16TH ANNUAL TAX LAWYERING WORKSHOP
(TAX 403)

FRIDAY, MAY 3, 2019
NEW YORK LAW SCHOOL
185 WEST BROADWAY
8:30 AM TO 3:00 PM
ROOM W400

ATTORNEY CONDUCT AND MISCONDUCT IN TAX PRACTICE

BREAFKFAST AND REGISTRATION
8:30 a.m. to 9:00 a.m.

WELCOME
9:00 a.m. to 9:15 a.m.

FIRST SESSION
KEYNOTE ADDRESS

9:15 a.m. to 10:30 a.m. - 1.5 Ethics CLE Credits

Attorney Misconduct and Rule 8.4 (c): Varsity Blues and Other Examples
Claude Millman, Partner, Kostelanetz & Fink LLP

10:30 a.m. to 10:45 a.m. - coffee break

SECOND SESSION
WORKSHOP CLASS

10:45 a.m. to 12:00 p.m. - 1.5 Ethics CLE Credits

Tax Opinions: Best Practices for Establishing the Factual Basis
Chair: David Moldenhauer, Partner, Clifford Chance
Panelists: Sharon L. Brown, Partner, Barclay Damon
Ann Berger Lesk, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP
12:00 p.m. to 12:30 p.m. - informal lunch

THIRD SESSION

12:30 p.m. to 1:30 p.m. - 1 Ethics CLE Credit

Elder Abuse: When You Must Act and What You Should Do
Q& A with Sally M. Donahue, Partner, Jaspan Schlesinger, LLP

1:30 p.m. to 1:45 p.m. - coffee break

FOURTH SESSION

1:45 p.m. to 3:00 p.m. - 1.5 Diversity, Inclusion and Elimination of Bias CLE Credits

Implicit Bias: What It Is and How Lawyers Can Address It in Practice
Panelists:
  Ann F. Thomas, Otto L. Walter Distinguished Professor of Tax Law; Director, Graduate Tax Program, New York Law School
  Penelope Andrews, Distinguished Visiting Professor of Law; Co-Director, Racial Justice Project, New York Law School

CLE credits
New York Law School has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of CLE programs. The entire Workshop is approved for four (4) CLE credit hours in ethics (NY transitional and nontransitional) and one and one half (1.5) credit hours in Diversity, Inclusion, and Elimination of Bias (NY nontransitional). Program materials will be available in advance through the Graduate Tax Program office; limited copies will be available at registration.

A continental breakfast and informal lunch will be provided. There will be no charge to attend this CLE program but registration in advance is required.
CLE MATERIALS FOR KEYNOTE ADDRESS

9:15 a.m. to 10:30 a.m. (1.5 Ethics CLE Credits)

Attorney Misconduct and Rule 8.4 (c): Varsity Blues and Other Examples
Claude Millman, Partner, Kostelanetz & Fink LLP

Materials:

Speaker PowerPoint Presentation
Attorney Misconduct and Rule 8.4(c)
Varsity Blues and Other Examples

Claude M. Millman
Kostelanetz & Fink, LLP
How Are We Doing?

“Please tell me how you would rate the honesty and ethical standards of people in these different fields – very high, high, average, low or very low?”

<table>
<thead>
<tr>
<th>Field</th>
<th>Very High</th>
<th>High</th>
<th>Average</th>
<th>Low</th>
<th>Very Low</th>
</tr>
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<tbody>
<tr>
<td>Lawyers</td>
<td>3</td>
<td>16</td>
<td>51</td>
<td>21</td>
<td>7</td>
</tr>
</tbody>
</table>

*Gallup Poll December 2018*
We Could Do Better

• People are more likely to trust:
  
  • Doctors
  • Accountants
    • Given “high” ethics rating by more than twice as many respondents.
  • Journalists
  • Building Contractors
  • Bankers
  • Real Estate Agents
We Could Do Better

• We’re still doing better than:
  • Members of Congress
  • Telemarketers
  • Car Salespeople
Should Legal Ethics Reach Beyond the Practice of Law?

• Should a lack of ethics OUTSIDE the office bear on whether a lawyer is deemed “ethical” professionally?

• If so, what types of unethical conduct that lawyers engage in when NOT practicing law should be deemed relevant to our profession?
“It is professional misconduct for a lawyer to . . .

(c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

Model Rules of Professional Conduct 8.4(c)
ABA Comments Regarding Rule 4.8(c)

• “Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return.”

• “[S]ome kinds of offenses carry no such implication,” including “offenses concerning . . . matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law.”
ABA Comments Regarding Rule 4.8(c)

• For purposes of professional misconduct, “a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”

• “Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.”

• “A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”
Sources of Law

• ABA Model Rules of Professional Conduct
  • ABA does not possess disciplinary authority
• State analogues
• Commentary on Model Rules
• ABA and state ethics opinions
• Court decisions
“Varsity Blues”

  - Defendants charged with conspiring with Rick Singer to use bribery and fraud to obtain college admissions.

- The conspiracy alleged included:
  - Bribing SAT/ACT exam administrators to allow test takers to secretly take exams in place of students or correct answers after-the-fact.
  - Bribing university athletic coaches and administrators to admit students as purported athletic recruits.
“Varsity Blues”

• **Defendant Gordon Caplan**
  • B.A. from Cornell University.
  • J.D. from Fordham Law School.
  • In 2016 became co-Chairman of Wilkie Farr & Gallagher.
  • Accused of agreeing to pay Singer $75,000 to participate in the exam cheating scheme for his daughter.
Defendant Gordon Caplan

“It’s just, to be honest, I’m not worried about the moral issue here. I’m just worried about the, if she’s caught doing that, you know, she’s finished.”

Affidavit of Special Agent Laura Smith, FBI, in Support of Criminal Complaint p. 28 (emphasis added).
“Varsity Blues”

• Caplan’s Plea Agreement
  • Caplan will “plead guilty to count one of the Information charging him with conspiracy to commit mail fraud and honest services mail fraud.”
  • Caplan “admits that he committed the crime specified in that count and is in fact guilty of that crime.”
  • Caplan “does not dispute the accuracy of the Information.”
NYU Professor Stephen Gillers:

“The alleged conduct, if true, can warrant serious discipline. *It doesn’t matter that the alleged dishonesty is not in connection with a client matter.*”

Attorneys may not:

“Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”
What Conduct Should Implicate Rule 8.4(c)?

• **Attorney Grievance Comm’n of Md. v. Coppock**, 432 Md. 629, 646–47, 69 A.3d 1092, 1102 (Ct. App. 2013):

  • “The hearing judge . . . concluded that, although Mr. Coppock had admittedly deceived the lender, his misrepresentations were unrelated to his fitness to practice law and therefore did not violate Rule 8.4(c) . . . .”

  • “[T]he hearing judge explained: ‘Lying to one’s bill collector is akin to lying to one’s mistress. While it may have been dishonest, a breach of his agreement . . . , and an undesirable thing to do, it was wholly unrelated to [his] fitness to practice law.’”
What Conduct Should Implicate Rule 8.4(c)?

• Coppock (continued):

  • Rule 8.4(c) “extends to actions by an attorney in business or personal affairs that reflect on the individual's character and fitness to practice law.”

  • “Our decision should not be taken to mean that every dispute that an attorney may have with one who provides funds, goods, or services to the attorney in connection with the attorney's legal practice implicates the rules of professional responsibility. We do not countenance misuse of the grievance process, or the threat of a complaint, as a collection device for an attorney's personal or professional debts. In such disputes, however, an attorney has a particular obligation to prosecute or defend the matter through the appropriate legal processes and not to deliberately mislead and deceive those with whom the attorney does business.”
What Conduct Should Implicate Rule 8.4(c)?

• Where do we draw the line?
  • Need to ensure that lawyers respect the law.
  • Need to promote public trust in our profession.
  • Need to protect lawyers from misuse of the grievance process.
  • Need to avoid undue interference in lawyers’ personal lives.
“\[W\]e lawyers need to lead—and lead by our acts and words.”

Judy Perry Martinez, ABA President-Elect, 2018-2019
Attorney Misconduct and Rule 8.4(c)
Varsity Blues and Other Examples

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16TH ANNUAL TAX LAWYERING WORKSHOP
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FRIDAY, MAY 3, 2019
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CLE MATERIALS FOR SECOND SESSION

10:45 a.m. to 12:00 p.m. (1.5 Ethics CLE Credit)
Tax Opinions: Best Practices for Establishing the Factual Basis
Chair: David Moldenhauer, Partner, Clifford Chance
Panelists: Sharon L. Brown, Partner, Barclay Damon
Ann Berger Lesk, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP

Materials:

1. Tax Opinions (David Moldenhauer)
2. Circular 230- pp. 24- 27
3. NYS Bar report- cover to page 2; pp. 12 -18
4. Two Sample opinions
CHAPTER 7

TAX OPINIONS

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§ 7.1 The Need for and Functions of Tax Opinions
§ 7.2 Sources of Authority Regarding Tax Opinions
§ 7.3 Tax Shelter Reporting and List Maintenance Rules
§ 7.4 Taxpayer Penalties
§ 7.5 Who May Prepare Tax Opinions
§ 7.6 To Whom Does a Practitioner Have Duties
§ 7.7 Confidentiality of Tax Opinions
§ 7.8 Taxpayer Planning Opinions
   [A] General Ethical Principles Regarding Lawyers and CPAs as Advisors
   [B] Formal Opinion 85-352
   [C] STSS No. 1 and Interpretations No. 1-1 and No. 1-2
   [D] Circular 230 Section 10.51(a)(13)
   [E] Circular 230 Section 10.35
   [F] Circular 230 Section 10.34
   [G] Circular 230 Section 10.37
§ 7.9 Tax Return Position Opinions
§ 7.10 Penalty Protection Opinions
§ 7.11 Financial Audit Opinions
§ 7.12 Tax Shelter Marketing Opinions

Appendix A Reorganization Opinion
Appendix B Securities Disclosure Opinion
§ 7.1 THE NEED FOR AND FUNCTIONS OF TAX OPINIONS

The complexity of the tax law, and the many areas of uncertainty in the tax law, are well documented.\(^2\) Those factors lead taxpayers and others who deal with taxpayers to seek out advice from experts (generally lawyers or accountants) on the tax law for a variety of reasons and in a number of contexts. The practitioners rendering such advice in turn are subject to a variety of requirements and standards, reflecting the practitioners' professional roles, the purpose of the advice, and the standards to which the taxpayers are subject. The effect is a complex set of relationships involving the practitioner, the taxpayer, the Internal Revenue Service (the “IRS”),\(^3\) and other regulators.

Every tax opinion describes the application of the tax laws to an actual or proposed situation faced by a taxpayer. However, such advice may be called upon in many different situations and for many different purposes. Types of tax opinions that raise particularly complex issues include:

- **Taxpayer Planning Opinions**: These are opinions rendered by a practitioner to his or her client for purposes of planning the client's personal or business affairs and related tax situation. These opinions normally are rendered before the relevant planning steps are taken.

- **Tax Return Position Opinions**: These are opinions rendered by a practitioner to his or her client for purposes of assessing the positions that the client may take on a tax return. These opinions normally are rendered after the client has taken the relevant personal or business steps.

- **Penalty Protection Opinions**: These are a subset of tax return position opinions that are intended to be used by the taxpayer to defend against the assertion of penalties if the positions taken by the taxpayer on the return are successfully challenged by the IRS. These

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\(^2\) Partner, Clifford Chance US LLP.

\(^3\) “The income tax laws, as every citizen knows, are far from a model of clarity. Written to accommodate a multitude of competing policies and differing situations, the Internal Revenue Code is a sprawling tapestry of almost infinite complexity. Its details and intricate provisions have fostered a wealth of interpretations. To thread one’s way through this maze, the business or wealthy taxpayer needs the mind of a Talmudist and the patience of Job.” United States v. El Paso Co., 682 F.2d 530, 534 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984).

This chapter focuses on opinions regarding the federal income tax laws. However, similar considerations arise for opinions regarding other taxes.
opinions effectively serve as evidence that the position taken by the taxpayer fall within a permitted range of positions.

- **Financial Audit Opinions**: These are opinions rendered by a practitioner to the financial auditors of a company for purposes of auditing the financial reporting of the company's tax positions.

- **Tax Shelter Marketing Opinions**: These are opinions rendered by a practitioner for the purpose of marketing a tax shelter transaction to a non-client. Such opinions may be rendered directly to the prospective investor, or to the tax shelter promoter for use by the promoter in marketing the tax shelter.

Tax opinions may be rendered in many other contexts. For example, a taxpayer under IRS audit may seek an opinion regarding the strength of the taxpayer's position, to assess a potential settlement. A party to a commercial negotiation may ask a practitioner to render a tax opinion to another party to the negotiation to persuade the other party to accept a particular commercial position. Corporations and shareholders in a merger or other corporate reorganization may seek an opinion regarding the tax-free status of the reorganization. An issuer of securities may ask a practitioner to provide disclosure regarding the taxation of typical purchasers of the securities, and to provide an opinion regarding the accuracy of such disclosure. Such opinions often involve detailed practical considerations, and often there are standard forms for such opinions. However, such opinions generally do not raise unique ethical, regulatory and other legal considerations beyond those raised by the foregoing categories of opinions. An example of a typical corporate reorganization opinion is contained in Appendix A, and an example of a typical securities disclosure opinion is contained in Appendix B.

In many circumstances, tax opinions are rendered in connection with other legal opinions, for example in corporate transactions or in connection with the issuance of securities. Non-tax legal issues may be embedded in a tax opinion, because the tax analysis depends on a non-tax legal characterization of a situation. Likewise, tax issues under the laws of one jurisdiction may be embedded in a tax opinion regarding the tax laws of another jurisdiction, because the latter jurisdiction's tax treatment depends on the tax treatment in the former jurisdiction. Finally, tax issues may be embedded in non-tax legal opinions, such as a so-called “10b-5 opinion” issued in connection with a securities offering.

From a taxpayer's perspective, the principal disadvantage of a tax opinion is its lack of binding effect on the IRS. The taxpayer may in some situations seek tax certainty directly from the IRS, in the form of a letter ruling, a closing agreement or a technical advice memorandum. Alternatively, in some situations, a taxpayer may purchase insurance regarding a specific uncertain tax question. However, in many cases these avenues are unavailable or have substantial disadvantages in terms of cost, delay, or uncertainty about whether the guidance or relief will be granted. For example, the IRS ordinarily will not issue a letter ruling where the determination is inherently factual, in the case of alternative plans or hypothetical situations, where regulations or other published guidance is pending, or in a number of other situations.  

\[^4\text{See Rev. Proc. 2010-1, I.R.B. 2010-1, 1 §6.}\]
The IRS also publishes a list of areas where the IRS will not issue a ruling or ordinarily will not issue a ruling.\(^5\) Finally, the IRS may in its discretion decline to issue a ruling.\(^6\) If a taxpayer requests guidance or relief from the IRS and such guidance or relief is not granted (or the guidance is unfavorable), the taxpayer will have disclosed its situation to the IRS, which in turn may lead to a greater likelihood of audit. Accordingly, a taxpayer generally should seek guidance or relief from the IRS only where the need for long-term certainty outweighs the short-term uncertainty of whether the guidance or relief will be granted, and the other costs and disadvantages. Taxpayers seeking guidance or relief must follow detailed IRS procedures.\(^7\)

This chapter first discusses the general legal regimes that affect tax opinions, including the relevant sources of authority, the tax shelter reporting and list maintenance rules, and the rules regarding taxpayer penalties for incorrect return positions. This chapter then addresses the question of who may prepare a tax opinion, the duties of a practitioner in preparing a tax opinion, and the confidentiality of a tax opinion. Finally, this chapter analyzes in detail the rules applicable to taxpayer planning opinions, tax return position opinions, penalty protection opinions, financial audit opinions and tax shelter marketing opinions.

§ 7.2 SOURCES OF AUTHORITY REGARDING TAX OPINIONS

A tax lawyer or certified public accountant (“CPA”) providing tax opinions is subject to a variety of rules, depending on the identity of the practitioner, the practitioner's role in a transaction, and the use of the opinion. The principal sets of authorities governing tax opinions are as follows:

- **General Professional Ethics Rules**: Separate professional ethics rules apply for lawyers and for accountants. Lawyers are regulated under state legal ethics rules that generally are based on the ABA Model Rules of Professional Conduct (the “Model Rules”) or the ABA Model Code of Professional Responsibility (the “Model Code”). The Model Rules contain Rules and comments to the Rules. The Model Code contains Canons, which state in general terms the relevant principles of professional conduct, Ethical Considerations, which are aspirational in character and represent the objectives toward which lawyers should strive, and Disciplinary Rules, which state minimum levels of conduct. The state ethics rules are enforced by state ethics bodies, which on occasion issue interpretive opinions. The commentary to the Model Rules and the Model Code generally is seen as influential, as are


\(^6\)In limited circumstances, a taxpayer may seek a declaratory judgment by a court in a case involving a failure of the IRS to make a favorable determination regarding the qualification of certain retirement plans (Section 7476 of the Code), the value of certain gifts (Section 7477 of the Code), the status of certain governmental obligations (Section 7478 of the Code), or the eligibility of an estate to make installment payments of estate tax (Section 7479 of the Code).

the opinions issued by the ABA Standing Committee on Ethics and Professional Responsibility. The Committee on Standards of Tax Practice of the ABA Section of Taxation also publishes statements of standards of tax practice that are considered influential.

CPAs are regulated under the rules of state accountancy boards that generally are based on the rules of the American Institute of Certified Public Accountants (the “AICPA”). The state accounting boards and the AICPA each enforce their respective rules through disciplinary proceedings, which may result in loss of membership in the AICPA or revocation of an accountant’s license by the relevant state accountancy board. The AICPA standards are set forth in the AICPA Code of Professional Conduct (the “AICPA Code”). The AICPA Code contains Principles of Professional Conduct, which are aspirational in nature, and Rules of Professional Conduct, which state minimum levels of conduct. In addition, the Federal Taxation Executive Committee of the AICPA has issued the AICPA Statements on Standards for Tax Services, which address a CPA’s responsibilities in providing tax services. The AICPA also issues interpretations of rules of conduct and ethical rulings.

- **Treasury Department Circular 230**: The Treasury Department is authorized to regulate lawyers, CPAs and other representatives practicing before it. Those regulations are set forth in Treasury Department Circular No. 230, which contain a broad set of rules regulating many aspects of federal tax practice. The rules in Circular 230 generally are mandatory in nature. The rules are enforced by the Treasury Department Office of Professional Responsibility.

- **Internal Revenue Code and Treasury Regulations**: The Code and the Treasury Regulations promulgated under the Code contain a variety of rules affecting practitioners who render

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31 C.F.R. §10, Subtitle A (For ease of reference, all C.F.R. Sections on this topic will be identified first as Circular 230).

Section 10.33 of Circular 230 sets forth best practices for tax advisors. The best practices include (i) communicating clearly with the client regarding the terms of the engagement; (ii) establishing the facts, determining which facts are relevant, evaluating the reasonability of any assumptions or representations, relating the applicable law to the relevant facts, and arriving at a conclusion supported by the law and the facts; (iii) advising the client regarding the import of the conclusions, including, for example, whether a taxpayer may rely on the advice to avoid penalties; and (iv) acting fairly and with integrity in practice before the IRS. These best practices are stated to be aspirational in nature. Accordingly, a practitioner who fails to comply with best practices will not be subject to discipline under Section 10.33 of Circular 230. T.D. 9165, 2005-1 C.B. 357. But see Jerald David August & Kristen Jesse, The Regulation of Tax Professionals by the Internal Revenue Service in a Post-Enron World (With Forms), 20 No. 1, Prac. Tax Law. 7 (“Failure to meet such standard might, however, be cited by a plaintiff’s lawyer if the advice, later characterized as negligent, did not conform to such standards”).
tax opinions. For example, Sections 6111 and 6112 of the Code require a “material advisor” with respect to a “reportable transaction” to report the transaction to the IRS and to maintain a list containing the identity of participants in the transaction and related materials. Section 6664 of the Code and Treasury Regulation Section 1.6664-4 set forth standards for tax advice that may be relied upon by taxpayers to establish a reasonable cause and good faith defense against penalties. Section 6694 of the Code imposes penalties on “tax return preparers” with respect to certain tax return positions. Section 6700 of the Code imposes penalties on persons who participate in the organization or sale of tax shelters and make false or fraudulent statements regarding the tax benefits of the transactions.

- **Securities Laws**: A practitioner who renders an opinion in connection with a public offering of securities is subject to the rules generally applicable to participants in securities offerings, including Securities and Exchange Commission (“SEC”) Rule 10b-5.11 The Staff of the SEC recently set forth its views regarding the requirements for tax opinions filed in connection with registered offerings of securities.12 Likewise, practitioners who provide tax opinions in

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12Staff Legal Bulletin No. 19 (CF), *Legality and Tax Opinions in Registered Offerings* (Oct. 14, 2011). The Staff Legal Bulletin states that a tax opinion filed in connection with a registered offering of securities should address and express a conclusion for each material federal tax consequence, meaning a tax consequence if there is a substantial likelihood that a reasonable investor would consider the information regarding the tax consequence to be important in deciding how to vote or make an investment decision. In this regard, the opinion should (i) identify the applicable Code provision, regulation or revenue ruling; (ii) clearly identify each material tax consequence being opined upon; (iii) set forth the author’s opinion as to each identified tax item; (iv) set forth the basis for the opinion; (v) disclose the assumptions upon which the opinion is based, which must be consistent with the proposed transactions, and cannot be the tax consequence at issue; and (vi) if there is a lack of authority directly addressing the tax consequences of the transaction, describe the degree of uncertainty and state the risks of uncertain tax treatment to investors. If the author of the opinion is unable to opine on a material tax consequence, the opinion should (a) state this fact clearly; (b) provide the reason for the author’s inability to opine; and (c) discuss the possible alternatives and risks to investors of that tax consequence. A description of the relevant tax law does not itself satisfy the requirement to provide an opinion on the material tax consequences of the transaction. The Staff Legal Bulletin also provides guidance on (1) the persons who can render a relevant opinion; (2) the form which the opinion should take; (3) impermissible limitations on reliance; (4) the time when the opinion must be rendered; (5) requirements when the consummation of a transaction is conditioned on the receipt of a favorable tax opinion; and (6) required consents of the author of the opinion. See also New York State Bar Ass’n Tax Section, *Report on Tax Opinions*
connection with public company audits are subject to or affected by a wide range of rules regarding public company accounting and audits, including rules promulgated under the Sarbanes-Oxley Act of 2002\(^\text{12.1}\) by the SEC and the Public Company Accounting Oversight Board (the “PCAOB”)\(^\text{13}\) regarding auditor independence,\(^\text{14}\) improper influence on audits,\(^\text{15}\) public company codes of ethics,\(^\text{16}\) CEO and CFO certification of disclosure,\(^\text{17}\) and standards of professional conduct by lawyers.\(^\text{18}\)

- **Malpractice**: A lawyer or accountant who renders an incorrect tax opinion to a client is potentially subject to state law malpractice claims.\(^\text{19}\)


\[^{13}\text{The PCAOB is authorized to issue rules regulating the conduct of CPAs and CPA firms that audit public companies, subject to the approval of those rules by the SEC. 15 U.S.C. §7217(b). The rules of the PCAOB are enforced by the PCAOB, subject to review by the SEC. 15 U.S.C. §7217(c).}\]


• **General Tort and Criminal Liability:** A lawyer or accountant who renders a tax opinion may be subject to general tort or criminal claims if the tax opinion was part of a scheme to defraud the relevant taxpayer or the government.  

• **Evidentiary Rules:** A lawyer or accountant who renders a tax opinion should consider the extent to which the opinion is covered by the attorney-client privilege, the privilege under Section 7525 of the Code for tax advice provided by a “federally authorized tax practitioner,” or the attorney work product doctrine.

§ 7.3 TAX SHELTER REPORTING AND LIST MAINTENANCE RULES

The Code and the Treasury Regulations create a comprehensive system to ensure that tax shelters are reported to the IRS, and related information is maintained by taxpayers participating in the transactions, and by promoters and other advisors to the transaction. The rules include (i) requirements that taxpayers who participate in “reportable transactions” report their participation to the IRS, (ii) requirements that “material advisors” report the transactions to the IRS, and (iii) requirements that material advisors maintain “lists” identifying the participants in reportable transactions and containing other information.

Treasury Regulation Section 1.6011-4 requires every taxpayer that has participated in a reportable transaction and that is required to file a tax return to report its participation in the transaction on IRS Form 8886. The Form 8886 must be attached to the taxpayer’s tax return, and a copy must be sent to the IRS Office of Tax Shelter Analysis. In addition, the taxpayer must retain copies of all documents and other records related to a reportable transaction that are material to an understanding of the tax treatment or tax structure of the transaction.

A reportable transaction is a transaction falling within one of several categories having

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21Several States have adopted similar reporting and list maintenance regimes. Special disclosure rules apply to participants in a “prohibited tax shelter transaction” involving a tax-exempt organization. See I.R.C. §§6011(g), 6033(b)(2).

22The Form 8886 generally must be attached to the taxpayer’s tax return for each taxable year in which the taxpayer participates in the reportable transaction and each amended return that reflects the taxpayer’s participation in the transaction.
features indicative of a tax shelter. Those categories include the following:

- **Listed Transactions**: A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction and identified by published guidance as a listed transaction.\(^{23}\)

- **Confidential Transactions**: A transaction is considered confidential if it is offered under conditions of confidentiality and the taxpayer has paid an advisor a minimum fee.\(^{24}\) For this purpose, a transaction is considered to be offered under conditions of confidentiality if the advisor places a limitation on disclosure by the taxpayer of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of the advisor's tax strategies.\(^{25}\)

- **Transactions with Contractual Protection**: A transaction is considered to have contractual protection if the taxpayer or a related party has the right to a full or partial refund of fees from a person making a statement regarding the potential tax consequences of the transaction if all or part of the intended tax consequences from the transaction are not sustained.\(^{26}\) A transaction also has contractual protection if fees are contingent on the

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\(^{23}\)A transaction other than a listed transaction may be excluded by a determination of the IRS. Also, a regulated investment company or an investment vehicle that is owned 95% or more by one or more regulated investment companies is not required to disclose a reportable transaction other than a listed transaction.

\(^{24}\)The IRS website contains a list of such transactions at http://www.irs.gov/businesses/corporations/article/0,,id=120633,00.html. A transaction is substantially similar to a listed transaction if it is expected to obtain the same or similar types of tax consequences and is either factually similar or based on the same or similar tax strategy. Receipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to a listed transaction.

\(^{25}\)The minimum fee is $250,000 for a transaction if the taxpayer is a corporation, a partnership or a trust, all of the owners or beneficiaries of which are corporations, and $50,000 for all other transactions. The minimum fee includes all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a transaction. A fee does not include amounts paid to a person in that person's capacity as a party to the transaction.

\(^{26}\)A transaction is treated as confidential even if the conditions of confidentiality are not legally binding on the taxpayer. A claim that a transaction is proprietary or exclusive is not treated as a limitation on disclosure if the advisor confirms to the taxpayer that there is no limitation on disclosure of the tax treatment or tax structure of the transaction.

taxpayer's realization of tax benefits from the transaction.\textsuperscript{28}

- **Loss Transactions**: A loss transaction is any transaction resulting in the taxpayer claiming a loss under Section 165 of the Code over certain thresholds.\textsuperscript{29} For this purpose, losses from the sale or exchange of assets with “qualifying basis,” and certain other specified losses, are not taken into account.\textsuperscript{30}

- **Transactions of Interest**: A transaction of interest is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by published guidance as a transaction of interest.

- **Transactions with a Significant Book-Tax Difference**: This category has been removed effective January 6, 2006.\textsuperscript{31}

- **Transactions Involving a Brief Asset Holding Period**: This category has been removed effective August 3, 2007.\textsuperscript{32}

\textsuperscript{28}A transaction is not considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon a tax event. Also, refundable or contingent fees are not taken into account if the statement is made only after the taxpayer has entered into the transaction and has reported the consequences of the transaction on a tax return, and the person making the statement had not previously received fees from the taxpayer relating to the transaction.

\textsuperscript{29}In general, the threshold is $10 million in any single taxable year or $20 million in any combination of years (up to 5 years following the year that the transaction is entered into) if the taxpayer is a corporation or a partnership all of the owners or beneficiaries of which are corporations. For all other taxpayers, the thresholds are $2 million and $4 million, respectively. If the loss arises with respect to a section 988 transaction, a threshold of $50,000 in any single taxable year applies for individuals or trusts.


\textsuperscript{31}Notice 2006-6, 2006-5 I.R.B. 385. For disclosures required to be made prior to January 6, 2006, a transaction with a significant book-tax difference is a transaction where the amount for tax purposes of any item or items of income, gain, expense or loss from the transaction for a taxpayer that is a reporting company under the Securities Exchange Act of 1934, or a business entity having $250 million or more in gross assets, differs by more than $10 million on a gross basis from the amount of the item or items for book purposes in any taxable year. Various exceptions were contained in Rev. Proc. 2004-67, 2004-50 I.R.B. 967.

\textsuperscript{32}For disclosures required to be made prior to August 3, 2007, a transaction is considered to involve a brief asset holding period if the taxpayer claims a tax credit over $250,000 and the underlying asset giving rise to the credit is held by the taxpayer for forty-five days or less. The principles of Sections 246(c)(3) and (c)(4) of the Code apply for purposes of determining the holding period. Transactions resulting in a foreign tax credit for withholding taxes or other taxes
Proposed regulations would add a further category of reportable patented transactions. A patented transaction is a transaction for which a taxpayer pays directly or indirectly a fee in any amount to a patent holder or the patent holder’s agent for the legal right to use a tax planning method that the taxpayer knows or has reason to know is the subject of the patent. A patented transaction also is a transaction for which a taxpayer (the patent holder or the patent holder’s agent) has the right to payment for another person’s use of a tax planning method that is the subject of the patent. For this purpose, a tax planning method is any plan, strategy, technique or structure designed to affect Federal income, estate, gift, generation skipping transfer, employment or excise taxes. A patent issued solely for tax preparation software or other tools used to perform or model mathematical calculations or to provide mechanical assistance in the preparation of tax or information returns is not a tax planning method.

Under Sections 6111 and 6112 of the Code, each material advisor for a reportable transaction must report such transaction on IRS Form 8198 and maintain a list identifying each person for whom the advisor acted as a material advisor, and containing other relevant information. A material advisor is a person who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and directly or indirectly derives gross income in excess of a threshold amount. A person provides material aid, assistance, or advice for this purpose if the imposed with respect to a dividend that are not disallowed under Section 901(k) of the Code are excluded. Certain other transactions are excluded by Rev. Proc. 2004-68, 2004-50 I.R.B. 969.


34For this purpose, a reportable transaction has the same meaning as described above. In addition, the IRS will issue to the material advisor a reportable transaction number with respect to a disclosed reportable transaction. The material advisor must provide the reportable transaction number to all taxpayers and material advisors for whom the material advisor acts as a material advisor. If more than one material advisor is required to disclose a reportable transaction, the material advisors may designate by written agreement a single material advisor to disclose the transaction. The designation of one material advisor to disclose the transaction does not relieve the other material advisors of their disclosure obligations if the designated material advisor fails to properly disclose the transaction.

35The threshold amount is $50,000 in the case of a reportable transaction substantially all of the tax benefits from which are provided directly or pass-through entities to natural persons, and $250,000 in all other transactions. For listed transactions, the threshold amounts are $10,000 and $25,000, respectively. Under proposed regulations regarding patented transactions, the threshold amounts are $250 and $500, respectively. For transactions of interest, the threshold amounts may be reduced as identified in the published guidance identifying the transaction. The determination of whether substantially all of the tax benefits from a reportable transaction are provided to natural persons is made based on all the facts and circumstances. Generally, unless the facts and circumstances prove otherwise, if 70 percent or more of the tax benefits from a reportable transaction are provided to natural persons, then substantially all of the tax benefits will be considered to be provided to natural persons. In
person makes or provides a “tax statement” to or for the benefit of a taxpayer who is required to disclose the transaction, or to another material advisor. A tax statement is any written or oral statement regarding a tax aspect of a transaction that causes the transaction to be a reportable transaction, and includes tax result protection that insures some or all of the tax benefits of a reportable transaction.

The list maintained by a material advisor generally must include each person with respect to whom the advisor acted as a material advisor and other information, including an itemized statement of information related to the transaction including a summary of the intended or expected tax treatment of each participant, a detailed description of the transaction that describes its tax structure and purported tax treatment, a copy of any designation agreement and copies of written materials, including tax analyses or opinions, relating to the transaction that are material to an understanding of the purported tax treatment or tax structure of the transaction and that have been shown to the taxpayer (or any other potential investor) or its advisors. The material advisor generally must provide the list within twenty days following a request by the IRS.

determining the amount of gross income a person derives directly or indirectly for material aid, assistance, or advice, all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a reportable transaction are taken into account. A fee does not include amounts paid to a person in that person's capacity as a party to the transaction. The threshold amount must be met independently for each transaction that is a reportable transaction and aggregation of fees among transactions is not required.

In the case of a reportable transaction, that is not a listed transaction or a transaction of interest, the potential material advisor must know or reasonably expect that the taxpayer or the other material advisor will be required to disclose the transaction.

A material advisor generally does not include a person who makes a tax statement solely in the person's capacity as an employee, shareholder, partner or agent of another person. Any tax statement made by that person will be attributed to that person's employer, corporation, partnership, or principal. Also excluded are tax statements that are made only after a tax return reflecting the tax benefits of the transaction is filed with the IRS, and tax statements that include only information contained in publicly available documents filed with the SEC no later than the close of the relevant transaction. A person becomes a material advisor when all the following events have occurred: (1) the person provides material aid, assistance, or advice as described above, (2) the person directly or indirectly derives gross income in excess of the threshold amount, and the transaction is entered into by the taxpayer to whom or for whose benefit the person provided the tax statement, or in the case of a tax statement provided to another material advisor, when the transaction is entered into by a taxpayer to whom or for whose benefit that material advisor provided a tax statement. Material advisors, including those who cease providing services before the time the transaction is entered into, must make reasonable and good faith efforts to determine whether the relevant transaction is entered into.

