

NEW JERSEY DEPARTMENT OF STATE

NJBAC New Jersey Business Action Center

Greetings!

Melanie Willoughby

Ex. Director, NJ Business Action Center

NJBAC

New Jersey Business Action Center

About the NJ Business Action Center

Mission

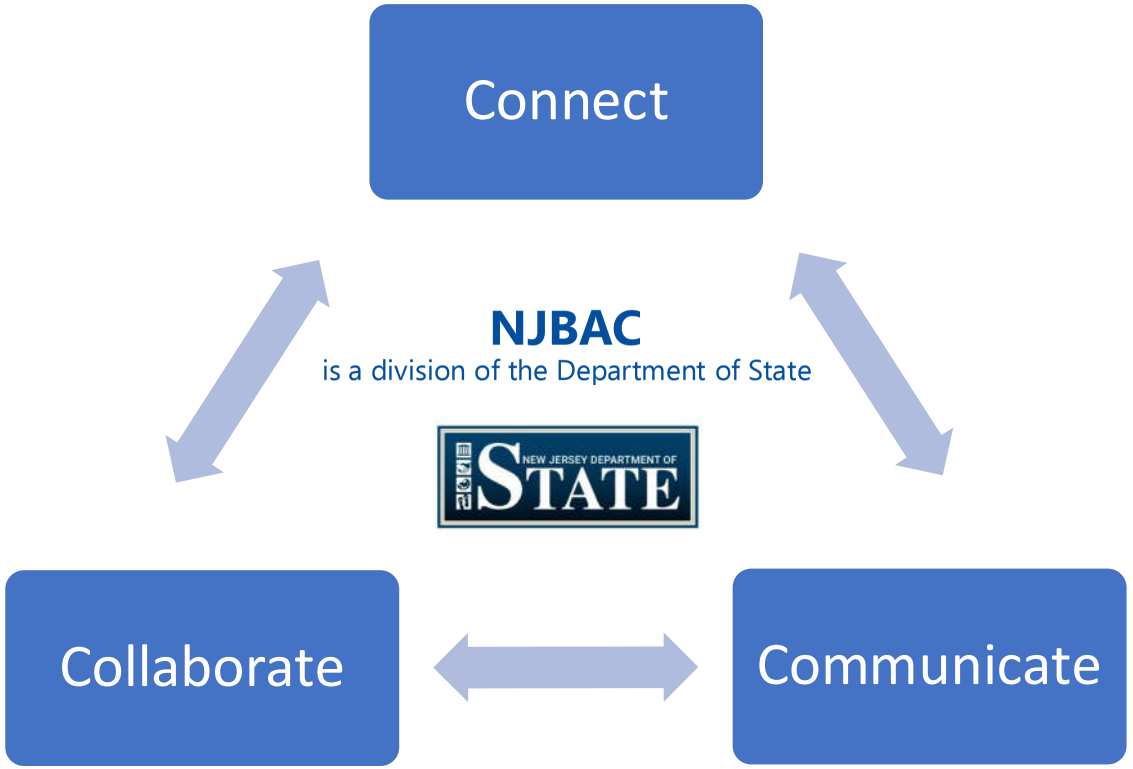
To provide exceptional technical assistance, customer service, resources, and information as advocates and mentors for New Jersey businesses of all sizes, categories, and ethnicities.

Vision

We envision a flourishing business community, in which all stakeholders – entrepreneurs, business owners, business leaders, exporters, municipalities, state agencies, elected officials, and organizations – are able to access the vital resources that ultimately strengthen every aspect of doing business in New Jersey.

NJBAC | New Jersey Business Action Center

About the NJ Business Action Center



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About the NJ Business Action Center

Provides free, confidential, reliable assistance

-- Office of Business Advocacy

-- Office of Export Promotion

-- Office of Small Business Advocacy

-- Office of State Planning

-- Cannabis Training Academy

-- Business Enhancement Services

Supportive services at every stage of business, regardless of size or industry, provided for thousands of businesses each year.

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Impact of NJBAC

business registration & business certification & site expansion & networking & navigating state systems & international sales & site selection & incentive programs & funding opportunities & introductions & district enhancement & education for grant opportunities & educational webinars & permitting assistance & research & commercial real estate assistance & NJSTEP & annual reports & procurement & district assessments & advocacy & community presentations & mentoring & industry insights & municipal incentives & tax abatements & application support & record keeping & much more

NJBAC provides solutions.