The list must be maintained even if a person asserts a claim of privilege with respect to the relevant opinions and other documents. If more than one material advisor is required to
§ 7.4 TAXPAYER PENALTIES

The Code imposes a variety of penalties for underpayments of tax and other incorrect tax return positions.\footnote{I.R.C. §4965 imposes an excise tax on certain tax-exempt entities and certain managers of tax-exempt entities for participation in certain “prohibited tax shelter transactions.” The excise tax applies regardless of whether the transaction is successfully challenged by the IRS. Prohibited tax shelter transactions generally include listed transactions, and reportable transactions that are confidential transactions or transactions with contractual protection.} The principal civil penalties include the penalties for (i) fraud,\footnote{I.R.C. §6663.} (ii) negligence or disregard of rules or regulations,\footnote{Id. §6662(b)(1).} (iii) substantial understatement of federal income tax,\footnote{Id. §6662(b)(2).} (iv) understatements with respect to reportable transactions,\footnote{Id. §6662A. The penalty for substantial valuation misstatements under I.R.C. §6662(b)(3) also is important in many tax shelter cases. See, e.g., Long-Term Capital Holdings, LP v. United States, 150 Fed. Appx. 40, 43-44 (2d Cir. 2005); Zfass v. Comm’r, 118 F.3d 184, 190 (4th Cir. 1997); Clearmeadow Investments LLC v. United States, 87 Fed. Cl. 509, 531-35 (Fed. Cl. 2009); Stobie Creek Invs., LLC v. United States, 82 Fed. Cl. 636, 704 (2008), aff’d on other grounds, 608 F.3d 1366, 1381-83 (Fed. Cir. 2010); New Phoenix Sunrise Corp. v. Comm’r, 132 T.C. 161, 187-89 (2009); Petaluma FX Partners LLC v. Comm’r, 131 T.C. 84, 100 (2008); Santa Monica Pictures, LLC v. Comm’r, T.C.Memo 2005-104. But see Southgate Master Fund LLC v. United States, 651 F. Supp. 2d 596, 665-66 (N.D. Tex. 2009) (holding that a disallowance was not attributable to a valuation misstatement when the I.R.S. disallowed a transaction as lacking economic substance); Klamath Strategic Inv. Fund v. United States, 472 F. Supp. 2d 885, 899-900 (E.D. Tex. 2007) aff’d in part on other grounds, 568 F.3d 537 (5th Cir. 2009) (same).} and understatements with respect to transactions lacking economic substance or failing to meet the requirements of any similar rule of law.\footnote{Id. §6662(b)(6).} In many cases, a taxpayer may claim reliance on a tax opinion as a defense against such penalties. However, depending on the penalty, such a defense may be subject to a variety of conditions and limitations.

A taxpayer will be subject to the penalty for fraud only if the government establishes that the taxpayer engaged in intentional wrongdoing with the specific intent to evade tax believed to maintain a list with respect to a reportable transaction, the material advisors may designate a single material advisor to maintain the list. However, the designation of one material advisor to maintain the list does not relieve the other material advisors if the designated material advisor fails to furnish the list to the IRS.

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A taxpayer's good faith reliance on the opinion of a lawyer or accountant that a
position is sustainable normally will prevent a finding of fraud. 

Section 6662(b) of the Code and Treasury Regulation Section 1.6662-3(b) define
“negligence” as a failure to make a reasonable attempt to comply with the provisions of
the Code or to exercise ordinary or reasonable care in the preparation of a tax return. However, a
tax return position that has a “reasonable basis” is not attributed to negligence. Section 6662(b) and Treasury Regulation Section 1.6662-3(c) define “disregard” to include any careless,
reckless, or intentional disregard of rules or regulations. A disregard of rules or regulations is
careless” if the taxpayer does not exercise reasonable diligence to determine the correctness of
the return position; it is “reckless” if the taxpayer makes little or no effort to determine whether
a rule or regulation exists, under circumstances which demonstrate a substantial deviation from
the standard of conduct that a reasonable person would observe; and it is “intentional” if the
taxpayer knows of the rule or regulations that are disregarded. Nevertheless, a position
contrary to a revenue ruling or notice does not constitute “disregard” if the position has a
realistic possibility of being sustained on the merits. An exception to the penalty for disregard
of rules or regulations applies for positions that are adequately disclosed and that have a
“reasonable basis.” In addition a taxpayer may seek relief from the penalty under the

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45See, e.g., Webb v. Comm’r, 394 F.2d 366, 377 (5th Cir. 1968).
46See, e.g., Jemison v. Comm’r, 45 F.2d 4 (5th Cir. 1930); Estate of Spruill v. Comm’r, 88 T.C. 1197, 1244-46 (1987); Whyte v. Comm’r, 52 T.C.M. (CCH) 677, aff’d, 852 F.2d 306 (7th Cir. 1988).
47Treas. Reg. §1.6662-3(b)(1). “Reasonable basis” as a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper. Treas. Reg. §1.6662-3(b)(3). The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim. If a return position is reasonably based on one or more of the authorities set forth in Treas. Reg. Section 1.6662-4(d)(3)(iii) (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the “substantial authority” standard as defined in Treas. Reg. Section 1.6662-4(d)(2).
48The term “rules or regulations” includes the provisions of the Internal Revenue Code, temporary or final Treasury regulations issued under the Code, and revenue rulings or notices (other than notices of proposed rulemaking) issued by the IRS and published in the Internal Revenue Bulletin.
49Treas. Reg. §1.6662-3(b)(2).
50Id. This exception does not apply to a position taken in a “reportable transaction” as defined in Treas. Reg. Section 1.6011-4(b). The “realistic possibility” standard is defined by reference to the standard in Treas. Reg. Section 1.6694-2(b) regarding income tax return preparer penalties. Treas. Reg. §1.6662-3(a).
51Treas. Reg. §§1.6662-3(c), 1.6662-7. This exception does not apply to a position taken in a reportable transaction unless the transaction is disclosed in accordance with Treas. Reg. Section 1.6011-4.
reasonable cause and good faith exception in Section 6664(c), discussed below.

A taxpayer's reliance on a tax opinion will be relevant in determining whether a taxpayer has acted with negligence or disregard in taking a tax return position that ultimately is established as incorrect. For example, the opinion may establish that the taxpayer's position had a reasonable basis, or had a realistic possibility of being sustained on the merits. Moreover, even reliance on a clearly erroneous opinion may be a defense against the penalties for negligence and disregard of rules or regulations if the taxpayer used reasonable care in choosing the professional, provided all relevant information to the tax professional, and acted reasonably in relying on the opinion. Nevertheless, a taxpayer may not be able to assert reliance on a professional's opinion in circumstances where the taxpayer has knowingly structured a transaction to achieve a questionable tax benefit. Likewise, a taxpayer is not reasonable in relying on the opinion of a

52 See, e.g., Everson v. United States, 108 F.3d 234, 238 (9th Cir. 1997); Lemishow v. Comm'r, 110 T.C. 110, 114 (1998) (“The negligence penalty is inappropriate where an issue to be resolved by the Court is one of first impression involving unclear statutory language”); Hitchins v. Comm'r, 103 T.C. 711, 719-20 (1994) (first impression exception applies to issue not previously considered by the court where the statutory language is not entirely clear); United Title Ins. Co. v. Comm'r, 55 T.C.M. (CCH) 34, 53 (1988) (“an incorrect decision regarding an unsettled question of law does not constitute negligence, provided the taxpayer's interpretation is not clearly untenable and is held in good faith”). But see Nicole Rose Corp. v. Comm'r, 320 F.3d 282, 284-85 (2d Cir. 2003); Neonatology Associates, P.A. v. Comm'r, 299 F.3d 221, 235 (3d Cir. 2002) (negligence penalty applicable in case involving novel situation, but the taxpayer's liability involved well-settled principles of taxation).

53 See, e.g., Henry v. Comm'r, 170 F.3d 1217 (9th Cir. 1999); Heasley v. Comm'r, 902 F.2d 380, 384 (5th Cir. 1990); Martin Ice Cream Co. v. Comm'r, 110 T.C. 189, 231-32 (1998) (negligence penalty not applicable where taxpayer relied on tax professional to structure transaction); Sim-Air USA Ltd. v. Comm'r, 98 T.C. 187, 201 (1992) (reliance on tax professional's advice was reasonable when a corporate subsidiary failed to qualify as a DISC when the advice turned out to be erroneous).

54 See, e.g., Stobie Creek Invs., 608 F.3d at 1383 (applying a “too good to be true” test); Murfam Farms, LLC v. United States, 94 Fed. Cl. 235, 247 (2010) (“[p]ersons of their background would have known that sheltering nearly the exact amount of capital gains that they received from the Smithfield merger, in a barely comprehensible, complicated, transaction, in which there was no real chance of profit, was ‘too good to be true’”); Alpha L.P. v. United States, 93 Fed. Cl. 280, 317 (2010) (“[e]ven if the taxpayer relied on advice of professionals, the taxpayer will still be liable for a negligence penalty if the purported savings are too good to be true”); Jade Trading, LLC v. United States, 80 Fed. Cl. 11, 56 (2007), rev'd on other grounds, 598 F.3d 1372 (Fed. Cir. 2010) (applying a “too good to be true” test); New Phoenix Sunrise, 132 T.C. at 195 (“Jenkens & Gilchrist’s conflict of interest and petitioner’s knowledge of recent developments in tax law should have convinced petitioner of the need for further investigation into the proper reporting of the BLISS transaction. Petitioner claimed a fictional loss of nearly $11 million. This is exactly the type of ‘too good to be true’ transaction that should cause
professional having an inherent conflict of interest about which the taxpayer knew or should have known.\footnote{55Stobie Creek Invs., 608 F.3d at 1381-83, aff’g 82 Fed. Cl. at 714-15; American Boat Co. v. United States, 583 F.3d 471, 481-83 (7th Cir. 2009); Mortensen v. Comm’r, 440 F.3d 375, 387-88 (6th Cir. 2006); Van Scoten v. Comm’r, 439 F.3d 1243, 1253-54 (10th Cir. 2006); Chamberlain v. Comm’r, 66 F.3d 729, 732-33 (5th Cir. 1995); Goldman v. Comm’r, 39 F.3d 402, 408 (2d Cir. 1994); Pasternak v. Comm’r, 990 F.2d 982 F.2d 893, 902 (6th Cir. 1993); Iles v. Comm’r, 982 F.2d 163, 164-66 (6th Cir. 1992); Klamath Strategic Inv. Fund v. United States, 472 F. Supp. 2d 885, 904-05 (E.D. Tex. 2007), aff’d on other grounds, 568 F.3d 537 (5th Cir. 2009); Maguire Partners-Master Invs., LLC v. United States, 2010-1 U.S.T.C. Para. 50, 172 (C.D. Cal. 2009); Murfam Farms, 94 Fed. Cl. at 247-48; Alpha I, L.P., 93 Fed. Cl. 280; Jade Trading, LLC, 80 Fed. Cl. at 56-57; 106 Ltd. v. Comm’r, 136 T.C. No. 3 (2011); Canal Corp. v. Comm’r, 135 T. C. No. 9 (2010); New Phoenix Sunrise Corp.,}
Section 6662(d) of the Code establishes a complex series of tests for applying the substantial understatement penalty. In general, an understatement of tax is substantial if the understatement exceeds the greater of $5,000 or 10% of the tax required to be shown on the taxpayer's return for the taxable year. However, the penalty does not apply to an understatement which is attributable to a position for which the taxpayer has substantial authority, or a position that is adequately disclosed in the taxpayer's return, and for which there is a reasonable basis. The disclosure and reasonable basis exception does not apply to the tax return position of a corporation attributable to a multiple-party financing transaction if the position does not clearly reflect the income of the corporation. Neither the exception for positions having substantial authority, nor the disclosure and reasonable basis exception, applies to a position attributable to a “tax shelter,” meaning a partnership, entity, plan or arrangement having a significant purpose to avoid or evade federal income tax. A taxpayer may seek relief from the substantial understatement penalty under the reasonable cause and good faith exception in Section 6664(c), discussed below.

132 T.C. at 193-95; Kerman v. Comm'r, T.C. Memo 2011-54; Palm Canyon X Invest., LLC v. Comm'r, T.C. Memo 2009-288; Santa Monica Pictures, LLC v. Comm'r, T.C. Memo 2005-104; CMA Consolidated, Inc. v. Comm'r, T.C. Memo 2005-16. See also IRS Penalty Policy Statement, 2003 TNT 249-9 (Dec. 29, 2003) (“[t]axpayers may not rely on the advice of a tax advisor who has a financial arrangement or a referral agreement with a tax shelter promoter. The tax advisor's independent judgment is compromised by these arrangements and agreements. Accordingly, the Service will question the reasonableness and good faith of taxpayers who know or have reason to know that the tax advisor is not independent. The Service will not accept reliance on an opinion from a non-independent tax advisor as proof of reasonable cause and good faith on the part of the taxpayer”). See also Neonatology Assocs., 299 F.3d at 234 (insurance agent); Anderson v. Comm'r, 62 F.3d 1266, 1271 (10th Cir. 1995) (independent broker); Allison v. United States, 80 Fed. Cl. 568, 594, 598, 600 (2004) (investment advisor and accountant). But see McNeill v. United States, 119 AFTR 2d 2017-943 (mere fact that law firm issuing opinion had previously advised the promoter, and the taxpayer signed a waiver of the conflict did not prevent the taxpayer from relying on the opinion).

56 The substantial understatement penalty does not apply to an understatement with respect to a reportable transaction, which is subject to the rules of I.R.C. §662A, or a transaction lacking economic substance or failing to meet the requirements of any similar rule of law, which is subject to the rules of I.R.C. §§6662(b)(6) and 6662(i).

57 In the case of a corporation other than an S corporation or a personal holding company, the threshold is the lesser of $10,000,000 and 10% of the tax required to be shown on the taxpayer's return for the taxable year, but not less than $10,000. I.R.C. §6662(d)(1).

58 I.R.C. §6662(d)(3) authorizes the IRS to publish a list of positions for which the IRS believes there is not substantial authority.

59 Federal tax rules generally define “evasion” as reduction of taxes through unlawful means and “avoidance” as reduction of taxes through lawful (or arguably lawful) means. See Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts (1999).
A tax opinion may be relevant in determining whether there is substantial authority or a reasonable basis for a position. Treasury Regulation Section 1.6662-4(d)(2) provides that the substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts.\(^{60}\) The substantial authority standard is less stringent than the more likely than not standard, but more stringent than the reasonable basis standard.\(^{61}\) There is substantial authority for a position only if the weight of the authorities supporting the position is substantial in relation to the weight of authorities supporting contrary treatment.\(^{62}\) All authorities relevant to the tax treatment of the position, including the authorities contrary to the position, are taken into account in determining whether substantial authority exists. The weight accorded an authority depends on its relevance and persuasiveness, and the type of document providing the authority.\(^{63}\) Treasury Regulation Section 1.6662-4(d)(3)(iii) provides an exclusive list of documents that are considered “authority” for this purpose.\(^{64}\) Because the substantial authority standard is an objective standard, the taxpayer’s belief that there is substantial authority is irrelevant.\(^{65}\) Also, a tax professional’s opinion is not per se substantial authority, although the authority and interpretations discussed in the opinion may constitute substantial authority provided that the foregoing standards are met.\(^{66}\)

Section 6662A of the Code imposes a penalty for any “reportable transaction understatement” for a taxable year.\(^{67}\) A reportable transaction understatement includes (i) the product of the taxpayer’s understatement of taxable income (or overstatement of ordinary or capital losses) and the highest applicable rate of tax, and (ii) the taxpayer’s overstatement of credits, in each case attributable to the taxpayer’s position with respect to a reportable transaction. For this purpose, a reportable transaction includes a “listed transaction” and any other reportable transaction having as a significant purpose the avoidance or evasion of federal income tax. A taxpayer may seek relief from the reportable transaction understatement penalty under a special reasonable cause and good faith exception in Section 6664(d), discussed below.

\(^{60}\)Treas. Reg. §1.6662-4(d)(2).

\(^{61}\)Id. §1.6662-4(d)(2).

\(^{62}\)Id. §1.6662-4(d)(3)(i).

\(^{63}\)Id. §1.6662-4(d)(3)(iii). There may be substantial authority for a position despite the absence of certain types of authority. Thus, a taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision.

\(^{64}\)Id. §1.6662-4(d)(iii).

\(^{65}\)Id. §1.6662-4(d)(3)(i).


\(^{67}\)The reportable transaction understatement penalty does not apply to an understatement with respect to a transaction lacking economic substance or failing to meet the requirements of any similar rule of law, which is subject to the rules of I.R.C. §§6662(b)(6) and 6662(i).
Section 6662(b)(6) imposes a penalty for any transaction lacking economic substance (within the meaning of Section 7701(o)) or failing to meet the requirements of any similar rule of law. The noneconomic substance transaction understatement penalty is a strict liability penalty, and there is no relief under the reasonable cause and good faith exception of Section 6664.\textsuperscript{68}

Section 6664(c) of the Code provides an exception to the penalties for fraud, negligence or disregard of rules or regulations, and substantial understatements of federal income tax where the taxpayer shows reasonable cause for the position, and that the taxpayer acted in good faith with respect to the position. Treasury Regulation Section 1.6664-4(b)(1) states that the determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances. Generally, the most important factor is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability. Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge and education of the taxpayer. Reliance on professional tax advice constitutes reasonable cause and good faith only if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith. All facts and circumstances must be taken into account in determining whether a taxpayer has reasonably relied in good faith on such advice.\textsuperscript{69}

Treasury Regulation Section 1.6664-4(c)(1) states that a taxpayer will not be considered to have reasonably relied on tax advice unless the advice satisfies various requirements. First, the advice must be based upon all pertinent facts and circumstances and the law as it relates to those facts and circumstances. For example, the advice must take into account the taxpayer's purposes (and the relative weight of such purposes) for entering into a transaction and for structuring a transaction in a particular manner. In addition, the advice will not qualify if the taxpayer fails to disclose a fact that it knows, or reasonably should know, to be relevant to the proper tax treatment of the transaction.

Second, the advice must not be based on unreasonable factual or legal assumptions (including assumptions as to future events) and must not unreasonably rely on the representations, statements, findings, or agreements of the taxpayer or any other person. For example, the advice must not be based upon a representation or assumption which the taxpayer knows, or has reason to know, is unlikely to be true, such as an inaccurate representation or assumption as to the taxpayer's purposes for entering into a transaction or for structuring a transaction in a particular manner.

\textsuperscript{68}I.R.C. §6662(i) increases the rate of the penalty to 40% for any nondisclosed noneconomic substance transaction.

\textsuperscript{69}Treas. Reg. §1.6664-4(c)(1). For example, the taxpayer's education, sophistication and business experience will be relevant. Thus, reliance on an opinion may be deemed unreasonable where the taxpayer has knowingly structured a transaction to achieve a questionable tax benefit. See supra note 54. Also, reliance on an opinion may not be reasonable or in good faith if the taxpayer knew, or reasonably should have known, that the advisor lacked knowledge in the relevant aspects of federal tax law.
Third, a taxpayer may not rely on an opinion or advice that a regulation is invalid unless the taxpayer adequately disclosed the position that the regulation in question is invalid. If the underpayment is attributable to a reportable transaction, failure by the taxpayer to properly disclose the transaction is a strong indication that the taxpayer did not act in good faith. 70

As discussed above, a taxpayer will not be considered to be reasonable in relying on the opinion of a professional having an inherent conflict of interest about which the taxpayer knew or should have known. 71 Two recent decisions by the Tax Court have created some uncertainty about when a practitioner will be treated as having a conflict of interest for this purpose. In Canal Corp. v. Commissioner, 72 the taxpayer engaged an investment bank and an accounting firm to jointly develop a strategy for disposing of a business that had a fair market value substantially in excess of basis. The investment bank and accounting firm proposed a structure where the taxpayer and a party that wanted to purchase the business would contribute their respective businesses to a joint venture, the joint venture would borrow funds that would be distributed to the taxpayer, and the taxpayer would provide a limited indemnity covering the joint venture’s borrowing. The structure was intended to avoid treatment as a “disguised sale” 73 and thus defer the recognition of gain on the cash distribution to the taxpayer. The accounting firm assisted in structuring and negotiating the joint venture, and rendered an opinion that the cash distribution would not be treated as a disguised sale. The taxpayer agreed to pay the accounting firm an $800,000 fixed fee at the closing of the transaction, and the taxpayer conditioned its closing of the transaction on receipt of a favorable opinion.

The court concluded that the transaction would be treated as a disguised sale on the ground that the limited indemnity did not impose meaningful economic risk of loss on the taxpayer, and was structured primarily to create an appearance of shifting risk of loss to the taxpayer. The court upheld the imposition of a substantial underpayment penalty under Section 6662(a) of the Code, holding that the taxpayer had not established that it had reasonable cause, and had acted in good faith, in not reporting the distribution as a disguised sale. Specifically, the court held that the taxpayer could not rely on the accounting firm’s opinion to establish reasonable cause and good faith because the opinion was based on questionable conclusions and unreasonable assumptions, showed a lack of care in its preparation, and was prepared by a tax advisor with inherent conflicts of interest. The specific conflicts of interest identified by the court included the fact that (i) the author of the opinion “audited” certain financial data to make assumptions in the tax opinion; (ii) the opinion included legal assumptions separate from the tax assumptions in the opinion, and the author reviewed relevant State law to verify the assumptions; (iii) the author of the opinion helped plan the transaction and was intricately involved in drafting the documents involved in the opinion; and (iv) the accounting firm’s fee effectively depended on the accounting firm’s ability to render a favorable opinion, because the fee was payable only on the completion of the transaction, and the taxpayer would not close the transaction without

70 Treas. Reg. §1.6664-4(d).
71 See supra note 55.
72 135 T. C. 199 (2010).
73 Code Section 707(a)(2)(B).
receiving a favorable opinion.

In 106 Ltd. v. Commissioner, the court held that the taxpayer that had participated in a highly structured tax shelter could not rely on a tax opinion rendered by a lawyer, and on tax return preparation by an accounting firm, to avoid a gross valuation misstatement penalty, among other reasons because it concluded that the lawyer and the accountants were promoters of the tax shelter. In making this determination, the court defined a promoter for this purpose as “an adviser who participated in structuring the transaction or is otherwise related to, has an interest in, or profits from the transaction.” The court noted that the application of this definition could be problematic in transactions that are not ordinarily viewed as tax shelters, giving as an example a tax lawyer asked by a businessman for advice on how to sell the family business through a tax-favored stock redemption, who might be viewed as having “participated in structuring the transaction.” The court stated that a tax advisor would not be a “promoter” of a tax shelter transaction where the advisor:

- Has a long-term and continual relationship with the client;
- Does not give unsolicited advice regarding the tax shelter;
- Advises only within the advisor's field of expertise (and not because of the advisor's regular involvement in the transaction being scrutinized);
- Follows the advisor's regular course of conduct in rendering the advice; and
- Has no stake in the transaction besides what the advisor bills at the advisor's regular hourly rate.

The Canal Corp. and 106 Ltd. cases identify a number of factors that the IRS might assert as creating a conflict of interest, and thereby preventing a taxpayer from relying on an opinion to avoid penalties. In both cases, the Tax Court viewed the tax advisor's involvement in structuring and documenting the transaction as creating a potential conflict of interest. However, as the Tax Court recognized in the 106 Ltd. case, refusing to allow a taxpayer to rely on an opinion that addresses the tax treatment of an ordinary business transaction because the tax advisor participated in structuring and documenting the transaction would be “problematic.” It is common for taxpayers to engage the tax advisors who assisted in structuring and negotiating business transactions to provide opinions supporting the tax positions underlying the transactions. Those opinions commonly are relied upon by taxpayers in preparing their returns, and as a defense against possible penalties in the event the positions are ultimately rejected.

It is doubtful that the Canal Corp. case creates a standard under which no opinion that is prepared by a tax advisor that was involved in structuring and negotiating a transaction can be

75 Id. at 79 (quoting Tigers Eye Trading, LLC v. Comm'r, T.C. Memo 2009-121).
76 Id. at 80.
relied upon to avoid penalties. The cases in which courts have found a conflict of interest because a tax advisor was involved in structuring or documenting a transaction generally have involved tax shelters where the tax advisor effectively participated in the creation of a scenario where there is only the appearance of economic substance. In the Canal Corp. case, the court noted the absence of meaningful economic risk of loss and the fact that the other party to the transaction showed little interest in the specific terms that the accounting firm included in the documentation to create the impression that the taxpayer bore economic risk of loss.\textsuperscript{77}

A second factor identified by the Tax Court in these cases is the tax advisor’s billing arrangements. In many tax shelter cases, tax advisors have been viewed as promoters where they are paid on completion of the transaction, or on rendering a favorable opinion, or where the fees are based on the tax savings claimed by the taxpayer. In those circumstances, the courts have viewed the tax advisor as having a direct personal interest in whether the opinion is favorable to the taxpayer. However, it is doubtful that all fixed fee or contingent billing arrangements will prevent a taxpayer from relying on a tax advisor’s opinion. For example, clients frequently will request fixed fee arrangements from their advisors for structuring, negotiating and documenting common business transactions, in circumstances where the client expects as part of the services that a tax advisor will render a favorable opinion on the transaction. It also is common for clients and advisors to agree discount and premium billing arrangements based on whether a transaction completes. Those arrangements normally should not disqualify a tax opinion where the primary purpose of the transaction is to achieve a commercial objective, and not to generate tax benefits.

In the Canal Corp. case, the underlying transaction was the sale of a business, not the generation of tax benefits. However, a number of factors suggested that the billing arrangement with the accounting firm reflected, as the court put it, the “exorbitant price tag” for “an insurance policy as to the taxability of the transaction.”\textsuperscript{78} The court expressed doubt that the fee charged reflected the amount of work involved, noting that the opinion was “littered with typographical errors, disorganized and incomplete,”\textsuperscript{79} and questioned whether “any firm would have had such a cavalier approach if the firm was being compensated solely for time devoted to rendering the opinion.”\textsuperscript{80} Also, the court found it “unreasonable that anyone, let alone an attorney, would issue the highest level opinion a firm offers on such dubious legal reasoning [as was contained in the opinion],”\textsuperscript{81} and concluded that “no lesser level of comfort would have

\textsuperscript{77}Canal Corp. at 221 (“[i]n essence, Mr. Miller issued an opinion on a transaction he helped plan without the normal give-and-take in negotiating terms with an outside party”).

\textsuperscript{78}Id.

\textsuperscript{79}Id. at 219. Also, the court noted that the author of the opinion failed to recognize several parts of the opinion.

\textsuperscript{80}Id.

\textsuperscript{81}Id. The author of the opinion was a licensed attorney, who had previously practiced law with a law firm. The court noted that he was not a practicing attorney at the time he gave the legal opinion.
commanded the $800,000 fixed fee that Chesapeake paid for the opinion.”\textsuperscript{82} Finally, the court noted that the fee was payable and contingent on the closing of the transaction, and that the accounting firm would receive payment only if it issued a “should” level opinion on the transaction. The accounting firm “therefore had a large stake in making sure the closing occurred.”\textsuperscript{83}

A third factor identified by the Tax Court is the extent to which the author of a tax opinion bases the conclusions of the opinion on facts or non-tax legal conclusions that are reached by the advisor. The problem appears to be a lack of independent validation of the factual predicates to the opinion.\textsuperscript{84} However, this factor must be tempered by the requirement in the regulations that an opinion on which a taxpayer relies for penalty protection not “unreasonably rely on the representations, statements, findings, or agreements of the taxpayer or any other person.”\textsuperscript{85} That requirement effectively requires the tax advisor to consider the veracity and plausibility of the factual material on which the opinion is based, to make relevant inquiries and to draw appropriate conclusions. This approach is consistent with the ethical and regulatory requirements imposed directly on practitioners.\textsuperscript{86}

The final factor identified by the Tax Court is whether the tax advisor regularly advises the taxpayer, or acts outside its normal role and course of conduct, for example, by giving unsolicited advice regarding a tax shelter. That factor appears to target situations where advisors seek to encourage taxpayers to participate in tax shelters by, among other things, seeking new clients. It is doubtful that this factor has relevance outside of marketed tax shelters. Sophisticated businesses frequently will interview a set of potential advisors for a transaction, and expect potential advisors to keep them informed of developments in the tax law and their

\textsuperscript{82}Id. at 219-20.

\textsuperscript{83}Id. at 221.

\textsuperscript{84}Id. at 220-21 (“[w]e would be hard pressed to identify which of the hats Mr. Miller was wearing in rendering that tax opinion. There were too many”). See also 106 Ltd. at 80 (a tax advisor is not a promoter of a tax shelter where, among other things, the advisor “advises only within his field of expertise (and not because of his regular involvement in the transaction being scrutinized)”).

\textsuperscript{85}Treas. Reg. §1.6664-4(c)(1)(ii).

\textsuperscript{86}See, e.g., Circular 230 §10.34(d) (“[a] practitioner advising a client to take a position on a tax return...generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete’’); Circular 230 §10.37(a) (“[a] practitioner must not give written advice...concerning one or more Federal tax issues if the practitioner bases the written advice on unreasonable factual or legal assumptions,..., unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person, [or] does not consider all relevant facts that the practitioner knows or should know...”).
effect on tax planning. The mere fact that the taxpayer has turned to a new tax advisor, or that the advisor introduced the planning idea before being engaged for a normal business transaction, should not preclude the taxpayer from relying on the tax advisor's opinion to avoid penalties.

Treasury Regulation Section 1.6664-4(f) contains special rules for purposes of applying the reasonable cause and good faith exception to the substantial underpayment penalty attributable to tax shelter items of corporations. The corporation's legal justification of the treatment or characterization of the item or the related entity, plan or arrangement, may be taken into account only if (1) there is substantial authority for the tax treatment of the item, and (2) based on all facts and circumstances, the corporation reasonably believed, at the time the tax return was filed, that the tax treatment of the item was more likely than not the proper treatment. The reasonable belief requirement will be considered satisfied if either:

- The corporation analyzes the pertinent facts and authorities in the manner described in Treasury Regulation Section 1.6662-4(d)(3)(ii) (relating to the substantial authority test), and in reliance upon that analysis, reasonably concludes in good faith that there is a greater than 50% likelihood that the tax treatment of the item will be upheld if challenged by the IRS; or

- The corporation reasonably relies in good faith on the opinion of a professional tax advisor that meets the requirements of Treasury Regulation Section 1.6664-4(c), described above, if the opinion is based on the tax advisor’s analysis of the pertinent facts and authorities in the manner described in Treasury Regulation Section 1.6662-4(d)(3)(ii) (relating to the substantial authority test), and unambiguously states that the tax advisor concludes that there is a greater than 50% likelihood that the tax treatment of the item will be upheld if challenged by the IRS.

The possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account for purposes of the foregoing analysis. Moreover, although satisfaction of the foregoing requirements is an important factor to be considered in determining whether a corporate taxpayer acted with reasonable cause and in good faith, it is not necessarily dispositive.

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87 In the case of reportable transactions subject to the penalty in I.R.C. §6662A, the rules in Treas. Reg. §1.6664-4(f) are superseded by the rules contained in I.R.C. §6664(d), discussed below.


90 For example, depending on the circumstances, satisfaction of the minimum requirements may not be dispositive if the taxpayer’s participation in the tax shelter lacked significant
Section 6664(d) of the Code provides special rules for the application of the reasonable cause and good faith exception to the penalty under Section 6662A of the Code for reportable transaction understatements. The exception will not apply unless (A) the position is adequately disclosed (or the penalty for non-disclosure was rescinded), 91 (B) there is or was substantial authority for the position, and (C) the taxpayer reasonably believed that such treatment was more likely than not the proper treatment. A taxpayer will be treated as having a reasonable belief with respect to the tax treatment of a position only if such belief (i) is based on the facts and law that exist at the time the relevant return is filed, and (ii) relates solely to the taxpayer's chances of success on the merits of such treatment and does not take into account the possibility that a return will not be audited, such treatment will not be raised on audit, or such treatment will be resolved through settlement if it is raised.

In addition, under Section 6664(d)(3)(B) of the Code, an opinion of a tax advisor may not be relied upon to establish the reasonable belief of a taxpayer if the tax advisor is a “disqualified tax advisor,” or the opinion is a “disqualified opinion.” A tax advisor is disqualified if the tax advisor (I) is a material advisor and participates in the organization, management, promotion or sale of the transaction or is related to any person who so participates, 92 (II) is compensated for the purpose, if the taxpayer claimed tax benefits that are unreasonable in comparison to the taxpayer’s investment in the tax shelter, or if the taxpayer agreed with the organizer or promoter of the tax shelter that the taxpayer would protect the confidentiality of the tax aspects of the structure of the tax shelter.

91 Notice 2005-12, 2005-7 I.R.B. 494 sets forth rules for determining whether a position is adequately disclosed for this purpose.

92 A material advisor participates in the organization of a transaction if the advisor (1) devises, creates, investigates or initiates the transaction or tax strategy, (2) devises the business or financial plans for the transaction or tax strategy, (3) carries out those plans through negotiations or transactions with others, or (4) performs acts relating to the development or establishment of the transaction, including preparing documents that (A) establish the structure used in connection with the transaction, (B) describe the transaction for use in the promotion or sale of the transaction, or (C) register the transaction with any federal, state or local government body. A material advisor participates in the management of a transaction if the material advisor is involved in the decision-making process regarding any business activity with respect to the transaction. Participation in the management of the transaction includes managing assets, directing business activity, or acting as general partner, trustee, director or officer of an entity involved in the transaction. A material advisor participates in the promotion or sale of a transaction if the material advisor is involved in the marketing of the transaction or tax strategy. Marketing activities include (1) soliciting, directly or through an agent, taxpayers to enter into a transaction or tax strategy, (2) placing an advertisement for the transaction, or (3) instructing or advising others with respect to marketing of the transaction or tax strategy. A tax advisor, including a material advisor, will not be treated as participating in the organization, management, promotion or sale of a transaction if the tax advisor's only involvement is
directly or indirectly by a material advisor for the transaction, (III) has a fee arrangement with respect to the transaction which is contingent on all or part of the intended tax benefits of the transaction being sustained, or (IV) as determined under regulations, has a disqualifying financial interest with respect to the transaction.\(^93\) An opinion is disqualified if the opinion (I) is based on unreasonable factual or legal assumptions (including assumptions as to future events), (II) unreasonably relies on representations, statements, findings, or agreements of the taxpayer or any other person, (III) does not identify and consider all relevant facts, or (IV) fails to meet any other requirement as the IRS may prescribe.

§ 7.5 WHO MAY PREPARE TAX OPINIONS

In general, any lawyer, certified public accountant or enrolled agent in good standing may practice before the IRS,\(^94\) and the term “practice” includes rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion.\(^95\) A practitioner’s ability to render tax opinions is subject, however, to the general ethical rules such as the rules regarding conflicts of interest,\(^96\) and restrictions on rendering an opinion regarding the tax consequences of the transaction. In the course of preparing a tax opinion, a tax advisor is permitted to suggest modifications to the transaction, but the tax advisor may not suggest material modifications to the transaction that assist the taxpayer in obtaining the anticipated tax benefits. Merely performing support services or ministerial functions such as typing, photocopying, or printing will not be considered participation in the organization, management, promotion or sale of a transaction. Notice 2005-12.

\(^93\) A tax advisor will be treated as a disqualified tax advisor, even if not a material advisor, if the tax advisor has a referral fee or a fee-sharing arrangement by which the advisor is compensated directly or indirectly by a material advisor. In addition, an arrangement will be treated as a disqualified compensation arrangement if there is an agreement or understanding with a material advisor pursuant to which the tax advisor is expected to render a favorable opinion regarding the tax treatment of the transaction to any person referred by the material advisor. A tax advisor will not be treated as having a disqualified compensation arrangement if a material advisor merely recommends the tax advisor who does not have an agreement or understanding with the material advisor to render a favorable opinion regarding the tax treatment of the transaction. Notice 2005-12.

\(^94\) Circular 230 §10.3.

\(^95\) Id. §§10.2(a)(4), 10.34, 10.35, 10.37.

\(^96\) See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.7 (1983); MODEL CODE OF PROF’L RESPONSIBILITY DR 5-105 (1983); AICPA Code R. 102, 102.03; Circular 230 §10.29.
the activities of current or former government officials.\textsuperscript{97}

A certified public accountant whose firm is the auditor for a public company also is subject to the auditor independence rules of the SEC and the PCAOB. The SEC's final auditor independence regulations in 2003 under the Sarbanes-Oxley Act of 2002 did not address the provision of tax services. The preamble to the regulations reiterated the SEC's "long-standing position that an accounting firm can provide tax services to its audit clients without impairing the firm's independence."\textsuperscript{98} Accordingly, accountants may continue to provide tax services such as tax compliance, tax planning, and tax advice to audit clients, subject to the normal audit committee pre-approval requirements, and rules regarding the disclosure of fees paid to the accounting firm for tax services. The preamble nevertheless noted that certain tax services could impair the independence of the accountant. Specifically, audit committees should "scrutinize carefully the retention of an accountant in a transaction initially recommended by the accountant, the sole business purpose of which may be tax avoidance and the tax treatment of which may not be supported in the Internal Revenue Code and the related regulations."\textsuperscript{99}

In 2005, the PCAOB proposed ethics and independence rules concerning, among other things, tax services, whose rules subsequently were approved by the SEC.\textsuperscript{100} PCAOB Rule 3522 provides that an accounting firm is not independent of its audit client if the firm or an affiliate provides non-audit services related to marketing, planning, or opining in favor of the tax treatment of a transaction that is a "confidential transaction" or an "aggressive tax position transaction." For this purpose, a confidential transaction is any transaction that is offered under conditions of confidentiality imposed by an advisor who is paid a fee.\textsuperscript{101} It is therefore not necessary that the conditions of confidentiality be imposed by the accounting firm.\textsuperscript{102} By contrast, an aggressive tax position transaction is a transaction that was initially recommended, directly or indirectly, by the accounting firm and that has a significant purpose of tax avoidance, unless the proposed tax treatment is more likely than not to be allowable under applicable tax laws. The accounting firm may advise an audit client on the tax consequences of structuring a transaction as long as the accounting firm does not recommend an alternative tax transaction structure that is not more likely than not to be allowable under applicable tax laws and a

\textsuperscript{97}See, e.g., 18 U.S.C. §201 et seq.; 5 C.F.R. part 2635; 5 C.F.R. part 3101; 31 C.F.R. part 0; IRS Document 7098; MODEL RULES OF PROF'L CONDUCT R. 1.11 (1983); MODEL CODE OF PROF'L RESPONSIBILITY DR 9-101(B)(1983); Circular 230 §§10.3(f), 10.3(g), 10.4(c), 10.25.

\textsuperscript{98}68 Fed. Reg. 6,006, 6,017 (Feb. 5, 2003).

\textsuperscript{99}Id.


\textsuperscript{101}The definition of a transaction offered under conditions of confidentiality is similar to the definition under the tax shelter reporting rules. See PCAOB Rule 3501(c)(i)(2).

\textsuperscript{102}See PCAOB Staff Questions and Answers, Ethics and Independence Rules Concerning Independence, Tax Services, and Contingent Fees, April 3, 2007, Q&A 1.
significant purpose of which is tax avoidance. Thus, in planning a tax transaction for an audit client, the firm may inform the client about the tax consequences of alternative tax transaction structures, some of which may not be more likely than not to be allowable and have a significant purpose of tax avoidance, provided that the firm does not recommend that the audit client engage in such a transaction. A listed transaction is per se an aggressive tax position transaction. The PCAOB rules also address the provision of tax services to persons in financial reporting oversight roles, and the procedures for audit committee pre-approval of tax services.

As discussed in Section 7.4 above, under Section 6664(d)(3)(B) of the Code, an opinion of a tax advisor may not be relied upon for purposes of the reasonable cause and good faith exception to the penalty under Section 6662A of the Code for reportable transaction understatements if the tax advisor is a “disqualified tax advisor.” A tax advisor is disqualified if the tax advisor (I) is a material advisor and participates in the organization, management, promotion or sale of the transaction or is related to any person who so participates, (II) is compensated directly or indirectly by a material advisor for the transaction, (III) has a fee arrangement with respect to the transaction which is contingent on all or part of the intended tax benefits of the transaction being sustained, or (IV) as determined under regulations, has a disqualifying financial interest with respect to the transaction.

§ 7.6 TO WHOM DOES A PRACTITIONER HAVE DUTIES

Depending on the context and circumstances, a practitioner rendering a tax opinion may have duties to a wide variety of persons. The principal potential beneficiaries of a practitioner’s duties are the following:

- **Client Taxpayer**: A lawyer or CPA advising a client regarding its tax obligations has numerous duties to the client. For example, Canon 7 of the Model Code provides that a lawyer should represent a client zealously within the bounds of the law. More specifically, a lawyer or CPA must act competently and must exercise independent professional judgment in favor of the client. Under tort and contract principles, a lawyer or CPA providing tax advice to a client must use the skill, care and diligence that is commonly possessed and exercised

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103 Id., Q&A 3.


105 MODEL CODE OF PROF’L RESPONSIBILITY Canon 6 (1983); MODEL RULES OF PROF’L CONDUCT R. 1.1 (2003); AICPA Code R. 201 (1988); AICPA Statement on Standards for Tax Services No. 8, Form and Content of Advice to Taxpayers, para. 2 (2000) [hereinafter SSTS No. 8].

by other tax specialists under similar circumstances.\textsuperscript{107}

- **The Tax System and Tax Administrators**: The nature and scope of a lawyer or CPA’s duties to the tax system as a whole is unsettled. Canon 8 of the Model Code provides that a lawyer should assist in improving the legal system. However, under the Model Code, to the extent that a conflict arises between a lawyer’s duties to the legal system and the lawyer’s duties to the client, it generally should be resolved in favor of the client.\textsuperscript{108} For a lawyer serving as advocate, Ethical Consideration 7-19 states more directly that “[t]he duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.”\textsuperscript{109} Under AICPA Statement on Standards for Tax Services No. 1, Tax Return Positions, a CPA’s duties in respect of tax positions are substantially the same as a lawyer’s.\textsuperscript{110} Notwithstanding the client-centered position of the Model Code and the AICPA Statement on Standards for Tax Services No. 1, most commentators express the view that, when providing tax advice to a client, the practitioner’s duty to promote the interests of the

\textsuperscript{107} BERNARD WOLFMAN, JAMES P. HOLDEN & KENNETH L. HARRIS, STANDARDS OF TAX PRACTICE §603.3 (6th ed. 2004).

\textsuperscript{108} See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (1983) (“[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations”); id. at EC 8-4 (a lawyer may advocate legislative or administrative changes on behalf of a client even though he does not agree with them).

\textsuperscript{109} MODEL CODE OF PROF’L RESPONSIBILITY EC 7-19 (1983).

\textsuperscript{110} AICPA Statement on Standards for Tax Services No. 1, Tax Return Positions, para. 6 (2000) [hereinafter, SSTS No. 1] (“[i]n addition to a duty to the taxpayer, a member has a duty to the tax system. However, it is well established that the taxpayer has no obligation to pay more taxes than are legally owed, and a member has a duty to the taxpayer to assist in achieving that result”).
client is limited by a duty to the tax system as a whole.\textsuperscript{111} Such duty generally is justified by the self-assessment nature of the federal income tax system and the inability of the IRS to audit a meaningful percentage of returns filed.\textsuperscript{112} A number of commentators argue, on various theories, that a practitioner has a duty to the tax system regardless of whether a particular transaction is likely to be audited.\textsuperscript{113} The basis and scope of this duty to the

\textsuperscript{111}See, e.g., WOLFMAN ET AL., supra note 107, §101.2; Durst, supra note 111, at 648), that the duties of tax lawyers should be aligned with the client’s obligations (see WOLFMAN ET AL., supra note 107, §101.2; Durst, supra note 111, at 1047–48), that taxpayers should duly assert positions having legitimate authoritative support (see Handelman, Counseling, supra note 111, at 786), and that
system are not clear; beyond basic principles, the views regarding the fundamental sources of a practitioner's duties to the tax system are all over the map.¹¹⁴

- **Non-Client Taxpayers**: Frequently, a practitioner will be asked to render a tax opinion to a third party. For example, a practitioner may be asked to render an opinion to a client's business counterparty regarding the tax effects to the counterparty of a proposed transaction. A practitioner representing an issuer or underwriter in a securities offering may be asked to render an opinion to prospective purchasers of securities regarding the tax treatment of purchasing, holding and disposing of the securities. Finally, a practitioner representing a tax shelter promoter may be asked to render an opinion to prospective investors in the tax shelter. In those circumstances, the practitioner assumes responsibilities to the third party as well as to the client. Under Model Rule 2.3(a), a lawyer may provide such advice if the lawyer reasonably believes that providing the opinion “is compatible with other aspects of the lawyer's relationship with the client.” Where providing the opinion is likely to have a material adverse effect on the client's interests, the lawyer must obtain the client's informed consent before providing the opinion.¹¹⁵ Under the ethical rules, the lawyer rendering an opinion to a third party has a duty of candor and must exercise independent professional judgment.¹¹⁶ Thus, the lawyer must disclose to the third party any limitation on the scope of the opinion or limitation imposed by the client.¹¹⁷ The lawyer must not knowingly make a false statement of material fact or law in providing the opinion. Similar standards apply under the AICPA Code, which provides that a CPA must maintain objectivity and integrity, and must not knowingly misrepresent facts or subordinate his or her judgment to others.¹¹⁸

the flexibility taxpayers and advisors have to structure affairs to minimize taxes creates obligations to the tax system (see WOLFMAN ET AL., supra note 107, §503.1).

¹¹⁴See, e.g., Durst, supra note 111, at 1059–64 (distinguishing between rules imposing normative obligations and those meant to discourage specific activity); Falk, supra note 111, at 663 (“[t]ax shelters raise distinctive problems that justify unique ethical rules for tax shelter advice”); Grauer, supra note 111, at 358 (duty of lawyer derives from taxpayer's duty to file true and correct tax return); Handelman, Counseling, supra note 111, at 781–86 (lawyer's reporting position duties derive from the client's duties to comply with Code as can be best determined); Holden, Practitioners' Standard, supra note 111, at 327 (source of professional standards is "generally not the tax law itself [, but the] authority that has the power to regulate professional practice within the tax field"); Beale, supra note 111, at 632-33 (referring to the societal damage caused by unconstrained tax planning).

¹¹⁵ MODEL RULES OF PROF'L CONDUCT R. 2.3(b)(1983).


¹¹⁷ MODEL RULES OF PROF'L CONDUCT R. 2.3 cmt.

¹¹⁸ AICPA Code R. 102.
A practitioner’s duties to a third party also may arise under tort law principles or the securities laws.119 Depending on the jurisdiction, a variety of standards have been applied to determine a lawyer’s or accountant’s duties to third parties. The predominant approach is set forth in Section 552 of the Restatement (Second) of Torts, which imposes liability on a professional who negligently provides false information on which a third party relies. However, liability will be imposed under the Restatement only if the third party is one of a limited group of persons to whom the professional intends to supply the information or knows that the recipient intends to supply it, and the third party relies upon the information in a transaction the professional intends to influence or knows that the recipient of the information intends to influence, or in a substantially similar transaction.120 If the professional is under a public duty to give the information, liability extends to the class of persons for whose benefit the duty is created in any transaction in which the professional’s duty is intended to protect the class. Other approaches that have been applied to impose a duty on lawyers or accountants toward non-clients include (a) a “balancing of factors” approach; (2) third-party beneficiary theories; (3) fiduciary or agency theories; or (4) the foreseeability of harm.121

Under the securities laws, a lawyer or accountant may have liabilities to a non-client because of a statement made in connection with the purchase or sale of securities or in connection with a public filing regarding an issuer. The standards for imposing liability differ depending on the relevant statutory provision. However, as a general matter, a lawyer or accountant will have a duty to third party purchasers or sellers of securities in respect of inaccurate or incomplete statements if the lawyer or accountant knows or has reason to know that the lawyer’s or accountant’s statements are used in documents communicated to the purchasers or sellers, or in publicly filed documents.122 On the other hand, where a


121 Haft, supra note 11 at 811.

lawyer or accountant has made no statement, liability will arise only if the lawyer or accountant has a fiduciary or similar relationship of trust and confidence with the third party. Nevertheless, courts have found such a fiduciary or similar relationship in a variety of circumstances.

- **Other Third Parties**: A lawyer or accountant who provides a tax opinion that is used in connection with the preparation of the financial accounts of an entity may have liabilities to non-clients who rely on such financial accounts. The practitioner's duties may arise under tort law principles or the securities laws, applying principles similar to those described above regarding duties to non-client taxpayers.

### § 7.7 CONFIDENTIALITY OF TAX OPINIONS

Often the client receiving a tax opinion, or the practitioner rendering the tax opinion, will wish for the opinion to remain confidential. This may be to avoid providing information to the IRS that could expose weaknesses in the taxpayer's legal position, or to preserve the proprietary nature of the practitioner's tax strategies (or the tax strategies of a promoter who engages the practitioner to render the opinion). The ability of a client to maintain the confidentiality of a tax opinion depends on the application of various evidentiary privileges, including the attorney-client privilege, the federal practitioner privilege, and the work-product doctrine. Attempts by

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125. A lawyer also has an ethical duty to maintain client confidences. See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY Canon 4 (1983); MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983). However, that ethical duty is subject to various limitations, including the right of a lawyer to disclose.
a practitioner to assert the confidential or proprietary nature of a tax strategy implicate a variety of rules regarding the promotion of tax shelters.

The attorney-client privilege is an evidentiary privilege protecting confidential communications between a client and an attorney connected with the receipt of legal advice.\(^{126}\) The privilege is available only if certain conditions are met, including the client's reasonable expectation that the communication will remain confidential, and no waiver of the privilege by the client.\(^{127}\) Although the privilege is limited to communications involving lawyers, the work of other professionals may be covered by the privilege if such work is provided as part of a confidential communication to a lawyer for the purpose of rendering legal advice.\(^{128}\) Thus, for example, communications between a client and an accountant, and between the accountant and a lawyer, may be covered by the attorney-client privilege where the accountant is engaged to help the lawyer understand the client's complicated accounting issues.\(^{129}\) On the other hand, the privilege does not apply where the accountant is engaged to provide tax advice directly to the client, even if a lawyer is involved.\(^{130}\)

The attorney-client privilege is limited to advice and other work of a legal nature. Accordingly, the privilege does not cover work outside the traditional scope of legal services, information to comply with law or court order. See MODEL CODE OF PROF' L RESPONSIBILITY DR 4-101(C)(1983); MODEL RULES OF PROF' L CONDUCT R. 1.6(b)(1983).

\(^{126}\) Cf., U.S. v. Jones, 696 F.2d 1069 (4th Cir. 1982) (no attorney-client privilege for legal advice used to prepare materials for marketing tax shelters to third parties); Doe v. Wachovia Corp., 268 F. Supp. 2d 627, 633-35 (W.D.N.C. 2003) (no attorney-client privilege where attorneys sold tax shelter packages without consideration of clients' individual situations); U.S. v. KPMG, 316 F. Supp. 2d 30, 39-41 (D.D.C. 2004) (no attorney-client privilege where accounting firm had a business or marketing arrangement and not a true attorney-client relationship with law firm); Reiserer v. U.S., 479 F.3d 1160, 1165 (9th Cir. 2007) (no attorney-client privilege where documents were received or generated by a third party such as a bank).

\(^{127}\) The privilege will only apply if (1) the purported holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is a lawyer or a lawyer's subordinate, acting as such; (3) the communication relates to a fact of which the lawyer was informed by the client in confidence for the purpose of receiving legal advice or other legal services and not for the purpose of committing a crime or tort; and (4) the privilege has been claimed and not waived by the client. See Robert T. Smith, After the Alamo: Taxpayer Claims of Privilege and the IRS War on Tax Shelters, 98 TAX NOTES 233, 238 (Jan. 13, 2003) (citing U.S. v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950)).

\(^{128}\) U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961).

\(^{129}\) Id. at 921-22.

\(^{130}\) Cavallaro v. U.S., 284 F.3d 236 (1st Cir. 2002); U.S. v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995).
such as routine tax return preparation.\textsuperscript{131} However, legal advice does not fall outside the privilege merely because it concerns issues affecting entries on a tax return.\textsuperscript{132} Thus, for example, tax planning advice may be covered by the privilege even though the positions advised by the lawyer are ultimately reflected in the client’s tax return.\textsuperscript{133} A further question is whether legal advice regarding entries on a tax return lacks privilege either because there was no expectation of confidentiality or because the filing of the tax return constitutes a waiver of the privilege. Clearly, information that is communicated to a lawyer for inclusion in a tax return loses the benefit of the privilege.\textsuperscript{134} Likewise, legal analysis that determines the entries that should be made on a tax return lacks privilege where the analysis is made pursuant to a legal requirement that the taxpayer maintain books and records sufficient to calculate tax liabilities.\textsuperscript{135} Moreover, the privilege may be lost if the taxpayer discloses the substance of legal advice to a tax return preparer or other third party.\textsuperscript{136} On the other hand, the filing of a tax return should not be considered a waiver of all legal analysis leading to the entries in the return.\textsuperscript{137}

Legal advice that is intended to be disclosed to third parties lacks an expectation of confidentiality and accordingly does not qualify for the attorney-client privilege. For example, legal advice supporting tax reserves in audited financial statements is not privileged, because

\textsuperscript{131}See, e.g., U.S. v. Frederick, 182 F.3d 496, 500-01 (7th Cir. 1999); U.S. v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983); 636 F.2d 1028, 1043 (5th Cir. 1981).


\textsuperscript{133}See, e.g., In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037-38 (2d Cir. 1984); U.S. v. ChevronTexaco Corp. 241 F. Supp. 1065, 1076 (N.D. Calif. 2002); U.S. v. Willis, 565 F. Supp. 1186, 1190 (S.D. Iowa 1983); cf., Beale, supra note 111, at 651-54 (arguing that there is no viable distinction between tax planning and nonprivileged return preparation work); Schlicksup v. Caterpillar, Inc., 2011 WL 4007670 (C.D. Ill. 2011) (“[p]roposals on tax-saving strategies and the creation, analysis and implementation of business ideas to bolster the bottom line are not confidential communications of legal advice”).


\textsuperscript{136}Id. See also Fidelity International Currency Advisor A Fund, L.L.C. v. U.S., 2008 WL 4809032 at 9-12 (D. Mass. 2008) (380 legal opinion letters prepared based upon a template that was agreed with the tax shelter promoter are not privileged).

the analysis may be shown to the company’s auditors. Likewise, if a taxpayer asserts a defense against penalties by claiming reliance on legal advice, the taxpayer will waive the privilege with respect to such advice and all other communications relating to the same subject matter. Finally, certain types of communications such as the identity of the client, attorney billing records and attorney escrow account records generally are not covered by the privilege.

No federal common law privilege exists for communications between an accountant and a client. However, Section 7525 of the Code creates a limited privilege for tax advice provided by a “federally authorized tax practitioner” (an “FATP”), including accountants and enrolled agents. Under Section 7525, “the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney” apply to a communication between a taxpayer and a FATP “to the extent that the communication would be considered a privileged communication if it were between a taxpayer and an attorney.” The privilege is subject to a number of limitations. It applies only to “tax advice,” meaning advice given by an individual with respect to a matter that is within the scope of the individual’s authority to practice before the IRS. It only applies to noncriminal tax matters before the IRS and noncriminal tax proceedings in

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138 U.S. v. El Paso Co., 682 F.2d at 539-41; U.S. v. Textron Inc. 507 F. Supp. 2d 138, 147, 151 (D.R.I. 2007), vacated and remanded on other grounds, 577 F.3d 21 (1st Cir. 2009), cert. denied, 130 S. Ct. 3320 (2010) (tax accrual workpapers consisting of lawyers’ opinions regarding items that might be challenged because they involve areas in which the law is uncertain and lawyers’ assessment regarding the taxpayer’s chances of prevailing in any ensuing litigation are protected by the attorney-client privilege; however, disclosure of the workpapers to the taxpayer’s auditors waived the privilege).


140 See, e.g., U.S. v. Tratner, 511 F.2d 248 (7th Cir. 1975). The privilege may be applied to the identity of the client when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication. Id. at 252. See also U.S. v. BDO Seidman, 337 F.3d 802 (7th Cir. 2003). In BDO Seidman, the court noted that communications between a client and a practitioner will not create an expectation of confidentiality regarding the identity of the client if the practitioner has an obligation to disclose the identity of the client pursuant to the material advisor list maintenance rules of Section 6112 of the Code. Id. at 812-13. See also Doe v. KPMG, L.L.P., 325 F. Supp. 2d 746, 753-54 (N.D. Tex. 2004); U.S. v. KPMG LLP, 316 F. Supp. 2d 30, 35-37 (D.D.C. 2004); Reiserer, 479 F.3d at 1165-66.

federal court brought by or against the U.S.¹⁴² The privilege does not apply to a written communication made in connection with the promotion of a person’s direct or indirect participation in a “tax shelter,” meaning a partnership, entity, plan or arrangement having as a significant purpose the avoidance or evasion of federal income tax.¹⁴³ Finally, the privilege under Section 7525 of the Code is subject to all the limitations and exceptions applicable to the attorney-client privilege.¹⁴⁴

The attorney work product doctrine is another evidentiary privilege that applies to materials prepared in anticipation of litigation.¹⁴⁵ The doctrine is summarized in Rule 26(b)(3) of the Federal Rules of Civil Procedure:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

¹⁴²Accordingly, the privilege does not apply to proceedings before other regulatory agencies, proceedings not involving the U.S., or proceedings in State courts.

¹⁴³I.R.C. §6662(d)(2)(C)(ii). See Salem Fin., Inc. v. U.S., 102 Fed. Cl. 793 (2012) (advice rendered after taxpayer entered into a purported tax shelter not treated as made in connection with the “promotion” of the tax shelter); Valero Energy Corp. v. U.S., 569 F.3d 626, 631-34 (7th Cir. 2009) (defining “promotion” as the encouragement of the taxpayer’s participation in a tax shelter, and not merely communications in furtherance of the selling or marketing of a tax shelter). See also United States v. BDO Seidman, LLP, 492 F.3d 806, 822-828 (7th Cir. 2007) (discussing the scope of the tax shelter exception to the tax practitioner exception); Valero Energy Corp. v. U.S., 2008 WL 4104368 (N.D. Ill. Aug. 28, 2008) (government does not need to demonstrate that the underlying transaction lacked economic reality or was driven solely or primarily by tax-avoidance concerns in order to rely on the tax shelter exception to the privilege); Countryside Limited Partnership v. Comm’r, 132 T.C. 201, 204-06 (2009) (“promotion” does not include advice rendered by a long-standing advisor within the scope of his expertise and upon request by the client for an hourly fee paid to his employer, where the advisor had no other stake in the advice).

¹⁴⁴BDO Seidman, LLP, 337 F.3d at 810; Frederick, 182 F.3d at 502.

The work product doctrine applies only to material that was prepared “in anticipation of litigation.” For this purpose, “litigation” includes civil and criminal trial proceedings, adversarial proceedings before an administrative agency, arbitration, alternative dispute resolution proceedings such as mediation, grand jury proceedings and governmental investigations. However, the work product doctrine does not extend to materials prepared in anticipation of an IRS audit, absent a realistic possibility that the audit will lead to litigation.

In order to be protected by the work product doctrine, material must have been prepared or obtained because of the prospect of litigation. Accordingly, material prepared to inform a business decision may be protected if the material was prepared because of the prospect of litigation. However, protection will not be given to a document that is prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the prospect of litigation. In addition, the prospect of litigation must be

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149 U.S. v. Deloitte LLP, 610 F.3d 129, 136-38 (D.C. Cir. 2010) (material developed in anticipation of litigation can be incorporated into a document produced during a financial audit without ceasing to be work product); U.S. v. Roxworthy, 457 F.3d 590, 598-99 (6th Cir. 2006); U.S. v. Adlman, 134 F.3d 1194, 1204 (2d Cir. 1998); Regions Financial Corp. v. U.S., 2008-1 U.S.T.C. Para. 50,345 (N.D. Ala. 2008) (tax analyses prepared by lawyers and accountants and derivative documents protected by the work product doctrine even though they may have been created, used by or available for use by the taxpayer’s independent financial auditors); U.S. v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1081-82 (N.D. Calif. 2002); Long-Term Capital Holdings v. U.S., 2003-1 U.S.T.C. Para. 50,105 (D. Conn. 2002). But see U.S. v. Textron, 577 F.3d 21 (tax reserve workpapers that analyzed prospective liabilities that might result from litigation with the IRS were not protected by the work product doctrine because they were not prepared for potential use in current or possible litigation); El Paso Co., 682 F.2d at 543 (tax reserve workpapers were not protected by the work product doctrine because they were not prepared primarily to assist in litigation).

150 Textron, 577 F.3d at 30; Adlman, 134 F.3d at 1202; U.S. v Ackert, 76 F. Supp. 2d 222, 227 (D. Conn. 1999). See also Fidelity International Currency Advisor A Fund, L.L.C. v. U.S., 2008 WL 4809032 at 13-14 (opinion letters prepared to induce taxpayers to invest in tax shelters are not protected by the work product doctrine); Schlicksup v. Caterpillar, Inc., 2011 WL 4007670 (C.D.
The work product doctrine recognizes two types of work product: “opinion work product,” which generally may not be discovered absent a waiver by the party asserting the privilege, and “fact work product,” which may be discovered if the adverse party shows substantial need for disclosure and an inability without undue hardship to obtain equivalent evidence by other means. Opinion work product are materials reflecting the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, and fact work product are all other materials prepared because of the prospect of litigation. Neither type of work product is limited to materials prepared by a lawyer. Thus, for example, tax opinions of accountants may be protected opinion work product. However, no work product privilege exists for tax accrual workpapers prepared by an independent auditor in the course of a routine review of corporate financial statements.

Unlike material protected by the attorney-client privilege, the disclosure of work product to a third party will not waive the privilege unless such disclosure substantially increases the opportunity for potential adversaries to obtain the information. Thus, for example, opinion work product that is disclosed to an auditor for purposes of obtaining a financial audit opinion, or that is disclosed to an accountant for purposes of preparing a tax return may remain protected. If a taxpayer asserts a defense against penalties by claiming reliance on opinion work product, the taxpayer will waive the privilege in respect of such work product. Moreover, such waiver will extend to all non-opinion work product concerning the same subject matter, including any

Ill. 2011) (“even if a prospect of litigation existed, most of these documents were not prepared because of that prospect. They impart tax analysis, planning and advice, focusing on strategies to minimize taxes, analyze tax consequences and comply with tax laws”).

151Roxworthy, 457 F.3d at 599-601; Adlman, 68 F.3d at 1501.

152Deloitte, 610 F.3d at 135-36 (workpapers prepared by accountants that contained impressions of taxpayer’s lawyers).

153Adlman, 134 F.3d at 1204; ChevronTexaco Corp., 241 F. Supp. 2d at 1081-82.

154Arthur Young & Co., 465 U.S. at 818-19. The First and Fifth Circuits have likewise ruled that no work product privilege exists for tax accrual workpapers prepared by the taxpayer or its legal counsel. Textron, 577 F.3d 21; El Paso Co., 682 F.2d at 543.

155Deloitte, 610 F.3d at 139-143; Regions Financial Corp., 2008-1 U.S.T.C. Para. 50,345; Long-Term Capital Holdings, 2003-1 U.S.T.C. Para. 50,304.

156Black & Decker Corp. v. U.S., 219 F.R.D. 87, 92 (D. Md. 2003). However, the mere fact that a document is expected to be used by a taxpayer in articulating its tax-treatment rationale to the IRS during an audit in order to avoid a penalty will not cause the document to lose work product protection. U.S. v. Roxworthy, 457 F.3d at 598-99.
related tax reserve analysis.\textsuperscript{157}

In most cases, the taxpayer is the one who seeks to preserve the confidentiality of a tax opinion addressed to the taxpayer. However, in certain cases the tax practitioner or a promoter (the “advisor”) will assert that the tax opinion and the underlying tax strategies are confidential or proprietary. As discussed in Section 7.3 above, such assertions generally will cause the transaction to be a reportable transaction under Treasury Regulation Section 1.6011-4(b)(3) if the advisor is paid a minimum fee, and places a limitation on disclosure by the taxpayer of the federal income tax treatment or tax structure of the transaction that protects the confidentiality of the advisor’s tax strategies. In that case, the taxpayer will be required to report its participation in the confidential transaction to the IRS and retain related documentation. Also, the advisor will be treated as a “material advisor” and required to report the transaction under Section 6111 of the Code, and maintain a list under Section 6112 of the Code.\textsuperscript{158}

The list under Section 6112 of the Code must include various documentation, including information identifying the taxpayer, a detailed description of the transaction that describes its tax structure and expected tax treatment, a summary of the intended or expected tax treatment of the taxpayer, and copies of written materials, including tax analyses or opinions, relating to the transaction that are material to an understanding of the purported tax treatment or tax structure of the transaction and that have been shown to the taxpayer (or any other potential investor) or its advisors.\textsuperscript{159} The material advisor must provide the list within twenty days following a request by the IRS.

\section*{§ 7.8 TAXPAYER PLANNING OPINIONS}

Practitioners frequently render tax opinions in connection with a client's tax planning. In rendering such planning opinions, a practitioner is subject to a range of ethical rules and regulations of practitioner conduct. The ethical rules include the general principles regarding the role of lawyers and CPAs as advisors, and the ethical guidance related to tax return positions, to the extent that the positions advised on by the practitioner ultimately will be reflected in the client’s tax return. For lawyers, the relevant guidance is ABA Formal Opinion 85-352.\textsuperscript{160} For CPAs,

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\textsuperscript{157}\textit{Salem Fin.}, 102 Fed. Cl. at 795-97. \textit{But see Black & Decker Corp.}, 219 F.R.D. at 92 (the waiver of work product protection will be limited to the opinion work product actually disclosed and does not extend to other opinion work product having the same subject matter).
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\textsuperscript{158}In order to be a “material advisor,” the advisor must have made a “tax statement” to or for the benefit of the taxpayer concerning a tax benefit related to the transaction.
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\textsuperscript{159}The material advisor must maintain the list even if a person asserts a claim of privilege with respect to the written materials. Treas. Reg. §301.6112-1(e)(2). The regulations previously prescribed procedures for asserting a claim that the copies of written materials relating to the transaction are protected by the attorney-client privilege or the privilege of Code §7525.
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the relevant guidance is SSTS No. 1, Interpretation No. 1-1, “Realistic Possibility Standard,” of SSTS No. 1161 and Interpretation No. 1-2, “Tax Planning,” of SSTS No. 1.162 The regulatory rules under Circular 230 include Section 10.51(a)(13), which prohibits the giving of a false or misleading opinion, knowingly, recklessly, or through gross incompetence; Section 10.35, which imposes an obligation on practitioners rendering advice to have the appropriate levels of competence; Section 10.34, which provides standards for advising with respect to tax return positions; and Section 10.37, which provides requirements for written advice.162 Circular 230 Section 10.36 requires on individuals having or sharing the principal authority and responsibility for overseeing a firm’s practice governed by Circular 230, including the provision of advice concerning federal tax matters, to take reasonable steps to ensure that the firm has adequate procedures in effect for all personnel for purposes of complying with the relevant provisions of Circular 230.

[A] General Ethical Principles Regarding Lawyers and CPAs as Advisors

As a general matter, the ethical rules for lawyers and CPAs recognize and define the special role of a lawyer or CPA as an advisor. Unlike an advocate, who deals generally with past conduct and has a duty to resolve doubts as to the bounds of the law in favor of the client, a lawyer serving as an advisor has a duty to give his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and to inform the client of the practical effect of such decision.163 A CPA providing tax advice to a client should use judgment to ensure that the tax advice reflects professional competence and appropriately serves the client’s needs.164 The CPA should exercise professional judgment and should consider such factors as the importance of the transaction and the amounts involved, the specific or general nature of the client’s inquiry, the time available for development and submission of the advice, the technical complications presented, the existence of authorities and precedents, the tax sophistication of the client and the need to seek other professional advice.


162.1 Former Section 10.35 of Circular 230 provided standards for certain “covered opinions,” which imposed specific standards for due diligence and legal analysis, and required certain disclosures to be made on the face of an opinion in certain circumstances. Those rules were repealed for advice rendered on or after June 12, 2014. See T.D. 9668, 79 Fed. Reg. 33,685 (June 12, 2014).

163 MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3, 7-5 (1983). See also MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. (“[a] client is entitled to straightforward advice expressing the lawyer’s honest assessment”).

164 SSTS No. 8, paras. 2, 7 (2000).
[B] Formal Opinion 85-352

Formal Opinion 85-352 sets forth standards for lawyers providing advice regarding uncertain tax return positions. It provides that a lawyer may recommend positions favorable to a client if the lawyer has a good faith belief that the positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. Good faith requires some realistic possibility of success if the position is litigated, but may exist even if the lawyer believes that the client’s position probably will not prevail. Formal Opinion 85-352 also states the following duties of a lawyer in rendering tax advice:

- The lawyer should counsel the client as to whether a court is likely to sustain the position.
- The lawyer should counsel the client regarding the potential penalties and other legal consequences, including a judgment as to whether the position has sufficient merit to avoid penalties with or without disclosure.
- A lawyer must not mislead the IRS deliberately, either by misstatements, silence, or permitting the client to mislead.

A Special Task Force established by the ABA Tax Section issued a report concluding that Formal Opinion 85-352 applies both to advice rendered in the preparation of a tax return and to other advice involving tax return positions, including tax advice rendered while structuring transactions or preparing transaction documents. According to the Special Task Force Report, a position has a realistic possibility of success if the likelihood of success before a court closely approaches one-third, or if the position is supported by “substantial authority.” A position with a realistic possibility of success may be asserted to obtain a concession in settlement negotiations.