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Connecting with NJBAC

Services provided

-- Free of charge

-- Confidentially

-- Quickly, accurately, and carefully

Call: 1-800-JERSEY-7

Chat: business.nj.gov

Learn: state.nj.us/state/bac/

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Business Continuity Planning

The following is an edited version of a presentation I provide for Business Continuity Planning/Emergency Preparedness. I have modified some of the slides to emphasis the topic of Work Place Security, the topic for today. But I want to impress upon each of you the importance of an overall Business Continuity Plan.

Some of the elements of a broader Business Continuity Plan have been intentionally left in this presentation

What is Business Continuity Planning

What is Business Continuity Planning and Why Should You Care?

Business Continuity Planning is a comprehensive plan with the goal to enhance an organization's resilience by minimizing the impact of disruptions, maintaining essential operations, and safeguarding the interests of key stakeholders, including customers, employees, and partners.

A US Federal Emergency Management Agency (FEMA) study showed that 40% of businesses do not reopen after a disaster and another 25% will fail after 1 year.

The goal of business continuity planning is to better your odds of your business's survival after a disaster.

What is Business Emergency?

Types of Business Emergencies

Natural Disasters

--**Floods**, Hurricanes, Tornadoes, Winter Storms

Main-Made Disasters

--Accidents, including fires or industrial accidents

--Terrorism, **Workplace Violence**

--Cybersecurity Breaches

Health Emergencies

--Pandemics (local and wide scale outbreaks)

Infrastructure Failures

--Road Construction, Power Outages, Supply Chain Disruptions, Loss of key personnel

Emergency Preparedness plan should address three essential areas:

Preparation – Planning for a future disaster

--Risk Assessment

--Business Impact Analysis (BIA)

--Development of a Plan

Mitigation

--Protocols for immediate response to ongoing or recent crisis

Recovery

--Protocols and procedures to recover

Step 1 Create a plan

Preparation—Create a Plan

1. How to start to formulate a plan

-- Plans should be customized to your specific needs, budget, and circumstances

-- Work with a team of key employees

-- Consider multiple scenarios based on the threats (flooding is the most common disaster)

a. Cybersecurity
b. Pandemic Preparedness
c. Natural (weather related) disasters
d. Work Place Violence

-- Define critical operations necessary for you to operate you business

Preparation—Create a Plan

2. Inspect your building for possible issues

-- Worn or damaged roofs, or siding, leaking windows or doors

-- Move inventory and equipment above Base Flood Elevation (BFE) when possible

-- BFE is the level that surface water is likely to reach or exceed 1% of the time during a flood

--Control of ingress and egress from your office

3. Make Sure your Insurance is current

-- Go over your insurance coverage with your agent

-- Obtain Flood Insurance if appropriate

-- Check coverage for equipment and inventory loss

-- Business interruption insurance

Preparation—Create a Plan

Plan for evacuations, or shelter in place scenarios

-- Establish a rally point for evacuations of the building and a plan to account for everyone

--If possible establish a relationship with a nearby business as a shelter point if necessary

Train your employees on what to do during an emergency

--Assign responsibilities and training to secure the building or equipment

Hold drills

--Table top Drills can be held to test a plan

--Live Drills test the skills and preparedness of staff

Preparation—Create a Plan

Hold drills—What does a Table Top Drill Look Like?

A facilitator runs through a series of scenarios and staff describe their response.

A person is trying to gain access to our offices, what do you do?

The individual has been determined to be a threat, what do you do?

Retreat to a interior office to place a second locked door between the threat and staff, now what?

The threat has retreated from the front door and is now at the trying to break in through a window? What do you do? Think outside the box

The threat is attempting to set fire to the office, what do you do?

What is our evacuation plan?

Tom has a disability, what extra help might he need during an evacutation?

Mitigation

Mitigation

1. Protect your most valuable assets above all else

-- Your most valuable assets are your employees and customers

-- Take no action that could threaten the health or safety of your staff or customers

2. Listen to the instructions from the Office of Emergency Management or other officials

-- Was there an official "Emergency Declaration?"

-- Did you receive evacuation orders, shelter in place orders?

Recovery

Recovery

1. **Provide time off for mental health services for staff impacted by an incident**
2. **Activate alternate work locations or telework plans if necessary**
3. **Repair any damages**

-- Provided workers with appropriate training and supervision to work safely if they are cleaning up

-- Provide appropriate personal protection clothing

-- Appropriately deal with any toxic or dangerous situations, remember keep your employees safe!