[C] STSS No. 1 and Interpretations No. 1-1 and No. 1-2

STSS No. 1 sets forth standards for CPAs providing advice regarding uncertain tax return positions. Such advice includes giving advice in connection with transactions, documents or other events. It provides that a CPA may not recommend a position favorable to a taxpayer unless the CPA has a good faith belief that the position has a realistic possibility of being sustained administratively or judicially on its merits if challenged, or unless the CPA concludes that the position is not frivolous and the CPA advises the taxpayer to appropriately disclose. In

165Paul J. Sax, James P. Holden, Theodore Tannenwald, Jr., David E. Watts & Bernard Wolfman, Report of the Special Task Force on Formal Opinion 85-352, 39 TAX LAW. 635 (1986) [hereinafter, the Special Task Force Report]. The Special Task Force Report was approved by the Council of the Section of Taxation of the ABA but not reviewed or approved by the ABA Standing Committee on Ethics and Professional Responsibility, which had originally issued Formal Opinion 85-352. Accordingly, the authoritative effect of the Special Task Force Report is not clear. WOLFMAN ET AL., supra note 107, §204.1.

166A frivolous position is one that is knowingly advanced in bad faith and is patently improper. The Special Task Force Report supra note 165, para. 9.
order to meet the foregoing standards, the CPA should in good faith believe that the tax return position is warranted in existing law or can be supported by a good-faith argument for an extension, modification, or reversal of existing law. If the CPA has a good-faith belief that more than one tax return position meets the foregoing standards, the CPA’s advice concerning alternative acceptable positions may include a discussion of the likelihood that each such position might or might not cause the taxpayer’s tax return to be examined and whether the position would be challenged in an examination.

Also, when recommending tax return positions, a CPA should, when relevant, advise the taxpayer regarding potential penalty consequences of such tax return position and any opportunity to avoid such penalties through disclosure. A CPA should not recommend a tax return position that the CPA knows exploits the audit selection process or serves as a mere arguing position advanced solely to obtain leverage in the bargaining process of settlement negotiation.

Interpretation No. 1-1 interprets the “realistic possibility” standard of SSTS No. 1. The realistic possibility standard is less stringent than the substantial authority standard and the more likely than not standard, but is stricter than the reasonable basis standard. In determining whether a tax return position meets the realistic possibility standard, a CPA may rely on authorities in addition to those evaluated when determining whether substantial authority exists, including well-reasoned treatises, articles in recognized professional tax publications, and other reference tools and sources of tax analyses commonly used by tax advisors and return preparers making the determination, the CPA should take the following steps: (i) establish relevant background facts; (ii) distill the appropriate questions from those facts; (iii) search for authoritative answers to those questions; (iv) resolve the questions by weighing the authorities uncovered by that search; and (v) arrive at a conclusion supported by the authorities. The CPA should consider the weight of each authority as part of the analysis.

Interpretation No. 1-2 sets forth a CPA’s responsibilities in connection with tax planning in respect of both prospective and completed transactions, including recommending or expressing an opinion (whether written or oral) on (a) a tax return position, or (b) a specific tax plan developed by the CPA, the taxpayer, or a third party. When issuing an opinion with respect to the results of the tax planning service, the CPA should (i) establish the relevant background facts, (ii) consider the reasonableness of the assumptions and representations, (iii) apply the pertinent authorities to the relevant facts, (iv) consider the business purpose and economic substance of the transaction, if relevant to the tax consequences of the transaction, and (v) arrive at a conclusion supported by the authorities. When a CPA assists a taxpayer in a tax planning transaction in which the taxpayer has obtained an opinion from a third party, and the taxpayer is looking to the CPA for an evaluation of the opinion, the CPA should be satisfied as to the source, relevance and persuasiveness of the opinion, which would include considering

167 Interpretation 1-1, supra note 161, para. 5.

168 Interpretation 1-2, supra note 162, para. 6.
whether the opinion meets the requirements listed above. In considering the due diligence necessary to establish the relevant background facts, the CPA should consider whether it is appropriate to rely on an assumption concerning facts in lieu of either other procedures to support the advice or a representation from the taxpayer or another person. Likewise, a CPA must take care to assess whether an assumption and representation is reasonable, including considering its source and consistency with other information known to the CPA. The CPA should understand the business purpose and economic substance of the transaction, when relevant to the tax consequences, and in written advice the business purpose of the transaction generally should be described. If the business reasons are relevant to the tax consequences, it is insufficient to merely assume that a transaction is entered into for valid business reasons without specifying what those reasons are. A CPA should be diligent in applying such procedures as are appropriate under the circumstances and the scope of the engagement to understand and evaluate the entire transaction.

[D] Circular 230 Section 10.51(a)(13)

Section 10.51(a) of Circular 230 sets forth types of incompetent and disreputable conduct for which a practitioner may be sanctioned. Section 10.51(a)(13) includes in those types of conduct the giving of a false opinion, knowingly, recklessly, or though gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent tax opinions. False opinions include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the tax opinion or offering material are false and misleading. Reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.

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169 Id. para. 7.

170 Id. para. 8.

171 Id. para. 9.

172 Id. para. 10.

173 Id.

174 Id. para. 11.

175 [Reserved.]

176 [Reserved.]
[E] Circular 230 Section 10.35

Section 10.35 of Circular 230 requires practitioners to possess the necessary competence to engage in practice before the IRS, which means the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the relevant matter. A practitioner may become competent for the relevant matter through various methods, such as consulting with experts in the relevant area or studying the relevant law.

[F] Circular 230 Section 10.34

Section 10.34 of Circular 230 provides standards for practitioners providing advice regarding uncertain tax return positions. Under Section 10.34, a practitioner may not willfully, recklessly or through gross incompetence, sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that (a) lacks a reasonable basis, (b) is an unreasonable position under Code Section 6694(a)(2), or (c) is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in Code Section 6694(b)(2). Likewise, a practitioner may not willfully, recklessly, or through gross incompetence, advise a client to take a position on a tax return or preparing a portion of a tax return containing a position that (a) lacks a reasonable basis, (b) is an unreasonable position under Code Section 6694(a)(2), (c) is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in Section 6694(b)(2).\footnote{Under Circular 230 §10.34(b), a practitioner may not advise a client to take a position on a document submitted to the IRS unless the position is not frivolous, and may not advise a client to submit a document to the IRS that, among other things, is frivolous.}

[G] Circular 230 Section 10.37

Section 10.37 of Circular 230 provides standards for written advice on federal tax issues.\footnote{Written advice for this purpose does not include government submissions on matters of general policy, or continuing education presentations (other than presentations marketing or promoting transactions) provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on federal tax matters. \textit{Id.} §10.37(a)(1).} A practitioner rendering such advice must base the advice on reasonable factual and legal assumptions (including assumptions as to future events); reasonably consider all relevant facts and circumstances that the practitioner knows or should know; use reasonable efforts to identify and ascertain the facts relevant to written advice on each federal tax matter; not rely on assumptions, representations, and so on if such reliance would be unreasonable; relate applicable law and authorities to the facts; and not take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.\footnote{\textit{Id.} §10.37(a)(2).} Reliance on representations, statements, findings, or agreements is considered unreasonable if the
practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.\textsuperscript{180}

In evaluating whether a practitioner giving written advice has complied with the foregoing requirements, the Treasury Department Office of Professional Responsibility will apply a “reasonable practitioner” standard, considering all facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client.\textsuperscript{181} In the case of an opinion used in marketing a transaction with a significant tax avoidance purpose, the “reasonable practitioner” standard will be applied “with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances.”\textsuperscript{182}

§ 7.9 TAX RETURN POSITION OPINIONS

A practitioner who renders a tax opinion for use in preparing a tax return or claim of refund is subject to a range of ethical and regulatory principles and rules. The most significant ethical principles are set forth in Formal Opinion 85-352, STSS No. 1 and Interpretations No. 1-1 and No. 1-2, discussed in Section 7.8 above. The most relevant regulatory rules under Circular 230 are Section 10.51(a)(13), which prohibits the giving of a false or misleading opinion, knowingly, recklessly, or through gross incompetence; Section 10.35, which imposes an obligation on practitioners rendering advice to have the appropriate levels of competence; Section 10.34, which provides standards for advising with respect to tax return positions; and Section 10.37, which provides requirements for written advice other than covered opinions, all of which are discussed in Section 7.8 above. As discussed below, the practitioner also is subject to Section 10.22 of Circular 230, and may be subject to penalties under Code Section 6694, discussed below. Finally, the practitioner must consider the rules under which the client may use the practitioner's advice as a defense against penalties, discussed in Section 7.4 above.

Circular 230 Section 10.22

Section 10.22(a) of Circular 230 requires a practitioner to exercise due diligence (1) in preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to IRS matters; (2) in determining the correctness of oral or

\textsuperscript{180}Id. §10.37(a)(3). A practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Id. §10.37(b). Reliance is not reasonable where (1) the practitioner knows or reasonably should know that the opinion of the other person should not be relied on; (2) the practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or (3) the practitioner knows or reasonably should know that the other person has a prohibited conflict of interest. Id.

\textsuperscript{181}Id. §10.37(c)(1).

\textsuperscript{182}Id. §10.37(c)(2).

\textsuperscript{183}–215[Reserved.]
written representations made by the practitioner to the Department of the Treasury; and (3) in
determining the correctness of oral or written representations made by the practitioner to
clients with reference to any matter administered by the IRS. 216

In Director, Office of Professional Responsibility v. John M. Sykes, III,217 an Administrative
Law Judge with the Office of Professional Responsibility considered an action by the IRS Office of
Professional Responsibility (“OPR”) against John Sykes, III, a tax partner at a prominent law firm.
The OPR sought to suspend Sykes for a year based on an opinion he provided to Long Term
Capital (“LTC”) in respect of the basis of preferred stock that was contributed to LTC as part of a
tax shelter transaction. The preferred stock was issued in exchange for equipment under leases
in which there had been a prepayment of rent. The OPR alleged that the opinion was defective
in that it: (a) was a short form opinion that did not contain a detailed analysis of the law and
applicable law; (b) that the opinion did not consider the possible effect of Notice 95-53,218 which
stated that the IRS would challenge lease stripping transactions; (c) that the opinion contained
no analysis of relevant judicial doctrines (substance over form, sham transaction and step
transaction); (d) that the opinion contained no analysis of the economic substance of the lease
stripping transactions; (e) that Sykes failed to make sufficient inquiry into the assumptions in the
opinion; and (f) that Sykes failed to make sufficient inquiry into whether the lease stripping
transaction had a reasonable expectation of pre-tax profit and whether the parties to the
transaction complied with the contractual terms of the transaction.

The ALJ concluded that the rendering of the opinion constituted practice before the IRS and
thus subject to Circular 230 because Sykes knew that the taxpayer intended to rely on the
opinion as a potential defense against penalties. The ALJ further concluded that:

1. The use of a short form opinion was not a failure to exercise due diligence because such
   forms of opinion were customary at the time for the type of transaction, and that there was
   no rule at the time prohibiting the use of such a form of opinion (Circular 230 § 10.37 now
   requires that written advice relate applicable law and authority to the facts).

2. The failure of the opinion to discuss Notice 95-93 was not a failure to exercise due diligence,
   because the taxpayer was aware of the notice, and because Sykes had considered carefully
   the statutes and legal doctrines referenced therein in connection with earlier opinions that
   had been given in the original lease stripping transactions.

3. The failure to reconsider the application of the legal doctrines at the time of the later
   opinion was not a failure to exercise due diligence, because no facts had occurred that
   would change the original analysis.

4. Sykes' reliance on representations regarding the parties' expectations of profits given by a

216Section 10.22(b) of Circular 230 provides circumstances when a practitioner who relies on
the work product of another person will be presumed to have exercised due diligence.

217Complaint No. 2006-1.

2181995-2 C.B. 334.
lease advisory firm having an economic interest in the transaction was not a failure to exercise due diligence, because the lease advisory firm was a leading firm with a reputation for professionalism and integrity, and because Sykes reviewed underlying data showing the parties' profit expectations.

5. The evidence did not support the OPR's assertion that Sykes failed to investigate the appraiser's qualifications, or that he had reservations regarding the appraisal. Specifically, the fact that Sykes' firm had previously arranged for an accounting firm to review the appraisal's methodology and conclusions (which it confirmed were reasonable) did not constitute grounds for doubting the appraisal.

This decision is instructive for a number of reasons. As an initial matter, it is clear that if the IRS successfully challenges a tax-motivated transaction (particularly in a high profile case), there is a risk that the OPR will seek to challenge the behavior of the tax lawyer giving advice to the taxpayer. The ALJ's decision was critical of the OPR's position in the case, noting that the OPR "initiated this disciplinary proceeding based on the fact that [Sykes] used short form opinions in advising [LTC]...It has provided little more than that fact as evidence in support of its complaint allegations and has failed to prove any of those allegations by clear and convincing evidence, as required by Circular No. 230." The fact that Sykes ultimately prevailed in this proceeding (subject to any appeal by the OPR to the Secretary of the Treasury) is relatively cold comfort, as the proceeding required him to go through an OPR investigation, the issuance of a complaint and a full trial regarding his actions, which included numerous expert and other witnesses.

Second, the decision provides an indication of the types of activities that the OPR may seek to challenge in situations involving tax-motivated transactions. Those include (a) the use of summary opinions, (b) the failure to note the published position of the IRS on relevant issues, (c) the failure to discuss applicable legal doctrines in detail, (d) failure to question assumptions and representations, and (e) failure to question other documentary support such as transaction documents and appraisals. It also is likely that the OPR will inquire regarding a law firm's internal procedures for rendering tax opinions in these types of situations.

Finally, the decision provides a good description of the type of careful legal work by Sykes and his partners at his firm that avoided the imposition of penalties. In particular, they were careful in (i) bringing Notice 95-53 to LTC's attention, (ii) reviewing the legal doctrines that were asserted by Notice 95-53 and structuring the transaction to fit within those doctrines, (iii) crafting and evaluating the representations supporting the opinion, and (iv) selecting the appraiser and evaluating the appraisal.

Code Section 6694

Section 6694 of the Code imposes penalties on tax return preparers for understatements of federal tax due to either an undisclosed position for which there was not substantial authority, or a disclosed position that had no reasonable basis.219 In the case of a tax shelter (as defined in

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219 The penalty generally is the greater of $1,000 or 50% of the income derived (or to be derived) by the tax return preparer from the preparation of a return or claim with respect to which the penalty was imposed. I.R.C. §6694(a). However, the penalty is the greater of $5,000 or
Code Section 6662(d)(2)(C)(ii)) or a reportable transaction to which Code Section 6662A applies, the penalties are imposed for understatements of federal tax unless it is reasonable to believe that the position would more likely than not be sustained on its merits.\textsuperscript{220} However, the IRS has announced that until further guidance is issued, a position with respect to a tax shelter (as defined in Code Section 6662(d)(2)(C)(ii)) will not give rise to the penalties if there is substantial authority for the position and the tax return preparer advises the taxpayer of the penalty standards applicable to the taxpayer in the event that the transaction is deemed to have a significant purpose of Federal tax avoidance or evasion.\textsuperscript{221} An exception from the penalties applies where there is reasonable cause for the understatement and the tax return preparer

\textsuperscript{220}Prior to May 25, 2007, Section 6694 imposed penalties in respect of any undisclosed position for which there was not a realistic possibility of being sustained on its merits, and any disclosed position that was frivolous. Section 8246 of the Small Business and Work Opportunity Act of 2007, Title VIII-B of Pub. Law 110-28 (121 Stat. 190) (May 25, 2007) amended the standard to any undisclosed position unless it is reasonable to believe that the position would more likely than not be sustained on its merits, or a disclosed position that had no reasonable basis. Section 506 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Div. C of Pub. Law 110-343 (122 Stat. 3765) (Oct. 3, 2008) amended the standard retroactively for returns prepared after May 25, 2007 to apply a substantial authority standard to undisclosed positions with respect to non-tax shelter items.

\textsuperscript{221}Notice 2009-5, 2009-3 I.R.B. 309. The advice to the taxpayer must explain that, if the position has a significant purpose of tax avoidance or evasion, there needs to be at a minimum substantial authority for the position, the taxpayer must possess a reasonable belief that the tax treatment was more likely than not the proper treatment in order to avoid a penalty under Code §6662(d) as applicable, and disclosure in accordance with Treas. Reg. §1.6662-4(f) will not protect the taxpayer from assessment of an accuracy-related penalty if Code §6662(d)(2)(C) applies to the position. The tax return preparer must contemporaneously document the advice in the tax return preparer’s files. If a “nonsigning tax return preparer” (as defined below) provides advice to another tax return preparer regarding a position with respect to a tax shelter, the position will not give rise to the penalties if there is substantial authority for the position and the nonsigning tax return preparer provides a statement to the other tax return preparer about the penalty standards applicable to the tax return preparer under Code §6694. Id.
acted in good faith.\textsuperscript{222}

In general, a tax return preparer is a person who prepares for compensation all or a substantial portion of a federal tax return or claim of refund or an employer of one or more such persons.\textsuperscript{223} A person who furnishes to a taxpayer or other preparer sufficient information and advice so that the completion of the return or claim of refund is largely a mechanical or clerical matter is considered a tax return preparer, even though that person does not actually place or review placement of information on the return or claim of refund.\textsuperscript{224} A person who renders advice which is directly relevant to the determination of the existence, characterization, or amount of an entry on a return or claim of refund, will be regarded as having prepared that entry.\textsuperscript{225} However, a person who is not a “signing tax return preparer” (i.e., a tax return preparer who is required to sign the return) will only be treated as a tax return preparer (a “nonsigning tax return preparer”) if that person prepares all or a substantial portion of a return or claim for refund with respect to events that have occurred at the time the advice is rendered. For this

\textsuperscript{222}I.R.C. §6694(a). The exception does not apply to the enhanced penalty imposed for willful or reckless conduct under I.R.C. §6694(b).

\textsuperscript{223}I.R.C. §7701(a)(36). Treas. Reg. §301.7701-15(a). No more than one individual associated with a firm may be treated as a preparer with respect to the same position on the same return or claim of refund for purposes of I.R.C. §6694. Treas Reg. §1.6694-1(b)(1). An employer or partnership of a preparer subject to penalty under I.R.C. §6694 is also subject to penalty only if (i) one or more members of the principal management (or principal officers) of the firm or a branch office participated in or knew of the proscribed conduct; (ii) the employer or partnership failed to provide reasonable and appropriate procedures for review of the position for which the penalty is imposed; or (iii) the firm disregarded such review procedures through willfulness, recklessness or gross indifference in the formulation of the advice, or the preparation of the return or claim of refund, that included the position for which the penalty is imposed. Treas. Reg. §§1.6694-2(a)(2); 1.6694-3(a)(2). The “one preparer per firm” rule applies separately to each position on the return giving rise to an understatement. Accordingly, an individual is a tax return preparer with respect to a position if the individual is primarily responsible within his or her firm for the position., regardless of whether such individual signed the return Treas. Reg. §1.6694-1(b).

\textsuperscript{224}Treas. Reg. §301.7701-15(c).

\textsuperscript{225}Treas. Reg. §301.7701-15(b)(3)(i). Whether a portion of a return or claim for refund is a substantial portion is determined based upon whether the person knows or reasonably should know that the tax attributable to the portion is a substantial portion of the tax required to be shown on the return or claim for refund. Thus, a single tax entry may constitute a substantial portion of the tax required to be shown on a return. Factors to be considered in determining whether a portion of a return or claim for refund is a substantial portion include but are not limited to the size and complexity of the item relative to the taxpayer's gross income, and the size of the understatement attributable to the item compared to the taxpayer's reported tax liability. Id.
purpose, time spent on advice that is given after events have occurred that represents less than 5 percent of the aggregate time incurred by such individual with respect to the position(s) giving rise to the understatement generally will not be taken into account.\textsuperscript{226}

A tax return preparer is considered reasonably to believe that the tax treatment of an item is more likely than not the proper treatment (without taking into account the possibility that the tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled) if the tax return preparer analyzes the pertinent facts and authorities in the manner described in Treas. Reg. \$ 1.6662-4(d)(3)(ii) and reasonably concludes in good faith that there is a greater than 50 percent likelihood that the tax treatment of the item will be upheld if challenged by the IRS.\textsuperscript{227} Substantial authority has the same meaning as in Treas. Reg. \$ 1.6662-4(d)(2).\textsuperscript{228} A position will be considered to have a reasonable basis if it has a reasonable basis applying the principles of Treas. Reg. \$ 1.6662-3(b)(3).\textsuperscript{229}

\textsuperscript{226}Treas. Reg. \$301.7701-15(b)(2)(i). Time spent on advice before the events have occurred will be taken into account if all facts and circumstances show that the position(s) giving rise to the understatement is primarily attributable to the advice, the advice was substantially given before events occurred primarily to avoid treating the person giving the advice as a tax return preparer, and the advice given before events occurred was confirmed after events had occurred for purposes of preparing a tax return. \textit{Id.}

\textsuperscript{227}Treas. Reg. \$1.6694-2(b) (1). The determination whether a tax return preparer meets the standard will be determined based upon all facts and circumstances, including the tax return preparer's diligence. In determining the level of diligence in a particular situation, the tax return preparer's experience with the area of Federal tax law and familiarity with the taxpayer's affairs, as well as the complexity of the issues and facts, will be taken into account. \textit{Id.} The applicability of court cases to the taxpayer by reason of the taxpayer's residence in a particular jurisdiction generally is not taken into account in determining whether it is reasonable to believe that the position would more likely than not be sustained on the merits. However, the tax return preparer may reasonably believe that the position would more likely than not be sustained on the merits if the position is supported by controlling precedent of a United States Court of Appeals to which the taxpayer has a right of appeal with respect to the item. Treas. Reg. \$1.6694-2(b)(4).

\textsuperscript{228}Notice 2009-5, 2009-3 I.R.B. 309. The analysis prescribed in Treas. Reg. \$1.6665-4(d)(3)(i) through (ii) applies for purposes of determining whether substantial authority is present. The authorities considered in making the determination are those authorities described in Treas. Reg. \$1.6662-4(d)(3)(iii). The applicability of court cases to the taxpayer by reason of the taxpayer's residence in a particular jurisdiction generally is not taken into account in determining whether there is substantial authority for a position. However, there is substantial authority for a position if the position is supported by controlling precedent of a United States Court of Appeals to which the taxpayer has a right of appeal with respect to the position. \textit{Id.}

\textsuperscript{229}Treas. Reg. \$1.6694-2(d)(2).
In determining whether a tax return preparer has complied with the relevant standards, a tax return preparer generally may rely in good faith without verification upon information furnished by the taxpayer, another advisor, tax return preparer or other party (including another advisor or tax return preparer at the tax return preparer’s firm), and is not required to audit, examine or review books and records, business operations, or documents or other evidence in order to verify independently the taxpayer’s information. However, the preparer may not ignore the implications of information furnished to the preparer or actually known by the preparer, and must make reasonable inquiries if the information as furnished appears to be incorrect or incomplete. Additionally, if relevant provisions of the Code or the Treasury Regulations require that specific facts and circumstances exist, for example, that the taxpayer maintain specific documents, before a deduction may be claimed, the preparer must make appropriate inquiries to determine the existence of such facts and circumstances.

Treas. Reg. §1.6694-2(d)(3) provides guidance in respect of the disclosure obligations for both signing tax return preparers and nonsigning tax return preparers. The disclosure requirement under Code Section 6694 will be deemed satisfied by a nonsigning tax return preparer who provides advice to the taxpayer with respect to a position that is not a tax shelter or a reportable transaction and that does not satisfy the substantial authority standard if the advice includes a statement informing the taxpayer of any opportunity to avoid penalties under §6662 that could apply to the position as a result of disclosure and the standards for disclosure to the extent applicable.

For purposes of satisfying the disclosure standards, each return position for which there is a reasonable basis but for which there is not substantial authority must be addressed by the tax return preparer. The advice to the taxpayer with respect to each position, therefore, must be particular to the taxpayer and tailored to the taxpayer’s facts and circumstances. A general disclaimer will not satisfy the requirement that the tax return preparer provide and contemporaneously document advice regarding the likelihood that a position will be sustained on the merits and the potential application of penalties as a result of the position.

§ 7.10 PENALTY PROTECTION OPINIONS

A taxpayer that understates its tax may be subject to potentially burdensome penalties; however, many of those penalties may be avoided in certain circumstances where the taxpayer

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230 Treas. Reg. §1.6694-1(e)(1).

231 Treas. Reg. §1.6694-2(d)(3)(ii)(A). The tax return preparer must also contemporaneously document the advice in the tax return preparer's files. Id. If a non-signing preparer provides advice to another preparer with respect to a position that is not a tax shelter or a reportable transaction and that does not satisfy the substantial authority standard, disclosure of that position is adequate if the tax return preparer advises the other tax return preparer that disclosure under Code §6694(a) may be required. The tax return preparer must also contemporaneously document the advice in the tax return preparer’s files. Treas. Reg. §1.6694-2(d)(3)(ii)(B).

has relied upon a legal opinion in asserting the position. Accordingly, a practitioner may be called upon to render an opinion for the purpose of allowing a taxpayer to assert reliance on such opinion as a defense against penalties if the relevant position is ultimately disallowed. In that situation, the practitioner must be attentive both to the rules governing the effectiveness of a reliance defense, as well as the ethical and regulatory obligations imposed on the practitioner in rendering such an opinion.

In rendering any penalty protection opinion, it is important to first identify the potential penalties that may apply. Thus, as discussed above in Section 7.05, a taxpayer may be subject to penalties for fraud, negligence or disregard of rules or regulations, substantial understatements of federal income tax, and understatements with respect to reportable transactions. In general, a defense to the fraud penalty can be established if the taxpayer relied in good faith on an opinion of a practitioner that the position is sustainable. A defense to the negligence penalty can be established if the taxpayer reasonably relied upon an opinion that the position has a reasonable basis. A defense to the penalty for disregard of rules or regulations can be established if the taxpayer reasonably relies on an opinion that a position contrary to a revenue ruling or notice has a realistic possibility of being sustained on the merits. In order to establish any defense of good faith or reasonable reliance on a practitioner's opinion, it will be necessary that the taxpayer's choice of the practitioner was reasonable, that the taxpayer gave the practitioner the necessary information and did not unduly limit the scope of the practitioner's analysis, and that the opinion was in fact relied upon by the taxpayer and was not merely obtained as a shield to protect a questionable tax position. Alternatively, as discussed below, for each of these penalties, the taxpayer can assert the general defense under Section 6664(c) of reasonable cause and good faith.

In the case of the substantial understatement penalty and the reportable transaction understatement penalty, there is no reliance defense other than the reasonable cause and good faith defenses under Sections 6664(c) and 6664(d) of the Code. However, for understatements not involving a tax shelter or a reportable transaction, a defense may be established for an undisclosed position having substantial authority. Whether substantial authority exists is an objective analysis, but the analytical process set forth in the regulations is very similar to the process used to prepare an opinion. Thus, in practice a taxpayer's ability to assert a substantial authority defense will be strengthened if the taxpayer in fact receives an opinion that applies the methodology set forth in the regulations, even though the opinion itself will not constitute substantial authority.

Under Section 6664(c) of the Code, a taxpayer will not be subject to the penalties for fraud, negligence, disregard of rules or regulations, or substantial understatement of federal income tax if the taxpayer shows reasonable cause for the position and that it acted in good faith by using reasonable efforts to assess its proper tax liability. In this regard, reliance on an opinion will constitute reasonable cause and good faith only if such reliance was reasonable and the taxpayer acted in good faith taking into account all relevant facts and circumstances, including

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233 For example, an opinion rendered after the taxpayer has reported the position on a tax return normally cannot be used to establish a reliance defense. Long-Term Capital Holdings v. United States, 330 F. Supp. 2d 122, 206-08 (D. Conn. 2004), aff'd 150 Fed. Appx. 40, 42.
the taxpayer’s education, knowledge and experience, and whether the practitioner has a conflict of interest. Moreover, the opinion itself must satisfy various requirements. As discussed in greater detail above in Section 7.04, the opinion must be based upon all pertinent facts and circumstances, and must not be based on unreasonable factual or legal assumptions or unreasonably rely on representations, statements, findings, or agreements of the taxpayer or another person. Also, in the case of an opinion that a regulation is invalid, the position must be disclosed, and failure to disclose a reportable transaction will be treated as a strong indication that the taxpayer did not act in good faith.

A practitioner rendering an opinion that is intended to support a reasonable cause and good faith defense under Section 6664(c) therefore must consider both the taxpayer’s state of mind, and the substantive merits of the position, as well as the taxpayer’s disclosure of any position that a regulation is invalid or a position related to a reportable transaction. In assessing the substantive merits of the position, the practitioner must take into account the taxpayer’s purposes (and their relative weight) for entering into the transaction and structuring it in a particular manner, and must consider whether the taxpayer has disclosed all relevant facts. In addition, the practitioner must rely only on reasonable factual or legal assumptions (including assumptions as to future events), and must determine the reasonableness of any representations, statements, findings, or agreements on which the opinion relies.

Additional requirements apply to opinions rendered to support a defense against the substantial understatement penalty for tax shelter items of corporations. An opinion will not serve as a defense unless there is substantial authority for the tax treatment of the item, and based on all relevant facts and circumstances, the corporation reasonably believed when it filed the tax return that the tax treatment of the item was more likely than not the proper treatment. If the corporation asserts reliance upon an opinion to establish its reasonable believe regarding the correctness of the position, (1) such reliance must be reasonable and in good faith, (2) the opinion must apply the methodology set forth in the regulations for determining whether substantial authority exists, and (3) the opinion must unambiguously conclude that there is a greater than 50% likelihood that the position will be sustained (without taking into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue may be settled). Accordingly, a practitioner rendering a penalty defense opinion regarding a tax shelter item of a corporation must consider both the substantive merits of the position and whether the taxpayer will reasonably rely on the opinion.

Section 6664(d) of the Code imposes both substantive and procedural requirements for the assertion of the reasonable cause and good faith defense against reportable transaction understatement penalties. To assert the defense, the taxpayer must have adequately disclosed the position, there must be substantial authority for the position, and the taxpayer must have reasonably believed that the position was more likely than not correct, based on the facts and law at the time the return was filed (and without taking into account the possibility that the return would not be audited, the position would not be raised on audit, or that the position would be resolved through settlement if raised). The taxpayer may not assert reliance on an opinion to establish its reasonable belief regarding the correctness of the position, if the opinion is rendered by a “disqualified tax advisor” or the opinion is a “disqualified opinion.”

A practitioner rendering an opinion that is intended to support a reasonable cause and good faith defense under Section 6664(d) therefore must consider (1) whether the relevant position
will be disclosed, (2) whether the position has substantial authority, (3) whether the taxpayer will rely in good faith on the opinion, and (4) whether the practitioner is a disqualified tax advisor. In addition, the practitioner must (a) base the opinion on the facts and law at the time the return is filed, (b) rely only on reasonable factual or legal assumptions (including assumptions as to future events), and must determine the reasonableness of any representations, statements, findings, or agreements on which the opinion relies, (c) identify and consider in the opinion all relevant facts, and (d) meet such other requirements as the IRS may prescribe.

§ 7.11 FINANCIAL AUDIT OPINIONS

A practitioner providing a tax opinion to support the financial reporting of a tax position must consider both the accounting rules for the reporting of uncertain tax positions, and the potential securities law consequences of an erroneous opinion. The Financial Accounting Standards Board (“FASB”) published on July 13, 2006, Interpretation No. 48, Accounting for Uncertainty in Income Taxes (“FIN 48”). Under FIN 48, the benefit of a tax position may be booked only if the position is more likely than not to be upheld, applying a two-step analysis. The first step is to evaluate the tax position for recognition by determining whether the position is more likely than not to be sustained on audit, including resolution of related appeals or litigation processes, if any, and taking into account the facts, circumstances and information available at the reporting date. The second step is to measure the appropriate amount of the benefit to recognize. The amount of benefit to recognize will be measured as the largest amount of tax benefit that has a greater than 50 percent likelihood of being ultimately realized upon ultimate settlement with a taxing authority having full knowledge of all relevant information. The tax position should be derecognized when it is no longer more likely than not to be sustained.

The financial reporting of tax positions implicates a wide variety of relevant securities law rules. However, the most relevant to a tax practitioner rendering a tax opinion for financial audit purposes are the SEC rules promulgated under Section 303 of the Sarbanes-Oxley Act of 2002 regarding improper influence on audits, and the various SEC disciplinary sanctions in respect of attorneys and accountants. SEC Rule 13b2-2(b)(1) prohibits officers and directors of a company having registered securities, or that is a reporting company under the Securities Exchange Act of 1934, or any other person “acting under the direction thereof” to directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently induce any independent public or

234See generally Brett Cohen & Reto Micheluzzi, “Lifting the Fog: Accounting for Uncertainty in Income Taxes,” 113 TAX NOTES 233 (Oct. 16, 2006). In Announcement 2010-9, 2010-7 I.R.B. 408, and Announcement 2010-17, 2010-13 I.R.B. 515, the IRS announced that it is developing a schedule requiring certain taxpayers to report on their tax returns uncertain tax positions for which a tax reserve must be established under FIN 48 or other accounting standards, as well as any position for which the taxpayer has not recorded a tax reserve because (i) the taxpayer expects to litigate the position, or (ii) the taxpayer has determined that the IRS has a general administrative practice not to examine the position. In Announcement 2010-30, 2010-19 I.R.B. 668, the IRS released a draft schedule for public comment.
certified public accountant engaged in the performance of an audit or review of the financial statements of the issuer that are required to be filed with the SEC if that person knew or should have known that such action, if successful, could result in rendering the issuer's financial statements materially misleading. The relevant SEC release notes that in appropriate circumstances, persons acting under the direction of an issuer's officers or directors may include partners or employees of the accounting firm and attorneys. Moreover, the SEC release specifically states that the types of conduct that may constitute improper influence include providing an auditor with an inaccurate or misleading legal opinion. The SEC release also states that negligent statements that mislead an auditor are covered by the rule, provided that the person making the statement knows or should have known that the statement could result in investors being provided with misleading financial statements or a misleading audit report.

The SEC may sanction attorneys or accountants under a wide range of provisions, including injunctive actions brought under Section 20(b) of the Securities Act of 1933 and Section 21(d) of the Securities Exchange Act of 1934; administrative proceedings under Section 15(c)(4) of the Securities Exchange Act of 1934; administrative proceedings under Rule 2(e) of the SEC Rules of Practice; a Report of Investigation disseminated publicly by the SEC under Section 21(a) of the Exchange Act; and entry of an administrative cease and desist order under Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934. The standards for enforcement actions vary depending on the nature of the proceeding and the underlying securities law violation. However, in a number of circumstances, the rendering of a negligent opinion may be grounds for sanction.

235 Section 303(b) of the Sarbanes-Oxley Act of 2002 states that the SEC shall have exclusive authority to enforce its rule. Accordingly, there is no private cause of action for a violation of Rule 13b2-2.


237 Id. at 31,823.

238 Id. at 31,822 (“We do not intend to hold any party accountable for honest and reasonable mistakes or to sanction those who actively debate accounting or auditing issues. We do believe, however, that those third parties who, under the direction of an issuer's officers or directors, mislead or otherwise improperly influence auditors when they know or should know that their conduct could result in investors being provided with misleading financial statements or a misleading audit report, should be subject to sanction by the Commission.”).

239 See Haft, supra note 11 at 844-55. See also §12.29 of Chapter 12, “Legal Opinion Liability.”

240 See, e.g., SEC v. Universal Major Indus. Corp., 546 F.2d 1044 (2d Cir. 1976) (affirming the issuance of a permanent injunction against attorney who had negligently aided and abetted violations of Section 5 of the Securities Act of 1933 by issuing opinion letters permitting the illegal sale of unregistered securities); SEC v. Spectrum Ltd., 489 F.2d 535 (2d Cir. 1973) (negligent issuance of an opinion letter permitting the sale of unregistered securities sufficient to establish a violation of Section 17(a) of the Securities Act); KPMG LLP v. SEC, 289 F.3d 109,
Lawyers who prepare documents that are filed with, or submitted to, the SEC, or that are incorporated into any such documents, may be subject to the SEC's “up-the-ladder” reporting rules for lawyers promulgated under Section 307 of the Sarbanes-Oxley Act of 2002. 17 C.F.R. Section 205.2(a)(1)(iii) defines “appearing and practicing before the [SEC]” to include, in relevant part, “providing advice in respect of the United States securities laws or the [SEC's] rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, the [SEC.] including the provision of such advice in the context or preparing, or participating in the preparation of, any such document.” Such advice may include, for example, preparing a tax discussion in a document filed with the SEC, or preparing a tax opinion underlying such discussion. An attorney who so appears and practices before the SEC is required to report any “material violation” to designated persons or bodies of the issuer. For this purpose, a “material violation” includes a material violation of an applicable U.S. Federal or State securities law, a material breach of fiduciary duty arising under U.S. Federal or State law, or a similar material violation of any U.S. Federal or State law.

Finally, as discussed in Section 7.6 above, lawyers and accountants who provide tax opinions in connection with the preparation of financial accounts of an entity may have liabilities to third parties under tort principles or the securities laws.

§ 7.12 TAX SHELTER MARKETING OPINIONS

A tax shelter normally cannot be marketed without a persuasive opinion addressed to the investor in the tax shelter. Although frequently investors will seek advice from their own tax advisors, it is customary for the tax shelter promoter to arrange for a practitioner to render a so-called “marketing opinion” to potential investors. The potential investors normally will not be clients of the practitioner; consequently, the opinion is a form of third party marketing opinion. Such opinions raise complex issues under the ethical rules, Circular 230, and applicable tort and securities law principles.

As discussed in Section 7.6 above, the ethical rules impose a number of responsibilities on a practitioner rendering a third party opinion, including (i) the obligation of a lawyer to ensure that providing the opinion is compatible with other aspects of the lawyer’s relationship with the client, (ii) the lawyer’s duty to act with candor, including a duty to disclose to the third party any limitation on the scope of the lawyer’s opinion, and (iii) the lawyer’s duty to exercise independent professional judgment. In addition, ABA Formal Opinion 346 provides guidance regarding tax opinions used to market tax shelters to third parties, setting forth "disciplinary

126 (D.C. Cir. 2002) (affirming the SEC's determination that negligence is an appropriate basis for violations underlying a cease-and-desist order under Section 21C of the Securities Exchange Act of 1934 in cases where a person is alleged to cause a primary violation that does not require scienter).
standards” and “ethical considerations.” The “disciplinary standards” prohibit, among other things, the rendering of a false opinion, including one that is intentionally or recklessly misleading or that is based on facts that the lawyer knows are untrue.

The “ethical considerations” in Formal Opinion 346 reflect a “body of principles,” but do not “constitut[e] absolute requirements, the violation of which may result in sanctions.” The ethical considerations require a lawyer, among other things, to (a) obtain access to relevant information, inquire as to the relevant facts and be satisfied that the promoter’s representations regarding the venture are clearly identified, reasonable and complete; (b) relate the law to the facts and identify facts that are assumed; (c) consider all material tax issues and ensure that all issues having a reasonable possibility of challenge by the IRS are addressed in the offering materials; (d) provide, where possible, an opinion on the likely outcome of such issues; (e) provide, where possible, an overall evaluation whether the tax benefits in the aggregate are likely to be realized; and (f) ensure that the offering materials correctly describe the tax shelter opinion.

Formal Opinion 346 contains a narrow definition of a “tax shelter,” but it reasonably should apply to any marketed investment, plan or arrangement designed to reduce federal taxes. The Opinion limits the definition of “tax shelter opinion” to broadly marketed opinions and tax disclosures in marketing materials. Accordingly, it excludes the following types of advice:

241ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 346 (1982) [hereinafter Formal Opinon 346]. Formal Opinion 346 was originally issued on June 1, 1981, but after criticism by tax practitioners, it was withdrawn and reissued in revised form on January 29, 1982.

242Id.

243Formal Opinion 346 defines a tax shelter as follows:

[A]n investment which has as a significant feature for federal income or excise tax purposes either or both of the following attributes: (1) deductions in excess of income from the investment being available in any year to reduce income from other sources in that year, and (2) credits in excess of the tax attributable to the income from the investment being available in any year to offset taxes on income from other sources in that year. Excluded from the term are investments such as, but not limited to, the following: municipal bonds; annuities; family trusts; qualified retirement plans; individual retirement accounts; stock option plans; securities issued in a corporate reorganization; mineral development ventures, if the only tax benefit would be percentage depletion; and real estate where it is anticipated that deductions are unlikely to exceed gross income from the investment in any year, and that any tax credits are unlikely to exceed the tax on the income from that source in any year.

244Formal Opinion 346 generally defines a tax shelter opinion as follows:
• Advice rendered solely to the offeror, so long as neither the name of the lawyer nor the fact that a lawyer has rendered tax advice is referenced in the offering materials or in sales promotion efforts;

• Cases in which a small group of investors negotiates the transaction directly with the offeror of securities and depends solely on other advisors for tax advice.

Under Formal Opinion 346, a lawyer should consider all “material tax issues” or ensure that they are considered by another competent professional. The opinion should address each material tax issue having a reasonable possibility of an IRS challenge. For this purpose, a “material” tax issue is an issue having a significant effect in sheltering from taxes. Formal Opinion 346 also requires a tax shelter opinion to state the probable outcome of each material tax issue, where possible. The tax disclosure in the offering materials should include an overall evaluation as to whether the aggregate tax benefits are likely to be realized. In particular, the lawyer should state whether the benefits probably will or probably will not be realized or whether the probabilities are evenly divided. If such a judgment is impossible, the lawyer should explain why and assure full disclosure in the offering materials of the assumptions and risks. Formal Opinion 346 does not set forth a minimum level of confidence for a tax shelter opinion. However, if it reaches a negative conclusion, that conclusion must be clearly and prominently noted in the offering materials.

As discussed in Section 7.8 above, Section 10.37 of Circular 230 imposes standards for written advice and provides that in evaluating whether a practitioner giving written advice has complied with the foregoing requirements, the Treasury Department Office of Professional Responsibility will apply a “reasonable practitioner” standard, considering all facts and circumstances. In the case of an opinion used in marketing a transaction with a significant tax benefit, the advice by a lawyer concerning the federal tax law applicable to a tax shelter if the advice is referred to either in offering materials or in connection with sales promotion efforts directed to persons other than the client that engages the lawyer to give the advice. The [definition] includes the tax aspects…portion of the offering materials prepared by the lawyer whether or not a separate opinion letter is issued.

See Wolfman et al., supra note 107, §503.4.2.6 (stating that “it would be difficult to conclude that a practitioner who provides an adequately disclosed negative opinion violated a professional standard”).

Formal Opinion 346 also notes that a tax shelter opinion may question the validity of a revenue ruling or the reasoning of a lower court opinion. However, there must be a complete explanation of such questioning, including an assessment of what position the IRS is likely to take on the issue and, if applicable, a summary of why this position is wrong, and a statement of the risks of an adversarial proceeding.

[Reserved.]
avoidance purpose, the “reasonable practitioner” standard will be applied with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances.

Tax shelter marketing opinions are subject to the same tort and securities law principles as apply to other third party marketing opinions. However, because of the importance of the tax opinion to the marketing of a tax shelter, the caselaw in the tax shelter area is substantially more developed than the caselaw relating to other types of tax opinions, such as generic tax disclosure in non-tax shelter securities offerings. As discussed in Section 7.6 above, tort liability arises only where the practitioner rendering a tax shelter opinion has a duty to the tax shelter investor. In general, under the predominant standards set forth in the Restatement (Second) of Torts, a duty generally arises where the practitioner intends to supply (or knows that the tax shelter promoter intends to supply) the opinion to a limited group of persons including the investor, and the investor relies on the opinion in a transaction that the practitioner intends (or knows the promoter intends) to influence, or a substantially similar transaction. Practitioners who render tax shelter marketing opinions often are directly involved in both the design and marketing of the shelters to a target group of investors, and accordingly a duty to those investors normally can be found. In addition, practitioners who participate in promoting tax shelters may be found liable under a theory of unjust enrichment.

As discussed in Section 7.6 above, the standards for imposing liability on a practitioner under the securities laws depends on the relevant statutory provision. However, as a general matter, a practitioner rendering a tax shelter marketing opinion will have a duty to investors in the tax shelter if the practitioner knows or has reason to know that the opinion is used in documents communicated to investors or in publicly filed documents. Again, given the role of a practitioner rendering a tax shelter marketing opinion, a duty to investors under the securities laws normally can be found.

Finally, in extreme cases a practitioner who provides a tax opinion in connection with an abusive tax shelter marketing scheme may face potential criminal liabilities. For example, the recent indictment of certain former partners of KPMG LLP and Sidley, Austin, Brown & Wood, LLP alleges that the defendants developed a series of fraudulent transactions designed solely to

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249 In a number of recent cases, purchasers of tax shelters have asserted claims that practitioners who rendered tax shelter opinions breached their duties to the purchasers by participating in the development and marketing of tax shelters they should have known would fail, and in certain cases by concealing their role in the development and marketing of the tax shelters. See, e.g., Green v. Beer, 2009 WL 911015 (S.D.N.Y. 2009); Amato v. KPMG LLP, 433 F. Supp. 2d 460 (M.D. Pa. 2006); Heller v. Deutsche Bank, 97 A.F.T.R.2d 2005-1372 (E.D. Pa. 2005); Seippel v. Jenkens & Gilchrist, P.C., 341 F. Supp. 2d 363 (S.D.N.Y. 2004).


produce tax losses and then drafted opinion letters intended to disguise the true nature of the transactions from the IRS. The defendants moved to dismiss the relevant indictment counts because the tax shelters were not clearly invalid. The court denied the motion on the ground that the government intended to prove that the transactions were never intended to happen as described in the tax opinions.

Appendices

Appendix A REORGANIZATION OPINION

This opinion (1) is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code, and (2) was written to support the promotion or marketing of the transactions or matters addressed in this opinion. Each taxpayer that is not a client of [Law Firm] in respect of the U.S. federal tax matters addressed herein should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

[Date]

[Target]

Re: Agreement and Plan of Merger among [Buyer Parent], [Buyer], [Target], [Company Parent], and [Shareholder]

Ladies and Gentlemen:

We have acted as counsel to [Target] (the “Company”), a Delaware limited liability company, in connection with an Agreement and Plan of Merger, dated [Date], entered into by and among [Buyer Parent] (“Buyer Parent”), a Delaware corporation, [Buyer], a Delaware limited liability company and a wholly owned subsidiary of Buyer Parent (the “Buyer”), the Company, [Company Parent], a [non-U.S.] company and the sole holder of all of the Company Percentage Interests, and [Shareholder], the sole holder of all of the issued and outstanding shares of Common Stock (the “Merger Agreement”). Pursuant to the Merger Agreement, the Company will merge with and into Buyer, with Buyer being the surviving entity (the “Merger”). In connection with the Merger, you have requested that we provide, pursuant to Section...  

253 In addition, a recent indictment charged four current and former partners of Ernst & Young with tax fraud conspiracy and related crimes arising out of tax shelters promoted by Ernst & Young.

rule” width="4” ][] of the Merger Agreement, an opinion regarding the treatment of the Merger under the Internal Revenue Code of 1986, as amended (the “Code”). All capitalized terms used herein, unless otherwise defined, have the meanings set forth in the Merger Agreement.

In connection with rendering these opinions, we have examined originals or copies, certified or otherwise identified to our satisfaction, of (i) the Merger Agreement, (ii) written representations and covenants of the Company and Buyer Parent concerning certain facts underlying and relating to the Merger set forth in letters dated as of the date hereof (the “Representation Letters”), and (iii) such other documents and materials as we have deemed necessary or appropriate for purposes of the opinions set forth below. In our examination, we have assumed the genuineness of all signatures, the legal capacity of all natural persons, the authenticity of all documents submitted to us as originals, the conformity to original documents of all documents submitted to us as certified or photostatic copies, and the authenticity of the originals of such copies. We have not made an independent investigation of the facts set forth in the Merger Agreement or such other documents that we have examined. We have consequently assumed in rendering these opinions that the information presented in such documents or otherwise furnished to us accurately and completely describes in all material respects all facts relevant to the Merger.

We have also assumed for purposes of rendering these opinions that (i) the representations of the Company and Buyer Parent set forth in the Representation Letters are true, complete, and correct, without regard to any qualification set forth in the Representation Letters to the effect that a representation therein is made to a person's knowledge; (ii) the statements made concerning the Merger in the Merger Agreement are true, complete, and correct; (iii) the Merger will be consummated in accordance with the terms of the Merger Agreement; (iv) the Company and Buyer Parent have complied with and will continue to comply with the covenants and agreements set forth in the Merger Agreement; (v) the statements in paragraph [ ] of the Representation Letter of the Company and paragraph [ ] of the Representation Letter of Buyer Parent would be true if the second sentence of each such paragraph referred to the Closing Date, instead of the last business day before the Closing Date. Our opinions could be affected if any of the facts set forth in the Merger Agreement or the Representation Letters are or become inaccurate or if there is a failure to comply with any of the covenants and agreements set forth in the Merger Agreement or the Representation Letters.

The opinions set forth below are based on the Code, the legislative history with respect thereto, rules and regulations promulgated by the Treasury Department thereunder, court decisions, and published rulings and administrative pronouncements issued by the Internal Revenue Service with respect to all of the foregoing, all as in effect and existing on the date hereof, and all of which are subject to change at any time, possibly on a retroactive basis. In addition, there can be no assurance that positions contrary to those stated in our opinions may not be asserted by the Internal Revenue Service, or that a court considering these issues would not hold contrary to such opinions.

Based on and subject to the foregoing, and subject to the qualifications and limitations stated herein and such examinations of law as we have deemed necessary, we are of the opinion that, for U.S. federal income tax purposes (i) the merger of Company with and into Buyer pursuant to and in accordance with the terms of the Merger Agreement will constitute a “reorganization” within the meaning of Section 368(a) of the Code, and (ii) the Company and
Buyer Parent will each be a “party to a reorganization” within the meaning of Section 368(b) of the Code.

We express our opinions herein only as to those matters specifically set forth above and no opinion should be inferred as to the tax consequences of the Merger under any state, local, or foreign law, or with respect to other areas of U.S. federal taxation. The opinions stated above represent our conclusions as to the application of the U.S. federal income tax laws existing as of the date of this letter to the Merger. We can give no assurance that legislative enactments, administrative changes, or court decisions may not be forthcoming that would modify or supersede our opinions.

The opinions set forth above represent our conclusions based upon the assumptions, documents, facts, and representations referred to above. Any material amendments to such documents, changes in any significant facts, or inaccuracy of such assumptions or representations could affect the accuracy of our opinions. The opinions set forth herein are as of the date hereof, and we undertake no obligation to update these opinions in the event that there is either a change in the legal authorities, facts, or documents on which these opinions are based or an inaccuracy in the representations or assumptions on which we have relied in rendering these opinions.

These opinions are being provided to you for your benefit in connection with the Merger. These opinions may not be relied on by you for any other purpose or relied on by, or furnished to, any other person without our prior written consent.

Very truly yours,

Appendix B SECURITIES DISCLOSURE OPINION

[Date]

[Issuer]

Ladies and Gentlemen:

We have acted as counsel to [Issuer], a Maryland corporation (the “Company”), in connection with the Company’s filing of a registration statement on Form S-3 (the “Registration Statement”) with the U.S. Securities and Exchange Commission under the Securities Act of 1933, as amended, on or about the date hereof. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Registration Statement.

In rendering the opinions expressed herein, we have examined and relied upon such documents, records, and instruments as we have deemed necessary in order to enable us to render the opinions expressed herein. In our examination of the foregoing documents, we have assumed, with your consent, that (i) all documents reviewed by us are original documents, or true and accurate copies of original documents, and have not been subsequently amended; (ii)
the signatures on each document are genuine; (iii) each party who executed such documents had proper authority and capacity; (iv) all representations and statements set forth in such documents are true, correct, and complete in all material respects; (v) all obligations imposed by any such documents on the parties thereto have been or will be performed or satisfied in accordance with their terms; and (vi) the Company at all times has been and will continue to be organized and operated in accordance with the terms of such documents.

For purposes of rendering the opinions stated below, we have also assumed, with your consent, the accuracy of the factual representations contained in a certificate of representations, dated as of the date hereof, provided to us by the Company (the “Certificate”). These representations generally relate to the operation and classification of the Company as a real estate investment trust (“REIT”) under the Internal Revenue Code of 1986, as amended (the “Code”).

Based upon and subject to the foregoing, we are of the opinion that:

(1) commencing with its taxable year ended December 31, 1998, the Company has been organized and operated in conformity with the requirements for qualification and taxation as a REIT under the Code, and the Company’s proposed method of operation, as represented by the Company and as described in the Registration Statement, will permit the Company to continue to so qualify; and

(2) although the discussion set forth under the heading “Certain U.S. Federal Income Tax Consequences” in the Registration Statement does not purport to discuss all possible U.S. federal income tax consequences of the ownership and disposition of the Company's securities, such discussion, although general in nature, constitutes, in all material respects, a fair and accurate summary under current law of the material U.S. federal income tax consequences of the ownership and disposition of the Company's securities, subject to the qualifications set forth therein.

The opinions set forth in this letter are based on relevant provisions of the Code, Treasury Regulations promulgated thereunder, interpretations of the foregoing as expressed in court decisions, legislative history, and existing administrative rulings and practices of the Internal Revenue Service (“IRS”) (including its practices and policies in issuing private letter rulings, which are not binding on the IRS except with respect to a taxpayer that receives such a ruling), all as of the date hereof. These provisions and interpretations are subject to change, which may or may not be retroactive in effect, and which may result in modifications of our opinions. Our opinions do not foreclose the possibility of a contrary determination by the IRS or a court of competent jurisdiction, or of a contrary determination by the IRS or the Treasury Department in regulations or rulings issued in the future. In this regard, an opinion of counsel with respect to an issue represents counsel’s best professional judgment with respect to the outcome on the merits with respect to such issue, if such issue were to be litigated, but an opinion is not binding on the IRS or the courts and is not a guarantee that the IRS will not assert a contrary position with respect to such issue or that a court will not sustain such a position asserted by the IRS.

Further, the opinions set forth herein represent our conclusions based upon the documents, facts, and representations referred to above. Any material amendments to such documents,
changes in any significant facts, or inaccuracy of such representations could affect the opinions set forth herein. Moreover, the Company's qualification and taxation as a REIT depend upon the Company's ability to meet, through actual operating results, requirements under the Code regarding its income, assets, distributions to its stockholders, and diversity of stock ownership. Because the Company's satisfaction of these requirements will depend on future events, no assurance can be given that the actual results of the Company's operations for any particular taxable year will satisfy the tests necessary to qualify for taxation as a REIT under the Code. We have not undertaken to review the Company's compliance with these requirements on a continuing basis. Although we have made such inquiries and performed such investigations as we have deemed necessary to fulfill our professional responsibilities as counsel, we have not undertaken an independent investigation of all of the facts referred to in this letter and the Certificate.

The opinions set forth in this letter are: (i) limited to those matters expressly covered and no opinion is to be implied in respect of any other matter; (ii) as of the date hereof; and (iii) rendered by us at the request of the Company.

We hereby consent to the filing of this opinion with the U.S. Securities and Exchange Commission as an exhibit to the Registration Statement and to the references therein to us. In giving such consent, we do not thereby admit that we are within the category of persons whose consent is required under Section 7 of the Securities Act of 1933, as amended, or the rules and regulations of the U.S. Securities and Exchange Commission promulgated thereunder.

Very truly yours,
Regulations Governing Practice before the Internal Revenue Service

Title 31 Code of Federal Regulations, Subtitle A, Part 10, published (June 12, 2014)
communication was mailed or otherwise distributed. The copy must be retained by the practitioner for a period of at least 36 months from the date of the last transmission or use.

(d) Improper associations. A practitioner may not, in matters related to the Internal Revenue Service, assist, or accept assistance from, any person or entity who, to the knowledge of the practitioner, obtains clients or otherwise practices in a manner forbidden under this section.

(e) Effective/applicability date. This section is applicable beginning August 2, 2011.

(Approved by the Office of Management and Budget under Control No. 1545-1726)

§ 10.31 Negotiation of taxpayer checks.

(a) A practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability.

(b) Effective/applicability date. This section is applicable beginning June 12, 2014.

§ 10.32 Practice of law.

Nothing in the regulations in this part may be construed as authorizing persons not members of the bar to practice law.

§ 10.33 Best practices for tax advisors.

(a) Best practices. Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service. In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following:

(1) Communicating clearly with the client regarding the terms of the engagement. For example, the advisor should determine the client’s expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.

(2) Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts.

(3) Advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy-related penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice.

(4) Acting fairly and with integrity in practice before the Internal Revenue Service.

(b) Procedures to ensure best practices for tax advisors. Tax advisors with responsibility for overseeing a firm’s practice of providing advice concerning Federal tax issues or of preparing or assisting in the preparation of submissions to the Internal Revenue Service should take reasonable steps to ensure that the firm’s procedures for all members, associates, and employees are consistent with the best practices set forth in paragraph (a) of this section.

(c) Applicability date. This section is effective after June 20, 2005.

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) Tax returns.

(1) A practitioner may not willfully, recklessly, or through gross incompetence —

(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or
(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(b) Documents, affidavits and other papers —

(1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.

(2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —

(i) The purpose of which is to delay or impede the administration of the Federal tax laws;

(ii) That is frivolous; or

(iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

(c) Advising clients on potential penalties —

(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —

(i) A position taken on a tax return if —

(A) The practitioner advised the client with respect to the position; or

(B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.

(3) This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.

(d) Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

(e) Effective/applicability date. Paragraph (a) of this section is applicable for returns or claims for refund filed, or advice provided, beginning August 2, 2011. Paragraphs (b) through (d) of this section are applicable to tax returns, documents, affidavits, and other papers filed on or after September 26, 2007.

§ 10.35 Competence.

(a) A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such
as consulting with experts in the relevant area or studying the relevant law.

(b) **Effective/applicability date.** This section is applicable beginning June 12, 2014.

§ 10.36 Procedures to ensure compliance.

(a) Any individual subject to the provisions of this part who has (or individuals who have or share) principal authority and responsibility for overseeing a firm’s practice governed by this part, including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with subparts A, B, and C of this part, as applicable. In the absence of a person or persons identified by the firm as having the principal authority and responsibility described in this paragraph, the Internal Revenue Service may identify one or more individuals subject to the provisions of this part responsible for compliance with the requirements of this section.

(b) Any such individual who has (or such individuals who have or share) principal authority as described in paragraph (a) of this section will be subject to discipline for failing to comply with the requirements of this section if—

(1) The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with this part, as applicable, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with this part, as applicable; or

(3) The individual knows or should know that one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, that does not comply with this part, as applicable, and the individual, through willfulness, recklessness, or gross incompetence fails to take prompt action to correct the noncompliance.

(c) **Effective/applicability date.** This section is applicable beginning June 12, 2014.

§ 10.37 Requirements for written advice.

(a) **Requirements.**

(1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. Government submissions on matters of general policy are not considered written advice on a Federal tax matter for purposes of this section. Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners’ professional knowledge on Federal tax matters are not considered written advice on a Federal tax matter for purposes of this section. The preceding sentence does not apply to presentations marketing or promoting transactions.

(2) The practitioner must—

(i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

(ii) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;

(iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;

(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;
(v) Relate applicable law and authorities to facts; and

(vi) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

3. Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.

(a) Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.

(b) Reliance on advice of others. A practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not reasonable when—

1. The practitioner knows or reasonably should know that the opinion of the other person should not be relied on;

2. The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or

3. The practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in this part.

(c) Standard of review.

1. In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.

2. In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner’s firm) in promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, with emphasis given to the additional risk caused by the practitioner’s lack of knowledge of the taxpayer’s particular circumstances, when determining whether a practitioner has failed to comply with this section.

(d) Federal tax matter. A Federal tax matter, as used in this section, is any matter concerning the application or interpretation of---

1. A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;

2. Any provision of law impacting a person’s obligations under the internal revenue laws and regulations, including but not limited to the person’s liability to pay tax or obligation to file returns; or

3. Any other law or regulation administered by the Internal Revenue Service.

(e) Effective/applicability date. This section is applicable to written advice rendered after June 12, 2014.

§ 10.38 Establishment of advisory committees.

(a) Advisory committees. To promote and maintain the public’s confidence in tax advisors, the Internal Revenue Service is authorized to establish one or more advisory committees composed of at least six individuals authorized to practice before the Internal Revenue Service. Membership of an advisory committee must be balanced among those who practice as attorneys, accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and registered tax return preparers. Under procedures prescribed by the Internal Revenue Service, an advisory committee may review and make general recommendations regarding the practices, procedures, and policies of the offices described in §10.1.

(b) Effective date. This section is applicable beginning August 2, 2011.
NEW YORK STATE BAR ASSOCIATION TAX SECTION

REPORT ON

TAX OPINIONS IN REGISTERED OFFERINGS

April 4, 2012
TABLE OF CONTENTS

Page

I. Purpose and Scope of Tax Disclosure and Tax Opinions in Registered Offerings .............. 2

A. In General ................................................................. ...................................................................... 2

B. Expertized Tax Disclosure ................................................................. 3

1. If the Federal Tax Consequences are “Material to an Investor”, the Tax Disclosure Must Be Expertized .......................................................... 3

2. Tax Opinion Expertizing Tax Disclosure on Federal Tax Consequences that are “Material to an Investor” ........................................ 5

3. Strength of the Tax Opinion ................................................................. 7

4. Tax Disclosure in the Registration Statement Addressing the Non-Expertized Matters ................................................................. 8

C. Tax Opinions Required Pursuant to a Contract Entered Into by the Issuer in a Registered Offering ................................................................. 10

1. Tax Opinions Contractually Required As a Condition to Closing the Transaction and/or Offering .............................................................. 10

2. Disclosure Opinions Required To Be Delivered to Underwriters ................. 12

II. Factual Basis for Tax Opinions in Registered Offerings ................................................ 12

A. How the Preparer of a Tax Opinion Determines the Facts....................................................... 12

B. Representations Regarding Facts and Future Conduct ............................................................. 13

C. Assumptions Regarding Facts and Future Conduct ................................................................. 14

D. When the Relevant Facts Include a Conclusion of Law (other than U.S. Federal Tax Law) ......................................................................................... 16

E. Standards for Reliance Upon Representations, Assumptions and Opinions of Other Professionals .............................................................................. 17

1. Customary Practices ....................................................................................... 17

2. Circular 230 ........................................................................................................ 17

III. Form and Delivery of Tax Opinions in Registered Offerings ......................................... 18

A. Form of Tax Opinion ............................................................................................. 18

B. Timing of Delivery of Tax Opinion ........................................................................... 19

IV. SEC Staff Review of Tax Disclosures and Tax Opinions .............................................. 19

V. Conclusion .............................................................................................................. 20
New York State Bar Association Tax Section

Report on Tax Opinions in Registered Offerings*

The Tax Section of the New York State Bar Association is an organization of tax lawyers with over 2600 members. Our primary function is to comment on pending tax legislation, regulations and other guidance from Congress, the Internal Revenue Service (“IRS”) and the Treasury Department in a manner that we believe will further the public interest in a fair and equitable tax system.

When an offering of securities is registered with the U.S. Securities and Exchange Commission (the “SEC”), pursuant to the Securities Act of 1933, 15 U.S.C. 77a et seq., as amended (the “Securities Act”), the issuer must file a registration statement with the SEC. A registered offering may involve an offering of securities, typically for cash, or a transaction that includes an exchange of one security for another (and thus an offering of the latter security). Regulation S-K, promulgated by the SEC under the Securities Act, contains the rules governing the information that must be disclosed in the registration statement and, under certain circumstances, the requirement that a tax opinion be filed as part of the registration statement.

On October 14, 2011, the SEC’s Division of Corporate Finance (the “Division”) released Staff Legal Bulletin No. 19 (CF) entitled “Legality and Tax Opinions in Registered Offerings” (the “Bulletin”). The Bulletin provides the Division’s views concerning when tax opinions are required to be filed with the SEC in a registered offering of securities, the required characteristics of such tax opinions and current practice of the Division’s staff (the “Staff”) in reviewing such opinions.

We understand that the views expressed in the Bulletin were intended to reflect current and longstanding administrative practice in this area and were not intended to signal any change of policy regarding either the types of securities offerings that require a tax opinion or the scope of such tax opinions.1 We appreciate the Staff’s decision to make its views on this subject available to the public.

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* The principal author of this report is Lisa A. Levy. Diana L. Wollman made significant contributions to the drafting of this Report. In addition, Howard B. Dicker and Robert Buckholz, chairman and member, respectively, of the Securities Regulation Committee of the Business Law Section of the New York State Bar Association, provided substantial contributions to this Report as members of the working group. Helpful comments were received from Kimberly S. Blanchard, Peter H. Blessing, S. Douglas Borisky, Peter J. Connors, Edward E. Gonzalez, Stanley Keller, Andrew W. Needham, Yaron Z. Reich, Robert P. Rothman, Michael L. Schler and Jodi J. Schwartz. This report reflects solely the views of the Tax Section of the NYSBA and not those of the NYSBA Executive Committee or the House of Delegates.

1 See Legal Opinion Newsletter (Volume 11 – No. 2, Winter 2011) published by the ABA Section of Business Law, Committee on Legal Opinions, at pp. 8-9 (report of a meeting of the Subcommittee on Securities Law Opinions on November 9, 2011 at which Thomas Kim, Chief Counsel in the Division, participated and stated that the guidance in the Bulletin “was not intended to revise substantially the existing practice with respect to tax opinions”).
Because our members include many tax lawyers with extensive experience in private practice providing U.S. federal income tax advice to issuers and underwriters in registered offerings of securities, we believe we are well-positioned to describe current market practices in this area. Given the Staff’s increased attention to these issues, we therefore undertook to prepare this Report and to make it publicly available to the tax bar, to members of the Division and to other interested parties.

The purpose of this Report is to describe current market practice regarding tax opinions in registered offerings. More specifically, the Report describes current market practices regarding the content and form of tax disclosures and tax opinions prepared and rendered in connection with public offerings of securities that are registered with the SEC. These tax disclosures and tax opinions generally address the U.S. federal income tax consequences to an investor of acquiring, holding and disposing of the securities to be issued in the offering.

Although we have not submitted this Report to the Division or requested any of its members to comment on its contents, we believe that the practices described in this Report are consistent with the views of the Staff as expressed in the Bulletin. We hope and expect that this Report, as well as any further dialogue it may produce, will promote greater consistency, transparency and efficiency, both in the preparation by tax counsel of the tax disclosure and tax opinion in registered offerings that require a tax opinion and in the process by which the Staff reviews such tax disclosure and tax opinion. We believe that these goals are shared by most members of the tax bar, the Staff and issuers of securities.

I. Purpose and Scope of Tax Disclosure and Tax Opinions in Registered Offerings

A. In General

Current market practice is to include, in the registration statement filed with the SEC, a description of the U.S. federal income tax consequences of the ownership and disposition of the offered security or of the underlying transaction, in each case to the extent relevant to the type(s) of investors expected to invest in the offered security or to the investors whose votes are being solicited in connection with the transaction. The precise reasons why such tax disclosure is included in a particular offering are beyond the scope of this Report.2

Although certain potential investors in a registered offering are subject to special tax rules, the primary target of most tax disclosure in registered offerings is the average investor expected to invest in the offered security or whose vote is being solicited in connection with the offering, necessitating a balance between detail and clarity such that the disclosure can be readily understood by that investor. Moreover, the tax consequences are likely to vary significantly for investors subject to special tax rules (such as, for example, insurance companies, financial institutions, dealers in securities, certain traders in securities, tax exempt organizations, partnerships and equity owners of partnerships, and investors that hold the security as part of an

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2 In some cases tax disclosure is specifically required by the relevant registration statement form or by Regulation S-K, and in other cases the issuer provides such disclosure in an effort to provide helpful information to investors. The discussion in the tax disclosure is typically limited to U.S. federal income tax consequences, with no discussion of any U.S. state or local or other tax consequences.
integrated transaction, hedge or straddle). Accordingly, it is customary for the tax disclosure to (1) clearly state that it does not address the tax consequences to such investors and (2) recommend that all investors seek the advice of their own tax advisors concerning the particular tax consequences to them of the transaction or investment in light of their specific circumstances.

While the tax disclosure constitutes the issuer’s statements concerning these tax consequences, it is customary for the issuer’s tax counsel to review (and, in most cases, draft) the disclosure. When the tax disclosure names that tax counsel and states that statements in the tax disclosure are the opinion of tax counsel or a certified public accountant, the disclosure is considered “expertized” (see the discussion below in sections I.B.1-3). When the tax disclosure does not name that tax counsel and does not state that statements in the tax disclosure are the opinion of tax counsel or a certified public accountant, the disclosure is considered “unexpertized” (see the discussion below in section I.B.4).

B. Expertized Tax Disclosure

1. If the Federal Tax Consequences are “Material to an Investor”, the Tax Disclosure Must Be Expertized

When a registered offering involves a U.S. federal income tax consequence that is “material to an investor” (the term used in Regulation S-K), the issuer is required, by the applicable registration statement form and SEC regulations (including Regulation S-K), to include in the registration statement a tax disclosure discussing the material tax consequence and to have the portion of the disclosure discussing the material tax consequence “expertized” by obtaining (and filing with the SEC) an opinion from a tax lawyer or a certified public accountant.

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3 We note that the federal income tax consequence relating to a transaction or security that is “material to investors” (discussed below) typically is not the type of tax consequence that is affected by a particular investor’s specific circumstances.

4 We also note that investors subject to special tax rules tend to be more sophisticated than average investors and therefore more able to take into account their particular tax situations in making voting or investment decisions without relying on specific disclosure that addresses their particular situation. Inclusion of disclosure specifically addressing their situations, which are often complex, would often lead to voluminous disclosures, undermining the clarity of the disclosure for those investors not subject to such rules.