-- Hire professionals when prudent

Recovery

3. Restore any utilities

-- Only when it is safe and after inspection by licensed professionals if necessary

4. File insurance clams

5. Reach out to customers and suppliers

-- Keep them informed of your current status

-- Inform your customers when you will be able to fulfill your contractual obligations and suppliers if as to when you can accept planned delivers

6. Communicate with your employees

-- Let them know when it will be safe to return to work

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Contact the NJ Business Action Center

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-- 609-984-9834

Call: 1-800-JERSEY-7

Chat: business.nj.gov

Learn: state.nj.us/state/bac/

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Planning Resources

1. Local Office of Emergency Management
2. Municipal and County Officials
3. American Red Cross

www.redcross.org

4. Small Business Administration

www.sba.gov

5. Federal Emergency Management Agency

www.fema.gov

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We're in the solution business.

We're here to help. And we've got your back.

Thanks!

SECURING YOUR PHYSICAL OFFICE

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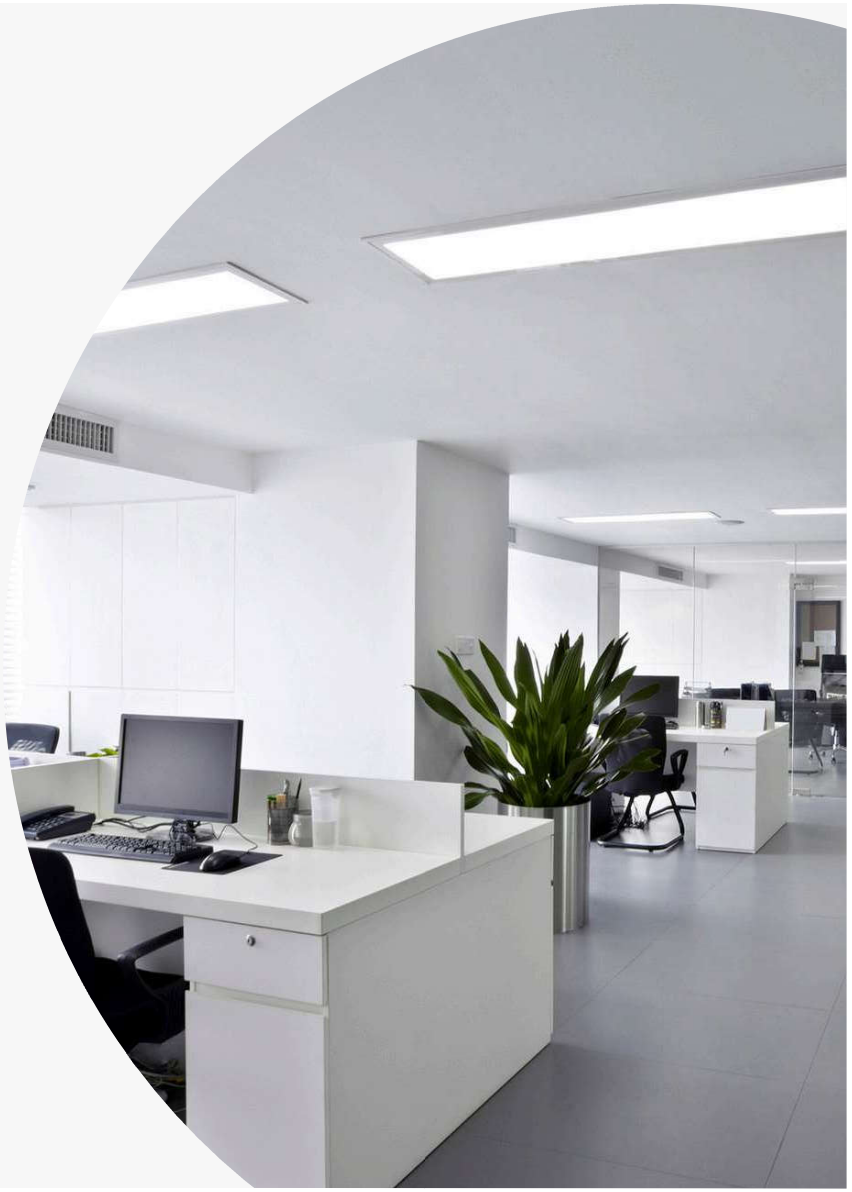
WELCOME NOTE & ABOUT

Disclaimer:
The information presented in this document and during this presentation are for informational purposes only and is not legal advice. Please consult a licensed attorney to evaluate, plan and discuss legal needs.