5 Although this Report uses the term “expert” and “expertized” throughout (which terminology is also used in the Bulletin), we are not expressing any view regarding whether lawyers providing Exhibit 8 tax opinions are “experts” for Securities Act purposes. As discussed below, tax counsel must consent to the disclosure’s discussion of the tax opinion and to tax counsel being named in the registration statement. See note 14 below and accompanying text. However, lawyers are not required to admit expressly in their consent that they are “experts” within the meaning of Sections 7 and 11 of the Securities Act, and some lawyers include a statement in the tax opinion to the effect that the giving of the consent is not an admission that counsel is an expert within the meaning of Section 7 of the Securities Act. See Bulletin, Part IV (Consents).

6 Item 601(b)(8) of Regulation S-K. Under Regulation S-K, a “revenue ruling” from the IRS addressed to the registrant that deals with the specific facts of the proposed transaction may be provided in lieu of the requisite tax opinion to the extent that the revenue ruling covers the material tax consequences of the proposed transaction. Although Regulation S-K and the Bulletin refer to a “revenue ruling”, it is clear from footnote 37 of the Bulletin that it is describing a “private letter ruling” issued solely to a particular taxpayer.
A federal income tax consequence is “material to an investor” if there is a substantial likelihood that a reasonable investor would consider the information to be important in deciding how to vote on the relevant transaction or whether to purchase the offered security. In the current market, the most common federal income tax consequences usually regarded as “material to an investor” are the tax-free treatment of a particular transaction and the special tax status of the issuer of a particular security. Common examples include:

- qualification of a merger or exchange as a tax-free reorganization under section 368 or as a tax-free exchange under section 351;
- qualification of a transaction as a tax-free spin-off under section 355; or
- treatment of the issuer as a publicly-traded partnership, real estate investment trust (“REIT”) or grantor trust for federal income tax purposes.

Consistent with the prevailing market interpretation, the Bulletin provides the following examples of transactions involving federal income tax consequences that are “material to an investor”: (i) transactions intended to be tax-free and (ii) transactions offering significant tax benefits or where the tax consequences are so unusual or complex that investors would need to have the benefit of an expert’s opinion to understand the tax consequences in order to make an informed investment decision. Likewise, the Bulletin’s statement that no tax opinion is required when a registrant represents that an exchange offer or merger is taxable is consistent with current practice of not issuing a tax opinion in a taxable transaction.

While the foregoing seems relatively straightforward, in practice confusion may arise regarding which portions of the tax disclosure (if any) must be expertized. As discussed in this Report, virtually any tax disclosure in a registered offering, whether or not the offering requires a tax opinion, must be expertized in connection with filings on Form S-11 and filings governed by Securities Act Industry Guide 5 “supporting the tax matters and consequences to the shareholders as described in the filing when such tax matters are material to the transaction for which the registration statement is being filed.” Form S-11 applies to securities issued by real estate investment trusts, as defined in Section 856 of the Code, or (ii) securities issued by other issuers whose business consists primarily of acquiring and holding for investment real estate or interests in real estate or interests in other issuers whose business consists primarily of acquiring and holding for investment real estate or interests in real estate. Securities Act Industry Guide 5 applies to real estate limited partnerships.

7 The Bulletin defines “material” as follows: “Information is ‘material’ if there is a substantial likelihood that a reasonable investor would consider the information to be important in deciding how to vote or make an investment decision or, put another way, to have significantly altered the total mix of available information.” Part III.A.2 (Requirements for Tax Opinion – When a Tax Consequence is “Material” to Investors). We understand this definition is derived from case law. See Basic v. Levinson, 485 U.S. 224 (1988).

8 Unless otherwise indicated, all references to “section” are to the Internal Revenue Code of 1986, as amended (the “Code”) and all references to “part” are to the Bulletin.

9 Part III.A.2 (Requirements for Tax Opinion – When a Tax Consequence is “Material” to Investors). See the discussion below in section I.B.4 regarding disclosure addressing non-expertized, “derivative” tax consequences that follow from a conclusion regarding a material tax consequence.

10 Part III.A.2 (Requirements for Tax Opinion – When a Tax Consequence is “Material” to Investors).
tax opinion, will include a discussion of federal income tax consequences that are not “material to an investor” as well as other factual information. In some cases, the offering will not involve any federal income tax consequences that are “material to an investor”. In others, there may be some consequences that are “material to an investor” and others that are not.

Under Regulation S-K, tax counsel is not required to expertize the portion of the tax disclosure addressing the tax consequences of owning and selling common stock when those tax consequences are not “material to an investor”. That tax counsel may have been required to expertize the tax consequence of the transaction pursuant to which the common stock was issued is irrelevant. In such a case, therefore, it is customary for tax counsel to expertize only the discussion of the federal income tax consequences that are “material to an investor”, and not to expertize any other portion of the discussion.

For example, in a registered offering of common stock to be issued in a tax-free merger, although the tax consequences to investors of the receipt of the common stock in the merger are “material to an investor”, the “plain vanilla” tax consequences to investors of holding and selling the common stock in the future are not. Consistent with the Bulletin, although a mere offering of common stock issued for cash does not involve any tax consequences that are “material to an investor”, the tax disclosure will typically describe the “plain vanilla” tax consequences for non-U.S. investors of owning and selling the common stock. That the same disclosure also appears in a registered offering of common stock issued in a tax-free merger does not make the tax consequences of holding and selling the common stock any more material to such investors.

We believe that much of the confusion regarding this point emanates from the heading or title introducing the tax disclosure in many offerings, which typically refers to “Material U.S. Federal Income Tax Consequences”. In this context, use of the word “material” is intended to communicate to investors that the tax disclosure contains information that will be useful to them in some relevant way. In this context, this word has a different meaning from the meaning attributed to it in the phrase “material to an investor” under Regulation S-K, as discussed above.

We hope that this in-depth discussion of these matters in the Report, together with the Bulletin’s clear affirmative statements regarding these matters, will assist in dispelling any remaining confusion.

2. Tax Opinion Expertizing Tax Disclosure on Federal Tax Consequences that are “Material to an Investor”

A tax opinion that expertizes the portion of the disclosure discussing the tax consequence that is “material to an investor” consists of one or more conclusions of federal income tax law. Like any tax opinion, a tax opinion in a registered offering reflects the professional judgment of

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11 Item 601(b)(8) of Regulation S-K.
12 Part III.A.2. (omitting common stock from list of securities offering “unusual” tax benefits).
13 The Bulletin discusses this issue and the reason the Staff does not accept headings that refer to “certain” or “principal” tax consequences. See Part III.C.1 (Substance of Tax Opinions – Material Federal Tax Consequences) (second paragraph).
tax counsel regarding the application of the relevant legal authorities to the specific facts and circumstances. A tax opinion is not binding on the IRS or the courts. As such, it is not a guarantee that the IRS will not assert a contrary position with respect to the subject matter of the opinion or that a court will not uphold such a position in litigation.

When the portion of the disclosure addressing the tax consequence that is “material to an investor” must be expertized, it is customary for the tax disclosure to (1) articulate the actual tax opinion of the issuer’s tax counsel or (2) state that the opinion will be delivered at closing and to describe the content of such opinion. In both cases, it is customary to identify issuer’s tax counsel by name in the disclosure. Under the Securities Act, the counsel providing such an opinion must set forth the opinion (or a confirmation of the opinion articulated in the tax disclosure) in a separate letter to the issuer and must consent to the disclosure’s discussion of the opinion, being named in the registration statement and the reproduction of such letter as an exhibit to the registration statement.14 (This tax opinion is filed as Exhibit 8 to the registration statement and thus is commonly referred to as an Exhibit 8 opinion.) We discuss below the form of opinion that is filed with the SEC.

When there is a Code section governing a federal income tax consequence that is “material to an investor”, the tax disclosure describing this consequence typically will refer to such Code section. Specific references to additional authorities, such as Treasury regulations, revenue rulings and judicial decisions, are rare and typically occur only when one of these authorities is highly relevant or directly on point. We interpret the Bulletin as being consistent with this aspect of current market practice, as well as the SEC’s plain English rule.15

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14 The Bulletin discusses this in Part IV (Consents).

15 Specifically, the Bulletin states in Part III.C.1.:

The tax opinion should address and express a conclusion for each material federal tax consequences, and the staff expects the opinion to identify the applicable Internal Revenue Code provision, regulation or revenue ruling. Regardless of whether the tax opinion is long or short form, it should

- clearly identify each material tax consequence being opined upon;
- set forth the author’s opinion as to each identified tax item; and
- set forth the basis for the opinion.

Under Securities Act Rule 421 (referred to herein as the “Plain English Rule”), “companies filing registration statements under the Securities Act of 1933 must:

- write the forepart of these registration statements in plain English;
- write the remaining portions of these registration statements in a clear, understandable manner; and
- design these registration statements to be visually inviting and easy to read.”

3. Strength of the Tax Opinion

In some cases, issuer’s tax counsel is unable to provide a “will” opinion on a specific federal income tax consequence at issue that is “material to investors”. Although this may occur for a variety of reasons, the typical reason is that the federal income tax law governing the issue in question is unclear in one or more respects. Although there often is authority addressing an issue in a general way, it is not unusual in many registered offerings that no authority directly applies to the specific facts and circumstances (or closely comparable facts and circumstances) related to the transaction, security or issuer’s method of operation. In other cases, the federal income tax laws are unclear because the relevant authorities are susceptible to differing (but reasonable) interpretations or are in actual conflict. On some occasions, the uncertainty relates to the highly factual nature of the issue in question (e.g., existence of a corporate “business purpose” in a spin-off). For one or more of these reasons, after analyzing, interpreting and weighing the various authorities as applied to the relevant facts, tax counsel may judge that it is not possible to render a “will” opinion on a material issue.

To reflect this uncertainty, issuer’s tax counsel may render a “should” opinion on the issue. Although the degree of risk associated with a “should” opinion is inherently difficult to quantify with precision, an unqualified “should” opinion is generally regarded as a robust opinion that reflects a relatively high level of confidence on an issue. We also note that there are situations where, by reason of the absence of any controlling authority, tax counsel provides, and the market accepts, an opinion expressing a lower level of certainty on an issue than a “should” opinion (e.g., a “more likely than not” opinion or an opinion that the expected tax treatment is “reasonable”).

When the expertized portion of any tax disclosure expresses anything other than a “will” opinion, it is customary for the tax disclosure to include an explanation of the nature of the uncertainty (e.g., absence of authority, lack of authority directly on point, conflicting authority or the inherently factual or subjective nature of the issue). If appropriate and informative to the investor, the tax disclosure is also likely to include a description of one or more possible alternative characterizations that the IRS could assert and the resulting tax consequences to the issuer and/or investors in the offering if the IRS were to prevail. The tax disclosure may also express a view on the likelihood of the IRS prevailing on the merits with respect to one or more alternative characterizations.

When the tax opinion reflects a level of certainty lower than a “will” opinion (e.g., a “should” or “more likely than not” opinion), the level of detail provided in the tax disclosure regarding the foregoing matters will vary depending upon the level of the opinion expressed and the tax issue at hand. However, as a general matter, it is not customary for tax disclosure to contain an extensive and highly detailed technical analysis of the tax issue, all of the possible alternative characterizations or why counsel reached the level of the opinion expressed. We

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16 The various levels of tax opinions and the degrees of uncertainty they express is beyond the scope of this report. For a discussion of these topics, see R. Rothman, *Tax Opinion Practice*, 64 The Tax Lawyer 301 (Winter 2011); and J. Cummings, Jr., *The Range of Legal Tax Opinions, with Emphasis on the “Should” Opinion*, 98 Tax Notes 1125 (Feb. 17, 2003).
interpret the Bulletin’s discussion of the substance of opinions as consistent with customary practice and the Plain English Rule.17

In other cases, tax counsel is unable to express any opinion on a federal income tax consequence that is “material to investors”. This may occur because the particular issue is of a highly factual nature or because the existing facts and circumstances may change in the future. Alternatively, there may be no relevant authority. Examples of highly factual issues in this category include the status of a foreign issuer as a “passive foreign investment company”, the status of a domestic issuer as a “United States real property holding corporation” and the status of a foreign issuer with some nexus to the United States as exempt from federal income tax because it not engaged in a trade or business in the United States. In these cases, it is customary for the tax disclosure to (i) explain why it is not possible for tax counsel to provide a tax opinion, (ii) state the issuer’s intended reporting position on the tax issue and, if relevant, its intentions and expectations regarding its future activities, and (iii) describe the related tax risks to the investors or the issuer, as applicable, arising from the various alternative resolutions of the tax issue. In these cases, the explanations do not provide an extensive and highly detailed technical analysis of the foregoing matters, nor are all of the possible alternative characterizations necessarily discussed. In addition, tax counsel typically conducts a level of diligence regarding statements concerning the issuer’s intended reporting position on the relevant tax issue or any statements describing the issuer’s intentions or expectations regarding its future operations that, in tax counsel’s professional judgment, is sufficient under the particular circumstances to support the reasonableness of such statements.

The Bulletin is consistent with market practice in acknowledging that there are cases where expertization of a federal income tax issue that is “material to investors” is not possible by reason of the highly factual nature of the issue or uncertainty in the law and where tax opinions expressing uncertainty are provided in registered offerings.18 The Bulletin comports with market practice in requiring that the tax disclosure or tax opinion explain the uncertainty and risks involved in these situations.19

4. Tax Disclosure in the Registration Statement Addressing the Non-Expertized Matters

When a registered offering does not involve any U.S. federal income tax consequences that are “material to an investor”, Regulation S-K and the Bulletin do not require that the tax disclosure be expertized.20 Accordingly, it is market practice to not expertize a disclosure that discusses no consequences that are “material to an investor”. Common examples of federal

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17 See Part III.C.1 and 4 (Substance of Tax Opinions – Material Federal Tax Consequences; – Opinions Subject to Uncertainty).
18 Footnote 44 of the Bulletin; Part III.C.4 (Substance of Tax Opinions – Opinions Subject to Uncertainty).
19 Part III.C.1 (Substance of Tax Opinions – Material Federal Tax Consequences); Part III.C.4 (Substance of Tax Opinions – Opinions Subject to Uncertainty).
20 Item 601(b)(8) of Regulation S-K; Part III.A.1 and 2 (Requirements for Tax Opinion – Regulation S-K Requirements for a Tax Opinion; – When a Tax Consequence is “Material” to Investors).
income tax consequences that are not “material to an investor”, which may be discussed in a disclosure, but need not be expertized include:

- tax consequences arising from the ownership and disposition of debt or equity securities that are generally known and readily understood by the average investor (e.g., the taxation of interest, dividends, capital gains, “plain vanilla” original issue discount and bond premium); and

- tax consequences arising from transactions that are wholly taxable, such as a taxable merger or exchange or a taxable spin-off (e.g., recognition of gain, impact on a shareholder’s tax basis and holding period of any security received in the exchange).21

A tax disclosure addressing a federal income tax consequence that is “material to investors” will often discuss other U.S. federal income tax consequences that are not “material to investors” (i.e., there is not a substantial likelihood that a reasonable investor would consider the information to be important in deciding how to vote on the transaction or whether to invest). It is market practice to not expertize this portion of the tax disclosure (just as it is market practice to not expertize a disclosure that discusses no consequences that are “material to an investor”).

A tax disclosure addressing a federal income tax consequence that is “material to an investor”, for example whether a merger is tax-free or a security with unusual terms is debt or equity, may also discuss certain “derivative” federal income tax consequences that follow from the conclusion regarding the material tax consequence. These derivative consequences are generally not considered “material to an investor” and, thus, it is market practice to not expertize this portion of the tax disclosure. Examples of such derivative tax consequences are:

- the impact of the tax-free merger or spin-off on a typical shareholder’s tax basis and holding period in the security received in the transaction and the recognition of gain on the receipt of cash in lieu of fractional shares; and

- the consequences to the investor of the treatment of the issuer as a partnership for federal income tax purposes, i.e., the “plain vanilla” tax consequences resulting from the ownership and disposition of an equity interest in a partnership.

Disclosure regarding non-material tax consequences is necessarily general in nature and typically does not contain technical citations to relevant provisions of the Code, Treasury regulations or IRS revenue rulings. In addition, when the tax disclosure describes or contains an opinion expressing uncertainty on a federal income tax consequence that is “material to an investor”, it is typical to preface the discussion of the non-material and derivative tax consequences by stating that that discussion assumes the legal conclusion that is the subject of

\[21\] See Part III.A.2 (Requirements for Tax Opinion – When a Tax Consequence is “Material” to Investors) (indicating expertization is not required when an exchange offer or merger is a taxable transaction). The tax consequences of a taxable transaction are generally not considered “material to an investor” because an investor would expect taxable treatment in the absence of a representation in the disclosure document to the contrary, and the tax treatment of the transaction does not purport to provide an investor with any special tax benefit.
the tax opinion. For example, if the tax disclosure describes an opinion that the issuer “should” qualify as a partnership for federal income tax purposes, the discussion regarding the non-material tax consequences to investors of owning and disposing of an equity interest in the issuer assumes that the issuer “will” qualify as a partnership for federal income tax purposes. Similarly, if the tax disclosure describes an opinion that a spin-off “should” qualify as tax-free to the shareholders of the distributing corporation, the discussion of the non-material, derivative tax consequences to those shareholders of receiving stock in the spun-off corporation assumes that the spin-off “will” qualify as a tax-free transaction.

It is customary practice to limit expertization to the federal income tax consequence that is “material to an investor” for several reasons. First, Regulation S-K does not require the expertization of non-material information. Second, this practice enhances the quality of the tax disclosure because it tends to highlight the tax issue of greatest significance to the ultimate voting or investment decision of the investors (e.g., the tax-free nature of a merger or spin-off). Third, expertization of the entire tax disclosure would tend to create ambiguities concerning which statements in the disclosure represent the opinion of tax counsel and which statements (e.g., factual statements, statements regarding the issuer’s beliefs, intentions or expectations related to a tax issue and descriptions of possible alternative tax characterizations) do not. Finally, as discussed above, a tax disclosure’s discussion of non-material federal income tax consequences is addressed to the average investor that is not subject to special tax rules and, as such, this discussion is general in nature by design. Expertization of the entire tax disclosure would tend to create the misimpression that this general discussion of the non-material federal income tax consequences is more definitive than it actually is.

The Bulletin is consistent with market practice because it states that “the registrant must provide accurate and complete disclosure concerning the tax consequences to investors” whereas “[i]n general, a tax opinion need address only material federal tax consequences.”

C. Tax Opinions Required Pursuant to a Contract Entered Into by the Issuer in a Registered Offering

Frequently, the issuer in a registered offering will be contractually obligated to deliver a tax opinion to another party involved in the offering. In a merger or reorganization, the other entity (or entities) participating in the merger or reorganization may also be contractually obligated to deliver a tax opinion. The scope of these tax opinions, why they are required, and the party whose tax counsel delivers them will vary depending upon the type of security or transaction involved in the offering.

1. Tax Opinions Contractually Required As a Condition to Closing the Transaction and/or Offering

The contractual agreements governing corporate combinations (e.g., mergers) and corporate divisions (e.g., spin-offs) that are intended to be tax-free (in whole or in part) for

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22 Part III. A.2 (When a Tax Consequence is Material to Investors).
23 Part III.C.1 (Substance of Tax Opinions – Material Federal Tax Consequences).
federal income tax purposes typically provide, as a condition to the closing of the transaction, that a tax opinion be delivered at a pre-agreed-upon level of comfort regarding the tax-free (or partially tax-free) treatment of the transaction for both the participating shareholders and the corporations involved. In the case of a corporate combination, the target corporation’s (and sometimes also the acquiring corporation’s) obligation to close the transaction is conditioned on receipt of this tax opinion from its own counsel (or, on occasion, from the other party’s counsel). In a corporate division, the obligations of both the distributing corporation and the corporation to be spun-off are conditioned upon receipt of this tax opinion from tax counsel to the distributing corporation.

In registered offerings involving either the issuance of stock or other equity interests in an entity that is intended to qualify for a favorable federal income tax classification (e.g., a publicly traded partnership, a REIT, or a grantor trust) or the issuance of a security with unusual terms that is intended to qualify for federal income tax treatment that is particularly important in the context of the offering (e.g., as debt or a prepaid forward contract), the agreement between the issuer and the underwriter typically requires, as a condition to the underwriters’ obligation to underwrite the offering, that the underwriters receive a tax opinion from issuer’s tax counsel at the pre-agreed-upon comfort level regarding the relevant federal income tax treatment.

These types of tax opinions typically cover issues that are “material to investors” and, as such, tax opinions addressing the same issues are also filed with the SEC as part of the registration statement. The Bulletin discusses the Division’s views regarding when these tax opinions must be filed (i.e., before the registration statement is effective or in a post-effective amendment to the registration statement filed prior to the closing).24

The closing tax opinion generally serves two purposes. The first is to protect the bargained for expectations of the recipient of the tax opinion (and, if applicable, its shareholders) by conditioning the consummation of the transaction on the delivery of the required tax opinion. The second is to ensure that tax counsel conducts appropriate and thorough factual and legal diligence, thereby increasing the likelihood that the assumptions reflected in the required tax opinion are in fact correct.

Consistent with these two purposes, a standard closing condition requires that the tax opinion address only the federal income tax consequence that is “material to investors”, i.e., the intended tax-free treatment of the transaction or intended tax status of the issuer; it does not require that the tax opinion address any of the various derivative, ancillary or non-material tax consequences to the issuer or its shareholders (or limited partners) that follow from the “material” federal income tax consequence. For example, a closing condition in a typical merger agreement requires that the tax opinion address the qualification of the merger as a tax-free reorganization and does not require that the tax opinion cover derivative or ancillary matters, such as the target shareholder’s resulting tax basis and holding period for the acquiror stock received in the merger and other commonly understood tax consequences related to the ownership and future disposition of the acquiror stock.

It is customary for tax counsel to cite the relevant authority in connection with the tax opinion on the “material” federal income tax consequence. For example, in the case of a transaction intended to qualify as a tax-free “reorganization” for federal income tax purposes, tax counsel typically will cite section 368(a) of the Code. Similarly, in the case of a registered offering of interests by an issuer intended to qualify as a “publicly traded partnership” for federal income tax purposes, tax counsel typically will cite section 7704 of the Code.

2. Disclosure Opinions Required To Be Delivered to Underwriters

In registered offerings involving the participation of an underwriter or dealer-manager who has agreed to market the security and/or solicit consents to the transaction, the underwriting agreement or dealer-manager agreement typically has as a condition to the closing of the offering that the issuer’s tax counsel provide an opinion to the underwriters or dealer-managers to the effect that the description of the tax laws and the legal conclusions contained in the tax disclosure, as addressed to investors in general without regard to their individual circumstances, is a “fair” or “accurate” summary of the federal income tax consequences of the transaction. Although the forms of these opinions vary from law firm to law firm, tax counsel’s ability and willingness to render this opinion provides comfort to the underwriters or dealer-managers concerning the completeness and correctness of the substance of the tax disclosure because it assists them in the establishment of a “due diligence” defense against possible future claims of inadequate disclosure by investors or other third parties. This type of tax opinion typically is not filed with the SEC.

II. Factual Basis for Tax Opinions in Registered Offerings

A. How the Preparer of a Tax Opinion Determines the Facts

As stated above, a tax opinion states one or more conclusions of federal income tax law. Those legal conclusions result from the application by tax counsel of his or her understanding and judgment regarding the relevant law and how it should apply to the specific facts and circumstances of the security or transaction in question. The relevant facts and circumstances may include not only objectively verifiable facts, but also matters concerning a person’s plans or intentions, or estimates or projections. Tax counsel typically determines what these facts and

25 This type of opinion is often requested and provided even in offerings that do not involve any tax consequences that are “material to investors.”

26 However, it is the prevailing practice that tax opinions filed with the SEC in connection with offerings on Form S-11 do include this type of opinion. See note 6 above.

In addition, issuer’s counsel typically provides to the underwriters or dealer-managers a negative assurance letter (sometimes colloquially referred to as a “10b-5” letter) on the entire disclosure document, including the tax disclosure. Although the forms of these negative assurance letters vary from law firm to law firm, the negative assurance letter states that, subject to various limitations and qualifications, no facts have come to the attention of counsel that caused counsel to believe that, as of specified dates and times, the disclosure documents contained any untrue statement of a material fact or omitted to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. See ABA Section of Business Law, Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions, Negative Assurance in Securities Offerings (2008 Revision), 64 Bus. Law. 395, at 396-7 (2009).
circumstances are by relying on a variety of sources. Where relevant, these sources usually include the following:

- the substantive terms of a transaction or security as described in the underlying transaction documents (e.g., a merger agreement, separation agreement or indenture) and/or as described in the disclosure document filed with the SEC;
- the constituent organizational documents of the issuer (e.g., a partnership agreement, an operating agreement of a limited liability company or a corporate charter);
- contractual representations, warranties and covenants made by the issuer of the security or the parties to the transaction (and other relevant persons) in the underlying transaction documents;
- factual information and statements in the disclosure document filed with the SEC; and/or
- opinions of other professionals or experts (e.g., economists, valuation experts or investment banks).

In addition, it is customary for tax counsel to rely upon (i) written representations from the issuer or the parties to the transaction (and other relevant persons) concerning relevant factual matters not available from any of the foregoing sources and (ii) assumptions regarding other factual matters.

B. Representations Regarding Facts and Future Conduct

The IRS has published the types of factual representations that it requires (or has required in the past) to grant private letter rulings on a variety of issues that arise in certain transactions (e.g., tax-free reorganizations and tax-free spin-offs). When tax counsel is opining on one of these issues, tax counsel customarily requests written representations from the issuer and/or other parties to the transaction (and, if relevant, other persons) that are based in substantial part upon the types of factual representations that the IRS requires (or required in the past) as a condition to granting a favorable private letter ruling on the same issue. Tax counsel may also request additional factual representations that tax counsel determines are appropriate in the specific context.

Similarly, when an issue is not the subject of such an IRS publication, tax counsel determines what factual representations are needed in the specific context by drawing upon a variety of sources, including the relevant legal authorities.

27 The IRS modifies its ruling practice from time to time. For issues as to which the IRS will no longer grant private letter rulings, tax counsel may look to the types of representations that the IRS required before the change in ruling practice.
Of course, the subject matter of these representations ultimately depends upon the substantive legal conclusion to be opined on, and may include:

- the manner in which the issuer or a transaction party will operate or conduct itself in the future (including the types of assets that it will or will not acquire, the types of income that it will or will not earn, and the types of actions or activities that it will or will not conduct); and/or

- the issuer’s or a transaction party’s (and other relevant persons’) plans, intentions, understandings and/or agreements or the nonexistence of the foregoing.

We note that, in most tax opinions filed in registered offerings, tax counsel must be able to rely on representations regarding the future conduct of the issuer or the future conduct of some other party to the transaction because such conduct is relevant to the subject matter of the tax opinion. In the case of tax opinions concerning the status of an issuer as a REIT or a publicly-traded partnership, for example, representations concerning the issuer’s future conduct are often extensive and detailed.

These representations typically are given in an officer’s certificate of the issuer or other party to the transaction (or other relevant person) executed by a responsible employee or officer thereof after due inquiry and investigation by the person signing the certificate.

As discussed in more detail below under section II.E, tax counsel will also perform a degree of diligence regarding the factual representations made in the officer’s certificates. Having done so, tax counsel customarily then includes in the tax opinion an assumption that the representations made in the officer’s certificate are true, correct and complete. By doing so, tax counsel communicates that the validity of the tax opinion depends upon those matters being true, correct and complete. While the Bulletin does not explicitly address this point in its discussion of tax opinions, the Bulletin does do so in the context of legality opinions, where the purpose and role of this assumption is the same. In that context, the Bulletin contains a list of assumptions and qualifications that the Staff generally believes are necessary or may be appropriate, which includes the assumption that the representations of officers and employees are correct as to questions of fact.\(^ \text{28} \) We therefore interpret the Bulletin to be consistent with customary tax opinion practice in this regard.

### C. Assumptions Regarding Facts and Future Conduct

In addition to determining some facts from the available documents and other facts from officers’ certificates of representation, it is customary for tax counsel to make certain assumptions regarding other factual matters relevant to the tax opinion. In such a case, it is customary for tax counsel to disclose these assumptions in the tax opinion (or in the tax disclosure if the disclosure itself constitutes the tax opinion) in summary fashion (comparable to the following summary in this paragraph), although tax counsel may describe any unusual or particularly significant factual assumption concerning the security or the transaction in greater detail.

\(^ {28} \) Part II.B.3 (Legality Opinions – Substance of Legality Opinions – Assumptions).
While the nature of the specific factual assumptions ultimately depends upon the type of transaction or security that is the subject matter of the tax opinion, tax counsel typically assumes one or more of the following:

- all parties to the transaction documents will act in accordance with the covenants, agreements, terms and conditions of the transaction documents and will perform their respective obligations under those documents in accordance with their terms;
- the transaction will be effected pursuant to and in accordance with the terms and conditions contained in the relevant transaction document (e.g., the merger agreement or separation agreement), without waiver or modification of any such terms and conditions;
- the factual statements concerning the transaction contained in the transaction documents and the disclosure document filed with the SEC are, and will continue to be until the closing of the transaction, true, correct and complete;
- all representations made in officer’s certificates are, and will continue to be until the closing of the transaction, true, correct and complete (without regard to any qualifications as to knowledge or belief);
- the issuer will operate in a manner consistent with the method of operation described in the disclosure document filed with the SEC and the representations contained in the officer’s certificate; and/or
- there are no arrangements, understandings or agreements among or between any of the parties to the transaction documents relating to the transactions or actions contemplated by the transaction documents other than those evidenced by the transaction documents.

In addition, when tax counsel relies on the legal opinion of a person outside tax counsel’s law firm concerning a non-tax or non-U.S. tax legal issue, tax counsel usually either explicitly relies on that opinion or explicitly assumes the non-tax or non-U.S. tax legal conclusion contained in that opinion.

Thus, it is customary practice that neither the tax opinion nor the tax disclosure contains a detailed description of all the factual representations and statements of plans or intentions (or the absence thereof) contained in an officer’s certificate (if any). This customary practice is dictated by a number of considerations, among them that including such detail would not be practical in many cases, might breach client confidentiality in some cases, and would not enhance the quality of the tax opinion or tax disclosure in most cases. Particularly with respect to the quality of the tax opinion or tax disclosure, detailed descriptions of the representations contained in officer’s
certificates would not assist the average investor in understanding the tax consequences addressed in the opinion.\textsuperscript{30} The Bulletin appears to be consistent with this market practice as the Bulletin states that the assumptions on which a tax opinion is based must be disclosed in the tax opinion,\textsuperscript{31} and that limited and reasonable assumptions as to future conduct are common and acceptable.\textsuperscript{32}

D. When the Relevant Facts Include a Conclusion of Law (other than U.S. Federal Tax Law)

A transaction or security may be governed by or involve aspects of non-tax laws, domestic or foreign, or foreign or U.S. state tax laws, and the accuracy of the U.S. federal tax opinion may depend in part upon a legal conclusion involving these other laws.\textsuperscript{33}

For example, certain transactions effected pursuant to foreign statutes, such as an “amalgamation” or other combination of two foreign corporations, may or may not qualify as a tax-free reorganization for U.S. federal income tax purposes.\textsuperscript{34} In order for tax counsel to render an opinion on this issue, tax counsel generally will need to rely upon an opinion from the issuer’s foreign counsel at the agreed upon comfort level regarding the legal effects of the transactional documents and the relevant foreign statutes. As another example, in order to render a tax opinion that a foreign corporation is not a “controlled foreign corporation” for U.S. federal income tax purposes, tax counsel generally will need to rely on an opinion of foreign counsel that provisions in the articles of incorporation of the corporation that prohibit the ownership of 10% or more of the stock by U.S. shareholders are enforceable under foreign law.

When a legal issue of this nature is relevant to the tax opinion, and neither the opining tax lawyer nor other members of his or her law firm are qualified to render an opinion on the matter, it is customary for tax counsel to rely upon the opinion of another legal professional regarding the legal issue. While the Bulletin does not describe this practice in the context of tax opinions,\textsuperscript{35} the Bulletin does describes this practice in the context of its discussion of legality opinions and states that, for purposes of providing a legality opinion on a debt security or guarantee, the registrant’s primary counsel may assume that the legal conclusions contained in an opinion of

\textsuperscript{30} Item 601(b)(8) of Regulation S-K provides that any conditions or qualifications to a tax opinion must be adequately described in the registration statement. Customary practice is to satisfy this obligation in the manner described above.

\textsuperscript{31} Part III.C.3 (Substance of Tax Opinions – Assumptions and Qualifications).

\textsuperscript{32} Part III.C.3 (Substance of Tax Opinions – Assumptions and Qualifications).

\textsuperscript{33} In this regard, the analysis of the U.S. federal income tax consequences of a transaction usually is based on the legal rights and obligations of the parties as determined under applicable local law. See Bittker & Lokken, “Federal Taxation of Income, Estates, and Gifts,” ¶ 4.1.1 (the Code taxes transactions whose legal effects (i.e., the parties’ rights and obligations) are usually prescribed by state law, rather than federal law, and rights and obligations relevant to federal taxes can also arise under the laws of foreign countries).

\textsuperscript{34} See Treas. Regulation Section 1.368-2(b)(ii) and Treas. Regulations Section 1.368-2(b)(iii), Examples 13 and 14.

\textsuperscript{35} See Part III.C.3 (Substance of Tax Opinions – Assumptions and Qualifications).
local counsel are correct.36 Accordingly, we understand the Bulletin to be consistent with current practice regarding tax opinions that depend, in part, upon conclusions of law other than U.S. federal income tax law.

E. Standards for Reliance Upon Representations, Assumptions and Opinions of Other Professionals

1. Customary Practices

It is commonly understood, and typically explicitly stated in the tax opinion, that tax counsel has not conducted an independent investigation or inquiry concerning the accuracy or completeness of the factual items underlying the opinion. Tax counsel typically conducts the level of diligence on representations and other items that, in tax counsel’s professional judgment, is sufficient under the particular circumstances to support the reasonableness of tax counsel’s reliance on such items. With regard to officer’s certificates containing factual representations and representations regarding future conduct, the scope of the diligence typically includes reviewing the substance of the requested representations with the signatories and confirming to the satisfaction of tax counsel that the signatories both understand the representations and have undertaken due inquiry and investigation within their organizations to confirm the accuracy and completeness of the representations. With regard to other factual assumptions, the scope of tax counsel’s diligence depends upon the matters involved. In no event, however, may tax counsel know or have reason to believe that the assumptions are inaccurate or incomplete. Tax counsel must always believe the assumptions are reasonable, given the context. With regard to tax counsel’s reliance upon opinions of other lawyers (as to issues of non-tax law or non-U.S. tax law) or other professionals or experts, tax counsel typically conducts the level of diligence necessary to be reasonably satisfied as to the competence of that person and the reasonableness of that person’s legal or other conclusions.

2. Circular 230

The standards tax counsel should comply with regarding reliance upon factual representations, representations regarding future conduct, assumptions and opinions of other legal counsel and experts, both in registered offerings and otherwise, are determined in part by state bar ethics and professional responsibility rules. The IRS also maintains a set of professional responsibility rules, which apply to attorneys (and other practitioners) who “practice before the IRS” (known as “Circular 230”).37

Section 10.37 of Circular 230 applies to most written tax advice that is included in a document required to be filed with the SEC (among other types of written tax advice that do not constitute “covered opinions” as defined in Section 10.35 of Circular 230). Section 10.37


37 The IRS has taken the position that Section 10.37 of Circular 230 (as well as certain other provisions of Circular 230) apply to tax practitioners even if they are not representing taxpayers before the IRS. For fuller commentary, see New York State Bar Association, Report on Circular 230 Regulations (March 3, 2005) at 8 (footnote 5).
provides that, in giving such written tax advice, a practitioner must not (i) base the advice on unreasonable factual or legal assumptions, (ii) unreasonably rely on representations, statements, findings or agreements of the taxpayer or any other person, (iii) fail to consider all relevant facts that the practitioner knows or should know or (iv) account for the possibility that a return or issue will not be audited or will be resolved through settlement. All facts and circumstances will be taken into account in determining whether a practitioner has failed to comply with the foregoing requirements.

A tax attorney who willfully, recklessly or through gross incompetence (which includes conduct that reflects gross indifference) violates Section 10.37 may be subject to monetary penalties, censure (i.e., a public reprimand), or suspension or disbarment from practice before the IRS.38 A tax attorney may not knowingly (directly or indirectly) accept assistance from, or give assistance to, any person who is disbarred or suspended under Circular 230 if the assistance relates to matters constituting practice before the IRS.39

III. Form and Delivery of Tax Opinions in Registered Offerings

A. Form of Tax Opinion

When a registered offering involves a federal income tax consequence that is “material to investors”, either a long or a short-form tax opinion is filed with the SEC as an exhibit to the registration statement. When tax counsel’s opinion on this consequence will be delivered at the closing of the transaction described in the tax disclosure, tax counsel typically provides a long-form opinion. The Bulletin explains that a long-form opinion is the full tax opinion filed as an exhibit and summarized in the prospectus, and that this opinion must be consistent with the disclosure in the prospectus.40 Consistent with market practice, we interpret this to mean that a long-form opinion is the full tax opinion on the federal income tax consequence that is “material to investors.” We do not interpret the Bulletin to require that the summary of the tax opinion in the tax disclosure be verbatim identical to the tax opinion filed with the SEC. Finally, we also do not interpret the Bulletin as requiring that the tax opinion expertize the entire tax disclosure merely because the tax disclosure also describes non-material federal income tax consequences or other factual information.

When tax counsel’s opinion on a federal income tax consequence that is “material to investors” is clearly identified and articulated in the tax disclosure, tax counsel typically provides a short-form opinion. According to the Bulletin, in a short-form opinion, the tax disclosure in the disclosure document serves as the tax opinion, and the opinion filed as an exhibit to the registration statement confirms this.41 We interpret the Bulletin as consistent with the common understanding of practitioners that the short-form opinion confirming that the tax opinion of named counsel identified in the tax disclosure is the tax opinion of named counsel. We do not

38 Sections 10.50, 10.51 and 10.52 of Circular 230.
39 Section 10.24 of Circular 230.
40 Part III.B.1 (Long and Short-Form Tax Opinions – Long-Form Opinion).
41 Part III.B.2 (Long and Short-Form Tax Opinions – Short-Form Opinion).
Merck & Co., Inc.
One Merck Drive
Whitehouse Station, NJ 08889

Ladies and Gentlemen:

We have acted as counsel to Merck & Co., Inc., a New Jersey corporation ("Merck"), in connection with the proposed merger (the "Mercury Merger") of SP Merger Subsidiary Two, Inc. (formerly known as Purple, Inc.), a New Jersey corporation ("Merger Sub 2") and a wholly owned subsidiary of Schering-Plough Corporation, a New Jersey corporation ("Schering-Plough"), with and into Merck, pursuant to the Agreement and Plan of Merger, dated as of March 8, 2009 (the "Agreement"), by and among Merck, Schering-Plough, SP Merger Subsidiary One, Inc. (formerly known as Blue, Inc.), a New Jersey corporation and wholly owned subsidiary of Schering-Plough, and Merger Sub 2. For purposes of this opinion, any capitalized term used but not otherwise defined herein shall have the meaning ascribed to it in the Agreement.

This opinion is being delivered at your request, and in connection with the registration statement on Form S-4 filed by Schering-Plough with the Securities and Exchange Commission (File No. 333-159371) (the "Registration Statement") to register the shares of Schering-Plough common stock required to be issued pursuant to the Agreement, to which this opinion is attached as an exhibit. In addition, it is a condition to Merck’s obligation to effect the Mercury Merger that Merck receive a written opinion of Fried, Frank, Harris, Shriver & Jacobson LLP or other counsel reasonably satisfactory to Merck, dated the Closing Date, to the effect that the Mercury Merger will be treated for United States federal income tax purposes as a reorganization within the meaning of Section 368(a) of the Code.

In connection with this opinion, and with your consent, we have reviewed and relied upon the accuracy and completeness of the following: (i) the Agreement; (ii) the Registration Statement; (iii) the joint proxy statement and prospectus which forms a part of the Registration Statement; (iv) the representations made by and on behalf of Merck, Schering-Plough and Merger Sub 2 contained in the tax representation letters (the "Tax Representation Letters") dated as of the date hereof and delivered to us by Merck and Schering-Plough; and (v) such other documents, information and materials as we have deemed necessary or appropriate.
In rendering this opinion, we have assumed, with your permission, that (1) all parties to the Agreement, and to any other documents reviewed by us, have acted and will act in accordance with the terms of the Agreement and such other documents, (2) the Mercury Merger will be consummated at the Subsequent Effective Time pursuant to and in accordance with the terms and conditions set forth in the Agreement, without the waiver or modification of any such terms and conditions, and as described in the Registration Statement, (3) all facts, information, statements and representations made by or on behalf of Merck, Schering-Plough or Merger Sub 2 in the Agreement, the Registration Statement and the Tax Representation Letters are and, at all times up to and including the Subsequent Effective Time, will continue to be true, complete and accurate, (4) all facts, information, statements and representations made by or on behalf of Merck, Schering-Plough or Merger Sub 2 in the Agreement, the Registration Statement and the Tax Representation Letters that are qualified by the knowledge and/or belief of Merck, Schering-Plough or Merger Sub 2 are and, at all times up to and including the Subsequent Effective Time, will continue to be true, complete and accurate as though not so qualified and (5) as to all matters as to which any person or entity represents that it is not a party to, does not have, or is not aware of any plan, intention, understanding or agreement, there is in fact no plan, intention, understanding or agreement and, at all times up to and including the Subsequent Effective Time, there will be no plan, intention, understanding or agreement. We also have assumed the authenticity of original documents, the accuracy of copies, the genuineness of signatures and the legal capacity of signatories. Moreover, we have assumed that all representations and statements contained in the documents we have reviewed were true, complete and accurate in all respects at the time made and will continue to be true, complete and accurate in all respects at all times up to and including the Subsequent Effective Time, and that all such representations and statements can be established to the Internal Revenue Service or courts, if necessary, by clear and convincing evidence. If any of the assumptions described above are untrue for any reason, or if the Mercury Merger is consummated other than in accordance with the terms and conditions set forth in the Agreement, our opinion as expressed below may be adversely affected.

The opinion expressed herein is based upon the Internal Revenue Code of 1986, as amended (the “Code”), United States Treasury Regulations, case law and published rulings and other pronouncements of the Internal Revenue Service, as in effect on the date hereof. No assurances can be given that such authorities will not be amended or otherwise changed at any time, possibly with retroactive effect. We assume no obligation to advise you of any such subsequent changes. If there is any change in the applicable law or regulations, or if there is any new administrative or judicial interpretation of the
Merck & Co., Inc.
June 24, 2009
Page 3

applicable law or regulations, any or all of the United States federal income tax consequences described herein may become inapplicable.

Based upon and subject to the foregoing, and to the qualifications and limitations set forth herein, and in reliance upon the representations and assumptions described above, it is our opinion that the Mercury Merger will be treated for United States federal income tax purposes as a reorganization within the meaning of Section 368(a) of the Code.

Our opinion relates solely to the specific matters set forth above, and no opinion is expressed, or should be inferred, as to any other federal, state, local or non-U.S. income, estate, gift, transfer, sales, use or other tax consequences that may result from the Mercury Merger. Our opinion is limited to legal rather than factual matters and has no official status or binding effect of any kind. Accordingly, we cannot assure you that the Internal Revenue Service or a court having jurisdiction over the issue will agree with our opinion.

The opinion expressed herein is being furnished to you for your use in connection with the Registration Statement and may not be used for any other purpose without our prior written consent. We hereby consent to the filing of this opinion as Exhibit 8.1 to the Registration Statement and to the references to this opinion in the Registration Statement. In giving this consent, we do not hereby admit that we are within the category of persons whose consent is required under Section 7 of the Securities Act of 1933, as amended, or the rules or regulations of the Securities and Exchange Commission promulgated thereunder.

Very truly yours,

/s/ Fried, Frank, Harris, Shriver & Jacobson LLP
This sample letter was prepared for instructional purposes and should not be considered a model for any particular matter nor should it be relied upon as being applicable to any specific legal matter.

SAMPLE CORPORATION
TAX REPRESENTATION LETTER

[DATE]

[Law Firm]

Ladies and Gentlemen:

In connection with the opinion (the “Tax Opinion”) to be delivered by [Law Firm] (“Tax Counsel”), as described in the joint proxy statement and prospectus (the “Prospectus/Proxy Statement”) which forms a part of the registration statement on Form S-4 (the “Registration Statement”) filed with the Securities and Exchange Commission (File No. xxx-xxxx) by Parent in connection with the issuance of shares of Parent Common Stock in the Merger pursuant to the Agreement and Plan of Merger (the “Agreement”), dated as of [DATE], among SAMPLE CORPORATION, a Delaware corporation (the “Company”), OTHER CORPORATION, a Delaware corporation (the “Company”), OTHER CORPORATION, a Delaware corporation (“Parent”), and Merger Corp., a Delaware corporation and a wholly-owned subsidiary of Parent (“Merger Sub”), and recognizing that (i) Tax Counsel will rely on the following representations in delivering the Tax Opinion and (ii) the Tax Opinion may not accurately describe the consequences of the Merger if any of the following representations are not accurate in all respects as of the Effective Time, the Company hereby represents and certifies after due inquiry and investigation that (1) to the extent the following representations relate to the Company, such representations are true, correct and complete in all respects as of the date hereof and the Company believes such representations will continue to be true, correct and complete in all respects at all times up to and including the Effective Time, and (2) to the extent the following representations relate to Parent or Merger Sub, the Company believes such representations are true, correct and complete in all respects as of the date hereof and will continue to be true, correct and complete in all respects at all times up to and including the Effective Time:

1. The Merger will be consummated solely in compliance with the terms and conditions of the Agreement, none of the terms and conditions of the Agreement have been waived or modified, and none of the Company, Parent and Merger Sub will waive or modify any of such terms and conditions.

2. The facts relating to the Merger, as described in the Agreement and in the Registration Statement, are, insofar as such facts pertain to the Company, true correct and
This sample letter was prepared for instructional purposes and should not be considered a model for any particular matter nor should it be relied upon as being applicable to any specific legal matter.

complete in all respects and will continue to be true, correct, and complete in all respects at all times up to and including the Effective Time, and, insofar as such facts pertain to Parent or Merger Sub, the Company believes such facts are true, correct and complete in all respects as of the date hereof and will continue to be true, correct and complete in all respects at all times up to and including the Effective Time. Other than those described or referenced in the Agreement and the Registration Statement, there are no agreements, arrangements or understandings, either written or oral, between or among (a) any of the Company, its subsidiaries, its affiliates or its shareholders, on the one hand, and (b) any of Parent, Merger Sub, their subsidiaries, their affiliates or their shareholders on the other hand, concerning the Merger. In rendering the Tax Opinion, the undersigned understands that Tax Counsel will be relying upon the accuracy of the factual information contained in the Registration Statement and the representations set forth in this Company Tax Representation Letter.

3. The Company is consummating the Merger for bona fide corporate business purposes described in the Registration Statement, which include:

- [description of business purposes]

4. The Company Shares are as of the date hereof, and will continue to be at all times up to and including the Effective Time, the only outstanding equity interest of the Company. The Company has not issued since the date of the Agreement, and will not issue prior to the Closing Date, any additional Company Shares other than pursuant to the exercise of Company Options.

5. The number of shares of Parent Common Stock into which each Company Share (other than Excluded Company Shares) issued and outstanding immediately prior to the Effective Time will be converted in the Merger was determined through arm’s length negotiations between Parent and the Company. The fair market value of the Parent Common Stock to be received in the Merger by each holder of Company Shares (plus cash, if any, to be received in lieu of a fractional share of Parent Common Stock) will be approximately equal to the fair market value of the Company Shares surrendered in exchange therefor. In connection with the Merger, no holder of Company Shares will receive in exchange for such shares, directly or indirectly, any consideration other than Parent Common Stock and, in lieu of a fractional share of Parent Common Stock, cash.

6. There is no plan or intention by holders of Company Shares to sell, exchange or otherwise transfer ownership (including by derivative transactions such as an equity swap, which would have the economic effect of a transfer of ownership) to Parent, the Company or any person related to Parent or the Company (within the meaning of Treas. Reg. § 1.368-1(e)(3)), directly or indirectly (including through partnerships or through third parties in connection with a plan to so transfer ownership), of any shares of Parent Common Stock (other than fractional shares of Parent Common Stock for which holders of Company Shares receive cash in the Merger).

7. Neither Parent nor any person related to Parent (within the meaning of Treas.
Reg. § 1.368-1(e)(3)) has redeemed, purchased or otherwise acquired or will redeem, purchase or otherwise acquire, directly or indirectly, any Company Shares for any consideration other than Parent Common Stock (except for cash paid in lieu of a fractional share of Parent Common Stock). Parent will not redeem, purchase, exchange or otherwise reacquire, directly or indirectly through a related person (within the meaning of Treas. Reg. § 1.368-1(e)(3)), or make any extraordinary distribution with respect to, any shares of Parent Common Stock to be received by holders of Company Shares pursuant to the Merger except for cash paid in lieu of a fractional share of Parent Common Stock.

8. At the Effective Time and after the Merger, the Company will hold at least 90% of the fair market value of the net assets and at least 70% of the fair market value of the gross assets held by the Company immediately prior to the Merger, and at least 90% of the fair market value of the net assets and at least 70% of the fair market value of the gross assets held by Merger Sub immediately prior to the Merger. For purposes of this Paragraph 8, assets of Merger Sub or the Company held immediately prior to the Merger include amounts paid or incurred by Merger Sub or the Company in connection with the Merger, including amounts used to pay reorganization expenses or to make payments to holders of Company Stock who receive cash in lieu of a fractional share of Parent Common Stock and all payments, redemptions and distributions (except for regular, normal dividends) made in contemplation or as part of the Merger. Any dispositions of assets held by the Company prior to the Merger which are made in contemplation of, or as part of, the Merger will be for fair market value, and the proceeds thereof will be retained by the Company.

9. Prior to and at the Effective Time of the Merger, Parent will be in “control” of Merger Sub within the meaning of Section 368(c) of the Internal Revenue Code of 1986, as amended (the “Code”). Merger Sub is wholly and directly owned by Parent.

10. Merger Sub has been newly formed solely in order to consummate the Merger, and at no time has or will Merger Sub conduct any business activities or other operations of any kind other than the issuance of its stock to Parent prior to the Effective Time. No stock of Merger Sub will be issued in the Merger.

11. Immediately after the Merger, Parent will be in “control” of the Company within the meaning of Section 368(c) of the Code, and the Company has no plan or intention to issue, and Parent has no plan or intention to cause or to permit the Company to issue, additional Company Shares, or any plan or intention to take any action or to permit any action to be taken that could result in Parent losing “control” of the Company within the meaning of Section 368(c) of the Code.

12. Parent has no plan or intention to liquidate the Company, to merge or cause the Company to be merged with or into another corporation or other entity, to sell, exchange, transfer or otherwise dispose of any stock of the Company acquired in the Merger except for transfers described in Section 368(a)(2)(C) of the Code, or to cause the Company to sell, exchange, transfer or otherwise dispose of any of its assets or of any of the assets acquired from Merger Sub except for dispositions made in the ordinary course of business.
This sample letter was prepared for instructional purposes and should not be considered a model for any particular matter nor should it be relied upon as being applicable to any specific legal matter.

13. Merger Sub will have no assets or liabilities, other than de minimis assets and liabilities received and incurred in connection with its formation.

14. Following the Merger, Parent or a member of Parent’s “qualified group” (within the meaning of Treas. Reg. § 1.368-1(d)(4)(ii)) will continue the Company’s historic business or use a significant portion of the Company’s historic business assets in a business (within the meaning of Treas. Reg. § 1.368-1(d)). For purposes of this test, Parent and such members (i) will be deemed to own that portion of the assets of a partnership reflecting their interest in the partnership and (ii) will be treated as conducting a business of a partnership of which they are members, provided (A) they own in the aggregate at least a 33 1/3% capital and profits interest in such partnership or (B) they own in the aggregate at least a 20% capital and profits interest in such partnership and perform active and substantial management functions as partners with respect that partnership business.

15. Subject to Section X of the Agreement, Parent, Merger Sub, the Company and the holders of Company Shares each will pay its or their own costs and expenses, if any, incurred in connection with the Agreement, the Merger, and the other transactions contemplated by the Agreement, provided, however, that pursuant to Section X of the Agreement expenses incurred in connection with the filing fee for the Registration Statement and printing and mailing the Prospectus/Proxy Statement and the Registration Statement will be shared equally by Parent and the Company.

16. There is no intercorporate indebtedness existing between Parent (or its subsidiaries) and the Company (or its subsidiaries) or between Merger Sub and the Company (or its subsidiaries) that was issued, acquired or will be settled at a discount.

17. In the Merger, (i) Company Shares representing “control” of the Company, as defined in Section 368(c) of the Code, will be exchanged solely for voting stock of Parent and (ii) Parent will acquire Company Shares solely in exchange for voting stock of Parent. For purposes of this Paragraph 17, if any Company Shares are exchanged or redeemed for cash or other property furnished by Parent (or any person related to Parent (within the meaning of Treas. Reg. § 1.368-1(e)(3))), such Company Shares will be treated as outstanding Company Shares acquired by Parent at the Effective Time.

18. The Company does not have outstanding, and at the Effective Time the Company will not have outstanding, any options, warrants, convertible securities, equity-linked securities or other rights to acquire Company Shares which, if exercised or converted, would affect the acquisition or retention by Parent of “control” of the Company within the meaning of Section 368(c) of the Code.

19. Parent will not assume any liabilities of holders of Company Shares in connection with the Merger, nor will any of the Company Shares acquired by Parent in the Merger be subject to any liabilities.

20. Neither Parent nor any person related to Parent (within the meaning of Treas.
Reg. § 1.368-1(e)(3)) will own, immediately prior to the Effective Time, nor has Parent or any person related to Parent owned during the five-year period ending immediately prior to the Effective Time, directly or indirectly, any class of stock of the Company or any securities of the Company or any instrument giving the holder the right to acquire any such stock or securities.

21. At the Effective Time, the fair market value of the assets of the Company will exceed the sum of the liabilities of the Company, plus the amount of liabilities, if any, to which those assets are subject.

22. The payment of cash in lieu of a fractional share of Parent Common Stock to holders of Company Shares is solely for the purpose of avoiding the expense and inconvenience to Parent of issuing fractional shares and does not represent separately bargained for consideration. The total cash consideration that will be paid in the Merger to the holders of Company Shares in lieu of issuing fractional shares of Parent Common Stock will not exceed one percent of the total consideration that will be issued to the holders of Company Shares in exchange for their Company Shares in the Merger. The fractional share interests of each holder of Company Shares will be aggregated, and no holder of Company Shares, with the possible exception of holders who own multiple Certificates, or whose holdings are in multiple accounts or with multiple brokers, will receive cash in an amount greater than the value of one full share of Parent Common Stock.

23. None of the compensation received or to be received by any stockholder-employee or stockholder-independent contractor of the Company is or will be separate consideration for, or allocable to, any of such person’s Company Shares. None of the shares of Parent Common Stock to be received by any stockholder-employee or stockholder-independent contractor of the Company pursuant to the Merger is or will be separate consideration for, or allocable to, any employment, consulting or similar agreement or arrangement. Any compensation paid or to be paid to any stockholder-employee or stockholder-independent contractor of the Company, who will be an employee of or will perform advisory services for Parent, the Company, or any affiliate thereof after the Merger, will be commensurate with amounts paid to third parties bargaining at arm’s length for similar services.

24. The Company has not made, and will not make, any distribution with respect to Company Shares in contemplation of or as part of the Merger (whether in redemption of such shares or otherwise), excluding for purposes of this Paragraph 24 regular, normal dividends.

25. The Company, Parent and Merger Sub will satisfy the information reporting requirements of Treas. Reg. § 1.368-3T with respect to the Merger.

26. None of Parent, Merger Sub and the Company has taken, or has any plan or intention to take, any action that is reasonably likely to cause the Merger to fail to qualify as a “reorganization” within the meaning of Section 368(a) of the Code.

27. The Company will not take any position on any Tax Return, or take any other Tax reporting position, that is inconsistent with any of the foregoing representations or the treatment
This sample letter was prepared for instructional purposes and should not be considered a model for any particular matter nor should it be relied upon as being applicable to any specific legal matter.

of the Merger for federal income tax purposes as a “reorganization” within the meaning of Section 368(a) of the Code unless otherwise required by a “determination” (as defined in Section 1313(a) of the Code).

28. The undersigned is authorized to make all representations set forth herein on behalf of the Company.

The Company understands that Law Firm will rely on this Company Tax Representation Letter in rendering the Tax Opinion, and the Company will promptly and timely inform them if, after signing this Company Tax Representation Letter, the Company has reason to believe that any of the facts described herein or any of the representations or statements made in this Company Tax Representation Letter are or have become untrue, incorrect or incomplete in any respect.

IN WITNESS WHEREOF, I have, on behalf of the Company, caused this Company Tax Representation Letter to be executed on this _____ day of _______.

SAMPLE CORPORATION

By: ______________________________

Name: ______________________________

Title: ______________________________
THE GRADUATE TAX PROGRAM AT NEW YORK LAW SCHOOL

16TH ANNUAL TAX LAWYERING WORKSHOP
(TAX 403)

FRIDAY, MAY 3, 2019
NEW YORK LAW SCHOOL
185 WEST BROADWAY
9:00 AM TO 3:00 PM
ROOM W400

CLE MATERIALS FOR THIRD SESSION

12:30 p.m. to 1:30 p.m. - 1 Ethics CLE Credit

Elder Abuse: When You Must Act and What You Should Do
Q&A with Sally M. Donahue, Partner, Jaspan Schlesinger, LLP

Materials:

1. New York State Elder Abuse Prevalence Study
2. New York Rules of Professional Conduct - 1.6 and 1.7
3. Elder Abuse & Crime (NYC Department for the Aging)
Under the Radar: New York State Elder Abuse Prevalence Study

SELF-REPORTED PREVALENCE AND DOCUMENTED CASE SURVEYS

FINAL REPORT
May 2011

Prepared by:
Lifespan of Greater Rochester, Inc.
Weill Cornell Medical Center
of Cornell University
New York City Department for the Aging
# TABLE OF CONTENTS

Research Project Participants ................................................................. iii
Advisory Committee ................................................................................ iv
Acknowledgements .................................................................................. v
Executive Summary ................................................................................... 1
Introduction ............................................................................................... 7
Background ................................................................................................. 7
Elder Abuse Defined .................................................................................... 8
Impetus for the Study .................................................................................. 10
Significance of the Study ............................................................................. 10
Previous Studies and Surveys of Prevalence and Documented Cases .......... 11
New York State Demographics ................................................................. 13
Research Partners ....................................................................................... 14
Research Challenges ................................................................................... 15
Elder Abuse Services in New York State ..................................................... 16
Methodology
  Prevalence (Self-Reported) Study ........................................................... 17
  Documented Case Study ......................................................................... 22
Results
  Self-Reported Cases ............................................................................... 24
  Documented Cases .................................................................................. 36
Comparison of Self-Reported and Documented Case Data ....................... 50
Conclusions ............................................................................................... 54
Limitations of the Study ............................................................................. 58
Implications for Further Research ............................................................. 58
References .................................................................................................. 59

Appendices
  A – Self-Reported Study Questionnaire .................................................. 61
  B – Documented Case Study Survey ......................................................... 77
  C – Documented Case Study Aggregate Case Data by Region ................... 94
  D – Documented Case Study Data by Region – Discussion ......................... 100
  E – Documented Case Study Aggregate Data by Service System ............ 115
  F – Documented Case Study Service System Data – Discussion .............. 118

Figures
  Figure 1 – New York State Resident Population- 60 + years of age ........ 13
  Figure 2 – Map of New York State Regions ........................................... 26

Tables
  Table 1 – Self-Reported Study-Marital Status of Respondents ............... 25
  Table 2 – Self-Reported Study-Ethnicity of Respondents ....................... 25
  Table 3 – Self-Reported Study-Household Income .................................. 25
Table 4 – Respondent and Elder Population Distribution by Region

Table 5 – Prevalence Rates of Self-Reported Elder Abuse in New York State by Mistreatment Domain

Table 6 – Prevalence Rates of Self-Reported Elder Abuse in New York State by Geographic Area

Table 7 – Incidence Rates of Self-Reported Elder Abuse in New York State by Mistreatment Domain

Table 8 – Incidence Rates of Self-Reported Elder Abuse in New York State by Geographic Area

Table 9 – Self-Reported Study-Number of Abusers in Individual Cases

Table 10 – Self-Reported Study-Distribution of Abusers by Relationship and Type of Mistreatment

Table 11 – Documented Case Study: Response Rate by Service System and Organization

Table 12 – Documented Case Study: Response Rate by Region

Table 13 – Rates of Documented Elder Abuse in New York State by Geographic Area

Table 14 – Documented Case Data – All Service Systems Statewide-Victim Information

Table 15 – Documented Case Data – All Service Systems Statewide-Abuser Information

Table 16 – Documented Case Data – All Service Systems Statewide-Referral Information

Table 17 – Documented Case Study Data-Percent of Organizations Providing Victim Information by Service System

Table 18 – Rates of Elder Abuse in New York State: Comparison of Self-Reported One-Year Incidence and Documented Case Data

Table 19 – Comparison of Self-Reported One-Year Incidence and Documented Case Rates of Elder Abuse by Geographic Area

Table 20 – Victim Demographic Information: Comparison of Documented Case Data and Self-Reported Data

Prepared for:
William B. Hoyt Memorial New York State Children and Family Trust Fund
New York State Office of Children and Family Services
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This study was the result of a team effort involving not only the research partners but also many experts, academic institutions, social service organizations and government agencies in New York State. The study partners would like to acknowledge the indispensable contributions made by many colleagues. In particular, we would like to thank the Project Advisory Committee for their input into the design of the study. Special recognition is in order for Yasamin Miller, Director, and Darren Hearn, Manager, and the exceptional staff of the Cornell Survey Research Institute for conducting over 4,300 telephone interviews with older New Yorkers.

We thank Karl Pillemer and Charles Henderson of Cornell University for their expert input throughout the project. We are grateful to the many organizations that responded to the Documented Case Survey and to the officials who facilitated access to critical data. We would also like to thank Mebane Powell, Research Associate, New York City Department for the Aging, and Mickelle Damassia, Research Assistant, Fordham University Graduate School of Social Service, for their diligent work in collecting and analyzing data from over 400 surveys collected from agencies across New York State.

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We would like to express our appreciation to the New York State Office of Children and Family Services/William B. Hoyt Memorial New York State Children and Family Trust Fund for sponsoring the project. Special thanks are due to Judy Richards, Trust Fund Director, and Karen Kissinger, Trust Fund Program Manager, for shepherding the project through the state funding process and for their contributions to planning in all phases of the study. We are grateful to the support staff at the participating institutions at Lifespan, Weill Cornell Medical College, New York City Department for the Aging and Fordham University, all of whom had a hand in realizing the goals of the study.

We would also like to give special thanks to all the organizations that worked with us to gather data and respond to our questionnaire.

Finally, the research partners would like to thank the many older adults in New York who shared their time with us and revealed private life experiences with us in telephone interviews for the purpose of shedding light on the often hidden problem of elder abuse.
NEW YORK STATE ELDER ABUSE PREVALENCE STUDY

EXECUTIVE SUMMARY

The New York State Elder Abuse Prevalence Study is one of the most ambitious and comprehensive studies to quantify the extent of elder abuse in a discrete jurisdiction ever attempted, and certainly the largest in any single American state. With funding from the New York State William B. Hoyt Memorial Children and Family Trust Fund, a program administered under NYS Office of Children and Family Services, three community, governmental, and academic partners (Lifespan of Greater Rochester, the New York City Department for the Aging and the Weill Cornell Medical College) formed a collaborative partnership to conduct the study.

AIMS OF THE STUDY

The study had three central aims achieved through two separate study components:

- To estimate the prevalence and incidence of various forms of elder abuse in a large, representative, statewide sample of older New Yorkers over 60 years of age through direct interviews (hereafter referred to as the Self-Reported Prevalence Study)
- To estimate the number of elder abuse cases coming to the attention of all agencies and programs responsible for serving elder abuse victims in New York State in a one-year period (the Documented Case Study), and
- To compare rates of elder abuse in the two component studies, permitting a comparison of “known” to “hidden” cases, and thereby determining an estimate of the rate of elder abuse underreporting in New York State.

Prevalence refers to the number of older adults who have ever experienced elder mistreatment since turning 60. Incidence refers to the number of new cases of elder abuse in the year prior to the survey interview.

METHODOLOGY

At the completion of the study, 4,156 older New Yorkers or their proxies had been interviewed directly and 292 agencies reported on documented cases from all corners of the state. Through the collaborative efforts of the three research partners, the study employed “cutting edge” methodologies to accomplish the goals of the study. These included (1) improvement of existing survey instruments to make them “state of the art” using the combined field knowledge of academics and direct service providers; separate surveys were created for the Self-Reported Prevalence Survey and the Documented Case Study, (2) utilization of the Cornell Research Survey Institute in Ithaca to assemble a representative state sample of older adults and to conduct the interviews by telephone, (3) administration of a survey to all major service systems, agencies and programs in the state that receive reports of elder abuse and provide investigation and intervention to older adult victims.
Methodology - Self-Reported Prevalence Study

In the Self-Reported Prevalence Study, the research team assembled a representative sample of all residents of New York State age 60 and older representing a broad cross section of the older population in the state. The sample was created using a random digit dialing strategy derived from census tracts targeting adults over 60. The study was limited to older adults living in the community, that is, not living in licensed facilities such as nursing homes and adult care facilities. The actual surveys were conducted by telephone by trained interviewers at the Cornell Survey Research Institute. The survey instrument used for this component of the study captured elder mistreatment in four general domains: (1) Neglect by a responsible caregiver (2) Financial Exploitation (3) Emotional Abuse and (4) Physical Elder Abuse (including Sexual Abuse).

Methodology - Documented Case Study

The Documented Case Study contacted programs and agencies responsible for specifically serving victims of elder abuse and older victims of domestic violence in New York State and requested that they complete a survey about cases served in calendar year 2008. The survey included questions on elder abuse cases that mirrored the questions used for the statewide Self-Reported Prevalence Study. Programs surveyed included Adult Protective Services, law enforcement, area agencies on aging, domestic violence programs, elder abuse programs, programs funded by the Office of Victim Services (previously known as the Crime Victims Board), elder abuse coalitions, and District Attorney (DA) offices. While the amount of data supplied varied by county and organization, at least some data was collected for each of the 62 counties in New York State.

MAJOR FINDINGS

- The findings of the study point to a dramatic gap between the rate of elder abuse events reported by older New Yorkers and the number of cases referred to and served in the formal elder abuse service system.
- Overall the study found an elder abuse incidence rate in New York State that was nearly 24 times greater than the number of cases referred to social service, law enforcement or legal authorities who have the capacity as well as the responsibility to assist older adult victims.
- Psychological abuse was the most common form of mistreatment reported by agencies providing data on elder abuse victims in the Documented Case Study. This finding stands in contrast to the results of the Self-Reported Study in which financial exploitation was the most prevalent form of mistreatment reported by respondents as having taken place in the year preceding the survey.
- Applying the incidence rate estimated by the study to the general population of older New Yorkers, an estimated 260,000 older adults in the state had been victims of at least one form of elder abuse in the preceding year (a span of 12 months between 2008-2009).

Caution must be exercised in interpreting the large gap between prevalence reported directly by older adults and the number of cases served. The adequacy of some documentation systems to provide elder abuse case data may have played a role in the results. The inability of some service systems and individual programs to report on their involvement in elder abuse cases may have affected the final tally of documented cases. As a
result, an undetermined number of cases may not be accounted for from agencies and programs that could not access some data about elder abuse victims served. However, the study received comprehensive data from the largest programs serving elder abuse victims: Adult Protective Services, law enforcement and community-based elder abuse programs.

### Table A

#### Rates of Elder Abuse in New York State: Comparison of Self-Reported One-Year Incidence and Documented Case Data

<table>
<thead>
<tr>
<th></th>
<th>Documented Rate per 1,000</th>
<th>Self-reported Rate per 1,000</th>
<th>Ratio of Self-Reported to Documented</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York State - All forms of abuse</td>
<td>3.24</td>
<td>76.0</td>
<td>23.5</td>
</tr>
<tr>
<td>Financial</td>
<td>.96</td>
<td>42.1</td>
<td>43.9</td>
</tr>
<tr>
<td>Physical and Sexual</td>
<td>1.13*</td>
<td>22.4*</td>
<td>19.8</td>
</tr>
<tr>
<td>Neglect</td>
<td>.32</td>
<td>18.3</td>
<td>57.2</td>
</tr>
<tr>
<td>Emotional</td>
<td>1.37</td>
<td>16.4</td>
<td>12.0</td>
</tr>
</tbody>
</table>

*The Documented Case rate includes physical abuse cases only. Physical and sexual abuse data were combined in the Self-Reported Study. The sexual abuse rate for the Documented Case Study was 0.03 per 1,000.

It should be noted that the sum of the rates exceeds the total rates in both the Documented Case and Self-Reported Studies because some victims experienced more than one type of abuse.