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NJ SBA Solo & Small Firm Section Director

Focusing on basic estate planning and niche family law

- **Wills, Power of Attorneys, Living Wills**
- **Guardian ad Litem appointed to represent the best interest of a child in custody or divorce cases**
- **DCPP (formerly, DYFS) adoptions**
- **Uncontested Guardianships for Adult Children**

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Majority of offices, including law firms, often focus on cybersecurity to protect sensitive client information. However, the importance of physical office safety should not be overlooked.

A secure office environment is vital for the protection of you, your staff, confidential documents, and maintaining client trust.

Physical office security is a critical issue for all law firms, particularly small and solo practices. Offices should ensure they are promoting wellness and a culture surrounding safety awareness.

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REASONS WHY PHYSICAL OFFICE SAFETY MATTERS

1. PROTECTING SENSITIVE INFORMATION

Legal offices handle a vast amount of sensitive data, from personal identification, such as social security numbers, attorney-client privileged information, and work product. Some matters may include confidential court proceedings. Ensuring that these case files and information are securely stored and only accessible to authorized personnel is crucial. Physical security measures, such as locked file cabinets, restricted access areas, and secure storage rooms, are essential in safeguarding this information.

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MORE REASONS WHY PHYSICAL OFFICE SAFETY MATTERS

2. EMPLOYEE SAFETY AND WELL-BEING

A safe work environment is not just about data; it's also about the people who work in your firm. Implementing safety protocols such as emergency exits, first-aid kits, and workplace violence prevention policies can protect employees and create a more secure atmosphere. Periodic training sessions can ensure that managers and staff know how to respond in an emergency.

3. CLIENT CONFIDENCE

Clients trust firms with their most sensitive issues. A well-secured office can prevent unauthorized access to client information, which could lead to potential breaches of confidentiality.

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TIPS FOR ENHANCING PHYSICAL OFFICE SAFETY

Lighting, Locks & Points of Entry

If only one person is in the office, keep the office door locked until the client arrives.

Installing timers may also be beneficial.

Ensure the reception area has a clear view of the office entryway

Make sure lights are positioned at entrances and exits.

A well-lit area can deter unwanted guests.

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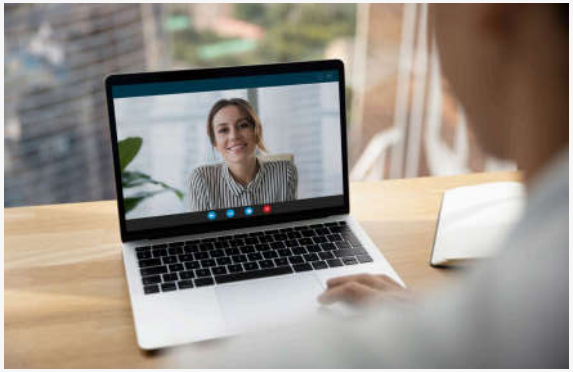
Create a Safety Culture

- Encourage employees to be vigilant about security. This includes reporting any suspicious activity, ensuring that confidential documents are not left unattended, and following all office security protocols.
- Have another individual in the office if a potential client is coming in for the first time or there are safety concerns about an existing client
- If appropriate, use phone or zoom rather than meeting in person
- Do not meet with walk-ins alone
- If going to someone's home, give address to another staff member and text before and after so they know you are safe; let staff member know how long you expect to be at the home
- If necessary, file a Motion to be Relieved as Counsel
- Encourage staff if they feel unsafe at court to ask a sheriff's officers to escort in and out of courthouse. If a sheriff's officer is unavailable, wait in the courtroom until you think the client or adversary leaves

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Secure All Physical Files

Even in a digital world, many law firms still use physical files. These documents should be stored in locked cabinets or secure rooms.

Consider digitizing older files to reduce the need for physical storage.

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Install Surveillance Systems

- Cameras in strategic locations can deter potential intruders and monitor office activity.
- Be sure the cameras are working and are regularly maintained.
- Consider hiring a security company rather than DIY

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Emergency Preparedness

Ensure that all employees are familiar with emergency procedures.

Equip the office with fire extinguishers, first-aid kits, and other emergency supplies, and make sure these are easily accessible.

Take proactive steps to secure your office environment to protect not only yourself, your employees, and clients but also the integrity of your firm.

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STAY SAFE!

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