### SELF-REPORTED PREVALENCE STUDY

Major findings of the Self-Reported Study include:

- A total one-year incidence rate of 76 per 1,000 older residents of New York State for any form of elder abuse was found.
- The cumulative prevalence of any form of non-financial elder mistreatment was 46.2 per thousand subjects studied in the year preceding the survey.
- The highest rate of mistreatment occurred for major financial exploitation (theft of money or property, using items without permission, impersonation to get access, forcing or misleading to get items such as money, bank cards, accounts, power of attorney) with a rate of 41 per 1,000 surveyed. This rate reflects respondent reports of financial abuse that occurred in the year preceding the survey. (The rate for moderate financial exploitation, i.e. discontinuing contributions to household finances in spite of agreement to do so, constituted another 1 per 1,000 surveyed.)
- The study also found that 141 out of 1,000 older New Yorkers have experienced an elder abuse event since turning age 60.
DOCUMENTED CASE STUDY

Major findings of the Documented Case Study include:

- Adjusting for possible duplication of victims served by more than one program, the study determined that in a one-year period **11,432 victims were served throughout New York State, yielding a rate of 3.24 elder abuse victims served per 1,000 older adults.**

- Rates of documented elder abuse varied by region. The highest rate was in New York City (3.79 reported cases per 1,000 older adult residents) compared to the region with the lowest rate of documented cases, Central New York/Southern Tier (2.30 cases per 1,000).

- Variability in data collection across service systems contributed to the large gap uncovered between the number of cases reported through the Documented Case Study and the prevalence rates found in the Self-Reported Study. The extent to which the gap can be attributed to data collection issues among service systems has not been established.

- While there was little difference among urban, suburban and rural counties in types of abuse reported in the Documented Case Survey (for all regions, emotional abuse is the most common abuse category reported), urban areas tend to have higher documented case rates than rural counties.
### Table B

**Victim Demographic Information**  
Comparison of Documented Case Data and Self Reported Data

<table>
<thead>
<tr>
<th>Information about victims</th>
<th>Documented Case Study</th>
<th>Self-Reported Study</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Percent of Victims</td>
<td>Percent of Victims</td>
</tr>
<tr>
<td><strong>Age groups</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>60-64</td>
<td>17.0</td>
<td>20.3</td>
</tr>
<tr>
<td>65-74</td>
<td>41.9</td>
<td>38.0</td>
</tr>
<tr>
<td>75-84</td>
<td>28.1</td>
<td>29.1</td>
</tr>
<tr>
<td>85+</td>
<td>13.0</td>
<td>12.7</td>
</tr>
<tr>
<td>(Missing)</td>
<td>14.9</td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Gender</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>32.8</td>
<td>35.8</td>
</tr>
<tr>
<td>Female</td>
<td>67.2</td>
<td>64.2</td>
</tr>
<tr>
<td>(Missing)</td>
<td>13.8</td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Race/Ethnicity</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>27.9</td>
<td>26.3</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
<td>3.0</td>
<td>1.6</td>
</tr>
<tr>
<td>Caucasian</td>
<td>69.3</td>
<td>65.5</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
<td>16.4</td>
<td>7.6</td>
</tr>
<tr>
<td>Native American/Aleut Eskimo</td>
<td>0.8</td>
<td>1.9</td>
</tr>
<tr>
<td>Race, other</td>
<td>10.5</td>
<td>2.9</td>
</tr>
<tr>
<td>(Missing)</td>
<td>50.8</td>
<td>1.9</td>
</tr>
</tbody>
</table>

Under Race/Ethnicity, it should be noted that in the Documented Case Study, some agencies permitted elder abuse victims to declare more than one ethnic category; as a result the sum of percentages exceeds 100. In the Self-Reported Study column, respondents who self identified as Hispanic/Latino in addition to another category are reported in a separate statistic (7.6%). As a result, the sum of all categories again exceeds 100 percent.

Note that in Table B, “Missing” in the Documented Case Study column indicates the percentage of cases in which responding organizations were unable to supply the data requested. In the Self-Reported Study column, “Missing” indicates the percentage of telephone survey respondents who declined to supply the requested information.

The comparison of demographic data in Table B reveals similar trends in both the Self-Reported and Documented Case data except in the area of Race/Ethnicity. The percentage of Hispanic/Latino and Asian/Pacific Islander victims served by Documented Case Study respondent organizations was approximately twice the percentage of Self-Reported Study respondents who self-identified as Hispanic/Latino or Asian/Pacific Islander. On the other hand, Native Americans/Aleut Eskimos were represented in the Documented Case findings at less than half the rate they were found in the Self-Reported Study. It should also be noted, however, that responding organizations in the Documented Case Study were as a whole unable to provide racial/ethnic data in half of the cases.
CONCLUSIONS

While the Prevalence Study did not attempt to analyze the reasons for the disparity in self-reported versus documented elder abuse, some possible explanations can be offered. Considerable variability in documentation systems may play a role in the results. The Documented Case Study found a great deal of variability in the way service systems and individual organizations collect data in elder abuse cases. Some service systems and some regions may lack the resources to integrate elder abuse elements in data collection systems or may simply not have an adequate elder abuse focus in their data collection. Population density, the visibility of older adults in the community and, conversely, social isolation in rural areas may contribute to differences in referral rate trends based on geography. Greater awareness by individuals, both lay and professional, who have contact with older adults and might observe the signs and symptoms of elder abuse, may also explain higher referral rates in some areas.

The New York State Elder Abuse Prevalence Study uncovered a large number of older adults for whom elder abuse is a reality but who remain “under the radar” of the community response system set up to assist them.

The findings of the New York State Elder Abuse Prevalence Study suggest that attention should be paid to the following issues in elder abuse services:

- Consistency and adequacy in the collection of data regarding elder abuse cases across service systems. Sound and complete data sets regarding elder abuse cases are essential for case planning and program planning, reliable program evaluation and resource allocation.

- Emphasis on cross-system collaboration to ensure that limited resources are used wisely to identify and serve elder abuse victims.

- Greater focus on prevention and intervention in those forms of elder abuse reported by elders to be most prevalent, in particular, financial exploitation.

- Promotion of public and professional awareness through education campaigns and training concerning the signs of elder abuse and the resources available to assist older adults who are being mistreated by trusted individuals.

IMPLICATIONS FOR FOLLOW UP AND FURTHER STUDY

For the first time, a scientifically rigorous estimate of the prevalence of elder abuse in New York State has been established. The study also provides an estimate of the number of cases that receive intervention in a one-year period throughout the state. The study raises many questions about differences in rates of abuse in various regions, about referral rates by region and about how elder abuse data is recorded. Further exploration of these issues in future research studies is warranted.

The findings also serve as a platform for more informed decision making about policy, use of limited resources and models of service provision for the thousands of older New Yorkers whose safety, quality of life and dignity are compromised each year by elder mistreatment.
NEW YORK STATE ELDER ABUSE PREVALENCE STUDY

INTRODUCTION

This report describes one of the most ambitious and comprehensive studies to quantify the extent of elder abuse in a discrete jurisdiction ever attempted, and certainly the largest in any single American state. With funding from the New York State Children and Family Trust Fund, three community, governmental, and academic partners — Lifespan of Greater Rochester, the New York City Department for the Aging, and the Weill Cornell Medical College — entered into a unique collaborative partnership to understand the magnitude and impact of elder abuse in New York State, aided by countless other dedicated state agencies, non-governmental organizations, universities, and individuals.

The study had three central aims achieved through two separate study components:

1. To estimate the prevalence of various forms of elder abuse in a large, representative, statewide sample of community-dwelling, older New Yorkers through direct subject interviews (hereafter referred to as the Self-Reported Prevalence Study)

2. To estimate the number of elder abuse cases coming to the attention of all agencies and programs responsible for serving elder abuse victims in New York State in a one-year period (hereafter referred to as the Documented Case Study), and

3. To compare rates of elder abuse in the two component studies, permitting a comparison of “known” to “hidden” cases, and thereby determining an estimate of the rate of elder abuse underreporting in New York State.

This report describes the state of elder abuse services in New York State, the methodology applied in both components of the study, the findings of the study and the extent to which the findings address the original research goals of the study. The report also draws conclusions based on the data and offers some implications for future elder abuse research and for services for maltreated elders in New York State.

BACKGROUND

Elder abuse and neglect (also known as elder mistreatment) is an insidious and tragic social problem that affects a significant number of older adults. Often a hidden and unreported phenomenon, over the past twenty years elder abuse has been increasingly recognized, both nationally and internationally, as a serious social problem. Mistreatment of older adults has joined economic insecurity, chronic disease and cognitive impairment as recognized major threats to the health and general welfare of individuals in the second half of life.

Several factors have prompted the increased attention to elder mistreatment by gerontologists, public health specialists and social service planners. Rapidly changing demographics in the US and in many other
countries have led to the realization that aging issues, including elder mistreatment, must figure prominently in social planning. In many societies, including the US, the number of older adults is steadily increasing and in the next few decades will surpass the number of minor youth in the population. The absolute number of mistreated individuals is thus expected to increase, challenging health and social service systems that are often unprepared to respond to their needs adequately. Professionals who work with abused older adults and researchers who specialize in gerontological issues have also highlighted the dramatic ways in which elder mistreatment can affect the health, safety and quality of life of older people.

Elder abuse can have potentially devastating effects on the lives of older adults. Injuries sustained by a frail older adult can have much more tragic consequences than similar injuries inflicted on a younger person. Physical abuse can result in nursing home placement, permanent disability or even death.

Financial exploitation can deprive older adults of resources needed for the necessities of life. Unlike younger people who lose assets or resources, older adults have less time and opportunity to recover from financial losses. An unexpected finding of a longitudinal study published in 1998 was that older adults who have been subjected to any form of mistreatment are three times more likely to die within three years than elders of similar age and medical and social circumstances who have not been mistreated (Lachs & Pillemer, 1998). Advocacy by those committed to preserving the health, safety and independence of older adults has also served to focus attention on the issue of elder abuse.

ELDER ABUSE DEFINED

While historically definitions of elder mistreatment have varied widely, there has recently been more consensus, promulgated by a National Academy of Sciences Panel, on a definition that includes the notion of a trusting relationship in which the trust of the older victim is violated (Bonnie, R.J., Wallace, R.B., 2002). The goal of the New York State Elder Abuse Prevalence Study was to capture data on elder mistreatment subsuming this idea in four general domains: (1) Neglect of a responsible caretaker in meeting ADL (Activities of Daily Living) and/or IADL (Instrumental Activities of Daily Living) assistance, (2) Financial Exploitation, (3) Psychological and (4) Physical Elder Abuse (including Sexual Abuse). (It should be noted that psychological abuse is also sometimes referred to as “emotional” or “verbal” abuse.)

New York State Social Services Law also contains a definition of adult abuse which guides Adult Protective Services (APS) practice throughout the state. For purposes of APS, the definition applies to persons over 18 and does not require a “trusted” person to be the perpetrator in every case. Since the study population was confined to older residents of New York State, the research team applied the definitions contained in the law in its operational definition of elder mistreatment in the survey instruments for both the Self-Reported and Documented Case studies; however, inclusion in the study was limited to those situations in which a “trusted individual” was the perpetrator of elder abuse. Respondents were asked to apply the definitions to situations in which victims were over age 60 and in which the elder abuse victim was in a “trusting relationship” with the perpetrator. It should be noted, however, that the data submitted for the Documented Case Study from the database used to collect case data by Adult Protective Services in New York State included cases of mistreatment perpetrated by third parties not considered “trusted” persons. There was no way to disaggregate data about
“trusted” perpetrators and those that did not meet this definition. Following are the definitions for each category of abuse contained in New York State Social Services Law, Article 9B, Adult Protective Services, Section 473(6) Definitions.

Physical Abuse

The non-accidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly restrained.

Sexual Abuse

Non-consensual contact of any kind, including but not limited to, forcing sexual contact or forcing sex with a third party.

Emotional Abuse

Willful infliction of mental or emotional anguish by threat, humiliation, intimidation or other abusive conduct, including but not limited to, frightening or intimidating an adult.

Active Neglect

Active neglect means willful failure by the caregiver to fulfill the care-taking function and responsibilities assumed by the caregiver, including but not limited to, abandonment, willful deprivation of food, water, heat, clean clothing and bedding, eyeglasses or dentures, or health-related services.

Passive Neglect

Passive neglect means the non-willful failure of a caregiver to fulfill care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment or denial of food or health-related services because of inadequate caregiver knowledge, infirmity or disputing the value of prescribed services.

Financial Exploitation

Improper use of an older adult’s funds, property or resources by another individual, including but not limited to, fraud, false pretense, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.

Self neglect, also defined in the statute, was not included in the scope of this study. It should also be noted that the study was limited to older adults residing in the community and did not include residents of licensed care facilities such as Adult Care Homes and Skilled Nursing Facilities.
IMPETUS FOR THE STUDY

In 2004 Lifespan of Greater Rochester, a not-for-profit social agency serving older adults in upstate New York, convened the first comprehensive statewide summit on elder abuse in the nation. In collaboration with state agencies and a private health insurer, Lifespan organized the summit event which brought over 100 experts in elder abuse and aging services to the state capital, Albany, to discuss the state of elder abuse services in New York State and to forge a prioritized set of recommendations regarding elder abuse policy and services for the state. The 2004 New York Elder Abuse Summit resulted in the formulation of a statewide Action Agenda. The first priority recommendation focused on changing laws around elder abuse. The second priority read “Conduct a statewide research study to define the nature and scope of elder abuse, establish the baseline of prevalence and incidence, and develop a methodology for ongoing data collection and analysis for purposes of policy, planning, program development and evaluation.” There was general consensus among Summit participants that the true extent of the problem in New York was unknown owing to several factors, including:

- inconsistent requirements for some agencies to keep and report statistics on elder abuse
- inconsistency among organizations that serve elder abuse victims in the collection and tracking of data concerning elder abuse cases throughout the state
- the conviction, based on professional work experience, that elder abuse is underreported and under prosecuted
- reluctance of victims to seek help out of shame, fear and lack of awareness of avenues for assistance and support.

There was also consensus that true change in systems and in policy can only be effected if hard data about the number of older adults who have fallen victim to elder mistreatment was determined in a scientifically valid way.

In 2007 the New York State Children and Family Trust Fund, a program of the New York State Office of Children and Family Services, offered funding to conduct a study on the prevalence of elder abuse in New York State. For over two decades this fund has provided start up resources for programs to prevent child abuse; the Trust Fund is unique among such funds in the nation in also supporting elder abuse initiatives. Lifespan of Greater Rochester was selected by the Trust Fund to act as the lead agency in a collaborative partnership to conduct a comprehensive study of the prevalence of elder abuse in New York. The partnership involved a unique research collaboration between a community agency, academia and a government department (Lifespan, Weill Cornell Medical Center and New York City Department for the Aging).

THE SIGNIFICANCE OF THE STUDY

The New York State Elder Abuse Prevalence Study is groundbreaking in several ways. It is the first scientifically rigorous survey of prevalence rates of elder mistreatment of community-dwelling older adults in an entire state that includes older adults age 60 years and above and focuses specifically on abuse, neglect and financial exploitation by family members and trusted others. It also concurrently utilizes statewide elder abuse data at the
county level, ascertained through multiple service systems across the state that may come into contact with and provide services to elder abuse victims and their families. Unlike some national studies, it does not include self-neglect. It provides information on elder abuse on a statewide basis as well as by region, and by rural, suburban and urban areas.

Finally, it is the first statewide study that compares self-reported data to documented case data over the same secular period; data was collected from multiple service systems statewide for cases of mistreatment occurring during a recent one-year period (2008), ensuring that findings are both timely and concurrent with the self-reported prevalence component of the study. This, therefore, allows a comparison of mistreatment rates reported by subjects themselves and those represented by cases that became known to official entities. The findings also permit quantification of the gap between cases “reported to agencies” and self-identified cases. Both components of the study are also among the largest to date in terms of sample size.

Both the self-reported and officially documented components of the study serve as baselines for future policy and funding decisions, service development and for future research into this significant social and public health problem.

**PREVIOUS STUDIES AND SURVEYS OF PREVALENCE AND DOCUMENTED CASES**

**National Studies**

Several significant studies have attempted to estimate prevalence rates of elder abuse in the US or in selected regions. Prior estimates of the prevalence of elder abuse range from 2% to 10% of all adults over 60 years of age based on various sampling, survey methods and case definitions (Lachs & Pillemer, 2004).

In 1988 Karl Pillemer and David Finkelhor conducted a seminal study of the prevalence of mistreatment of older adults living in the Boston area. Using a random digit dialing sampling strategy, the investigators determined an overall prevalence rate of 32 older adults per thousand individuals interviewed since turning 65 years of age. The study covered physical violence, verbal aggression and neglect but did not address financial exploitation (Pillemer & Finkelhor, 1988).

A national study conducted in 2008 estimated prevalence and assessed correlates of emotional, physical, sexual and financial mistreatment and potential neglect (defined as an identified need for assistance that no one was actively addressing) of adults aged 60 years or older in a randomly selected national sample (Acierno, Hernandez, et al., 2010). The researchers compiled a representative sample by random digit dialing across geographic strata. Using computer-assisted telephone interviewing to standardize collection of demographic, risk factor and mistreatment information, data from 5,777 respondents was analyzed. A one-year incidence rate of 4.6% was established for emotional abuse, 1.6% for physical abuse, 0.6% for sexual abuse, 5.1% for potential neglect and 5.2% for current financial abuse by a family member.
In 2009 the MetLife Mature Market Institute published the results of a study focusing on financial exploitation of older adults in the US. The study concluded that a conservative estimate of the personal cost to victims was $2.6 billion annually. The study also estimated that only one in five cases of financial exploitation is actually reported. MetLife found that elder financial abuse accounts for 30 to 50 percent of all forms of elder abuse and that financial exploitation also occurs with other forms of abuse (MetLife Mature Market Institute, 2009).

In 1998 the National Center on Elder Abuse at the American Public Human Services Association published the results of an innovative national study of elder abuse. The National Elder Abuse Incidence Study confirmed what elder abuse experts had long believed: reported elder abuse cases make up only the “tip of the iceberg.” The study estimated that 450,000 older adults in domestic settings in the US were newly abused, neglected, and/or exploited in 1996. The study also found that for every reported incident of elder abuse, neglect, exploitation or self-neglect, approximately five go unreported. (National Center on Elder Abuse, 1998).

The 2004 Survey of State Adult Protective Services was conducted by the National Center on Elder Abuse, with oversight by the National Committee for the Prevention of Elder Abuse and the National Adult Protective Services Association. The 2004 survey collected 2003 fiscal year data from all 50 states, Guam and the District of Columbia. Of the states sampled, at least 2/3 were able to separate out reports of elder abuse from vulnerable adult abuse. From the 32 states that responded, there were 253,426 incidents involving elder abuse. This represented 8.3 reports of abuse for every 1,000 older adults in America. The study included self-neglect as a type of elder abuse, which was the most prevalent type of abuse reported by the study (Teaster & Otto, 2006).

**Studies in New York State**

Prior to the New York State Elder Abuse Prevalence Study there had been no rigorous statewide research studies of the extent of elder abuse in the state; however, some regional studies and needs assessments had been conducted. A study of elder abuse using case record data from the New York State Adult Protective Services system was undertaken by Abelman in 1997. A random sample of 250 cases was drawn from case listings of cases served during 1995. The sample represented approximately 10% of the cases initially authorized for APS during the study period. For this age group, 65 and over, financial exploitation was identified as the most prevalent form of abuse (62% of cases), followed by caregiver neglect (56%), emotional abuse (34%), and physical abuse (22%) (Abelman, 1997).

Within New York City, a study of all incidents of elder abuse perpetrated by adult children against older adult parents reported to the New York City Police Department (NYPD) in Manhattan in 1992 was completed by Brownell in 1998. As part of this study, utilizing secondary data provided by the NYPD, crimes defined by the New York Penal Law were recoded into elder abuse categories. A total of 314 complaint reports were analyzed, with 295 reports reflecting elder abuse as defined by the criteria that a person aged 60 years or older was the victim of physical, psychological or financial abuse by an offspring. Alleged crimes reflecting psychological abuse were the most prevalent (35.7%), compared to alleged crimes reflecting financial abuse (33.6%) and physical abuse (30.7%) (Brownell, 1998).
A survey conducted by the Monroe County Department of Health for the Older Adult and Adult Health Report Card in the Rochester, New York area in September 2008 found that 8% of older adults in Monroe County reported having been a victim of abuse since turning 60 (Monroe County, 2008).

NEW YORK STATE DEMOGRAPHICS

To fully appreciate the findings of the study and their implications for elder abuse services in New York, it is important to understand the nature of the population of older adults who currently make their home in the state. New York State is the third most populous state in the nation with a 2009-estimated population of 19,541,453 (US Census, American Fact Finder). In 2008, 18.2% of the total population of the state was over 60 (over 3.5 million individuals); 13.2% were over 65. New York’s older population is growing both in percentage of the population and in absolute number. It is anticipated that by 2020, over 22% of the population of the state will be over 60 (cf. Figure 1). Within the next 25 years the number of elders in the state (over 62) will surpass the number of minor youth (under 18) following the trend of other areas in the US and other developed nations (US Census Bureau, US Population Projections). New York's older adult population is currently the third largest in the US, surpassed only by California and Florida.

Figure 1

New York State
Resident Population – 60+ years of age
Population 1990-2030
Numbers in thousands (US Census Bureau-American Fact Finder)
The state is large geographically and ethnically diverse. The major population center is the New York City region, the largest metropolitan and economic center in the state as well as in the nation. New York alone is home to over eight million people. Over 1.3 million New York City residents are age 60 or older. By 2030, this age group will increase by nearly a half million people to 1.8 million (New York City Department of Planning, 2006). Nearly half of today’s older New Yorker City residents are members of racial and ethnic minority groups (New York Academy of Medicine, 2008).

Some counties are affected more than others by rapid growth among the state’s minority elderly population. Minority elderly reside disproportionately in New York City and other metropolitan counties of the State. According to the 2000 Census, of the state’s minority age 60 and older population:

- 77.2% live in the five counties of New York City, comprising 46.6 percent of the city’s age 60 and older population; and,
- 17.9% live in the seven counties of Erie, Monroe, Nassau, Orange, Rockland, Suffolk and Westchester, comprising 10 percent or more of each county’s age 60 and older population.

In total, 95.1 percent of the State’s minority elderly live in the aforementioned twelve counties while only 4.9 percent live in the other fifty counties of the State (New York State Office for the Aging, 2000). There are also seven federally-recognized Native American nations scattered across New York State with a total population in excess of 50,000 (US Census Bureau, 2006-2008 American Community Survey, Selected Population Profile in the US: New York).

The unique demographic patterns in the state as well the tremendous cultural diversity represented in the elder population pose special research challenges in any attempt to determine the true prevalence of mistreatment in the state’s older adult population.

**RESEARCH PARTNERS**

The Prevalence Study was accomplished through the collaboration of three organizations representing academia, government and the not-for profit aging services sector.

**Lifespan of Greater Rochester Inc.**

Lifespan of Greater Rochester is a not-for-profit social agency that provides a full continuum of non-medical aging services to support older adults in taking on the challenges and opportunities of longer life. Lifespan was founded in 1971; for 40 years, the agency has been a leader in planning and delivering aging services in Monroe County, New York and the surrounding Finger Lakes counties. The agency currently operates 30+ programs including the Elder Abuse Prevention Program (EAPP). In 2010 Lifespan served over 25,000 clients. The agency has had extensive experience serving elder abuse victims in New York and is recognized as a leader in the field of elder abuse. The EAPP program, initiated in 1987, was one of the first non-governmental agencies to specialize in elder abuse. Lifespan also coordinates the New York State Coalition on Elder Abuse.
Weill Cornell Medical College

Founded in 1898, Weill Cornell Medical College is affiliated with what is now New York-Presbyterian Hospital. Weill Cornell Medical College is among the top-ranked medical schools in the country and New York Presbyterian Hospital is consistently ranked as among the top ten in the nation by US News and World Report. In 2009 New York-Presbyterian Hospital/Weill Cornell Medical Center launched the New York City Elder Abuse Center in order to improve identification and treatment of elder abuse victims in the New York City area. This is the first such center in the New York area to focus on coordinating elder abuse intervention.

New York City Department for the Aging

The New York City Department for the Aging (DFTA) is the only New York City municipal agency dedicated solely to representing and serving New York City’s elderly. It is also the largest Area Agency on Aging in the nation. The Department provides an array of services to older New Yorkers directly and through a network of community partners. DFTA’s Elderly Crime Victims Resource Center, funded by the New York State Office of Victim Services, has been providing direct services to elder abuse victims to break the pattern of domestic violence and financial and emotional abuse since 1986. The Center also offers case consultation, technical assistance and workshops to community agencies and law enforcement. DFTA was instrumental in the creation and development of the New York City Elder Abuse Network (NYCEAN); the agency remains an active member of NYCEAN through participation by the Center.

The research partners also convened an Advisory Committee comprised of experts in elder abuse and aging services in New York State as well as key representatives from each of the service systems surveyed in the study. The Advisory Committee provided consultation on the design and conduct of the study as well as guidance in obtaining access to entities serving elder abuse victims.

RESEARCH CHALLENGES

Each of the two components of the study had unique challenges.

Self-Reported Prevalence Study: For the Self-Reported Prevalence Study to be a valid measure of the experience of older adults with elder mistreatment, the researchers needed to:

- Devise a survey instrument that would adequately cover all forms of elder mistreatment (with the exception of self neglect), that would encourage respondents to respond truthfully and that would not be an excessive burden on the respondent.
- Reach a sufficient sample of older adults willing to consent to respond to a lengthy questionnaire.
- Obtain a cross section of people in all geographic areas of the state to be able to determine elder abuse data for each region and make comparisons between regions.
- Take into account the ethnic and linguistic diversity in the state.
Take into consideration the reality that some older adult respondents might have cognitive impairments that would prevent them from accurately responding to inquiries about personal history.

Include a protocol to protect the safety of respondents and offer referrals for assistance if researchers uncovered cases of active mistreatment.

**Documented Case Study:** The Documented Case Study component of the New York State Elder Abuse Study successfully addressed a number of similar challenges as well. These included the need to:

- Create a survey instrument that, as in the Self-Reported Prevalence Study, would adequately cover all forms of elder mistreatment (other than self-neglect) and that would capture the data elements required to describe elder mistreatment service activity in New York State.

- Design an instrument that would elicit information that could be meaningfully compared to the Self-Reported Prevalence Study findings without being onerous to the survey respondents.

- Find ways to elicit the cooperation of busy executives to complete a lengthy questionnaire requiring them to first obtain data from their own data systems. (The length of the final survey instrument was 17 pages covering 33 questions.)

- Develop a sampling frame that would comprise the total universe of programs serving elder abuse victims in New York State.

- Finally, take into account the differences that each service system has in terms of definitions of mistreatment, as well as differences in computer systems and administrative capacity to respond to what was being asked of them.

In spite of the obstacles, the researchers were able to conduct a comprehensive survey of elder abuse cases referred to agencies and programs known to serve elder abuse victims in all quarters of the state.

The research partners were able to address all of these concerns in the final survey instruments and in the protocol for administration of the telephone survey questionnaire. Copies of survey instruments used in both components of the study are contained in Appendices A and B.

**ELDER ABUSE SERVICES IN NEW YORK STATE**

One of the primary challenges in conducting the study was identifying the numerous agencies responsible for serving older adults who have been victims of elder abuse. New York State is not a mandatory reporting state for elder abuse; there is no central, statewide repository of data on cases of elder mistreatment. Elder abuse cases can come to the attention of several agencies capable of providing investigation and intervention services. In addition to Adult Protective Services, which operates in every county in the state, New York State also has several not-for-profit programs that specialize in investigating cases of elder abuse and responding to the needs of elder abuse victims. Nine such programs that specialize in serving elder abuse victims operate in New York City. In upstate New York, Lifespan’s Elder Abuse Prevention Program in Rochester provides elder abuse services in a ten county region. In addition, cases may enter the community’s response system through calls to law
enforcement, District Attorney Offices, domestic violence programs, county-based programs funded by the NYS Office of Victim Services and/or programs administered directly or under contract by local area agencies on aging.

Each service system has its own data collection system. Without a central statewide database for elder abuse cases, the task of the researchers was to track down data on elder abuse cases in all relevant service organizations throughout the state. Excluded were agencies such as home health agencies, senior centers, and other community-based programs that may identify cases of elder abuse and refer to other service entities but do not directly provide elder abuse intervention services.

The system offers multiple portals through which cases of elder abuse may be reported and for victims to access help; however, the number and variety of service providers presented a formidable task for the study partners to obtain an accurate estimate of the number of cases served in a one-year period.

**METHODOLOGY: PREVALENCE (SELF-REPORTED) STUDY**

**Study Population**

The research team assembled a population-weighted sample of all residents of New York State aged 60 and older. Age 60 was selected as the cutoff for the study because many official service systems that serve elder abuse victims (e.g., Adult Protective Services) use the same age criterion, and in subsequent analyses the aim of the study was to compare self-reported and officially reported cases meaningfully.

The sample was created using a random digit dialing strategy derived from census tracts targeting the older than 60 demographic. To assure adequate representation of minority populations, Hispanics and African-American subjects were intentionally oversampled; similarly, the sample was augmented with older subjects (age greater than 80) to assure adequate representation of the oldest elders. Subsequent weighted analyses adjusted for this sampling strategy.

Eligible subjects were those that were (1) at least 60 years of age, (2) living in a community residence (not a long term care facility) in New York State, (3) English or Spanish-speaking (all instruments were translated into and conducted in Spanish when this was the primary language of the respondent) and (4) who had enough cognitive ability to participate in the full interview. With regard to the latter, the investigators considered several protocols to assess cognition ranging from brief screening to formal mental status testing. Formal mental status testing was deemed as either too onerous given the overall length of the interview or potentially off-putting to subjects given the already sensitive nature of the study topic. Ultimately, a simple cognitive screening procedure was employed consisting of three questions: marital status, date or year of birth and age. If the subject was unable to provide answers to any of these questions, or if their reported age differed by more than one year from their age as computed from the birth date, they were deemed cognitively impaired and therefore not eligible to participate in the interview.
The actual surveys were conducted by telephone by the Cornell Survey Research Institute (CSRI). Located at the Cornell University campus in Ithaca, NY, CSRI has been providing survey research, data collection and analysis services since 1996 to a wide range of academic, non-profit, governmental and corporate clientele. CSRI interviewers were highly diverse in age, gender and ethnic background; two of the investigators (Mark Lachs, Art Mason) conducted on-site training and education on the general topic of elder abuse with the survey staff prior to the initiation of the study. The training specifically included techniques and referral information on how to address potential situations in which a subject was deemed to be in immediate danger; Dr. Lachs made himself available by phone and pager through the self-reported study to assist interviewers and or subjects with any urgent clinical issue that might arise. Fortunately, no such situation occurred during the telephone interviews.

**Instruments**

The survey instrument used for this component of the study was designed to capture elder mistreatment in four general domains: (1) Neglect by a responsible caretaker in meeting ADL (Activities of Daily Living) and/or IADL (Instrumental Activities of Daily Living) needs, (2) Financial Exploitation, (3) Emotional (Psychological or Verbal) Abuse and (4) Physical Elder Abuse (including Sexual Abuse).

Wherever possible, existing instruments were employed to measure mistreatment so as to permit comparisons to previous studies; this was a formal recommendation of the National Academy of Sciences Panel on Elder Abuse, which suggested use of instruments like the Conflict Tactics Scale to measure physical abuse (Bonnie, R.J., Wallace, R.B., 2002). However, that panel also suggested modification and adaptation of instruments for elder abuse, and the study investigative group (who collectively has many decades of experience in direct elder abuse service, administration, research and policy) found serious shortcomings in some aspects of virtually all instruments. For example, many older financial exploitation instruments fail to take into account many newer forms of “technologically-mediated” financial abuse, such as theft or misuse of an ATM card.

The Conflict Tactics Scale (and its actual preamble) assert that family violence occurs when families resolve stressful situations dysfunctionally but many cases of serious elder abuse have no such predicate (for example, a demented man who strikes a spouse with no provocation whatsoever). Additionally, although the intent of the study was to exclude stranger-mediated violence and crime, the study partners wished to capture abuse, neglect or exploitation conducted by non-family actors (such as a paid home health attendant) as situations such as this constitute a violation of an important trusting relationship and are highly relevant to victims, responders and policy makers. Accordingly, modest modifications were made to existing instruments as described below for each domain.

Additionally, following the precedent of Pillemer and Finkelhor in their adaptation of the Conflict Tactics Scale (Pillemer and Finkelhor, 1988), both a frequency and severity rating were assigned to all items. For frequency, subjects were asked if since turning age 60 they had ever experienced mistreatment; if they endorsed the mistreatment item, they were then asked how many times they had experienced the event in the past year. The possible response categories were “never, once, two to ten times, or greater than ten times.” This strategy permitted a calculation of both incident events (those occurring in the past year) versus prevalence (those occurring at any time since age 60). When a subject endorsed a form of mistreatment as having occurred at least
once in the past year, he or she was also asked how serious a problem the event(s) was for them; the ordinal choices for this were: “not serious, somewhat serious, very serious.”

Frequency and severity ratings of an item were then combined to determine whether abuse was deemed to be “present” or “absent.” However, the criteria for individual items necessarily varied by item. For example, neglect of an ADL by a responsible caregiver on a single occasion in the course of a year (e.g., failure to provide assistance with dressing) would not be considered abuse by many, whereas kicking or hitting would be, irrespective of how many times the event occurred or how severe the victims perceived the assault.

To resolve this and establish frequency and severity criteria for each variable, the research partners conducted a consensus meeting and discussed each variable individually; there was high agreement on all items after robust discussion. The final frequency and severity criteria were then vetted with several external experts with similar experience in elder abuse. The following is a summary of the domains, variable items and criteria for positivity.

A detailed version of the final questionnaire can be found in Appendix A.

**Neglect of IADLs and ADLs Domain.** Subjects were asked if they needed assistance with any of four higher functional IADL-type activities: shopping, meal preparation, basic housework, or taking medicine, and six more basic ADL-type activities: eating, bathing, dressing, toileting, transferring or walking. When individuals said assistance was required, they were asked (1) who was responsible for providing assistance with the activity and what their relationship was with the respondent, (2) whether they had failed to provide assistance with the activity in the past year and how many times and (3) how serious a problem it was when and if the care failure occurred. An ADL or IADL was deemed to be neglected when the neglect occurred more than ten times in the previous year, and/or the subject described the neglected care need as being “somewhat” or “very serious” for them.

**Financial Exploitation Domain.** Several financial exploitation instruments were reviewed; the research team found instruments used for a Canadian study and a study in the UK to be the most salient for the purposes of our study (Podnieks, 1992; Manthorpe et al., 2007). Some items from the existing instruments were adopted; the team also drew on the collective practice experience and expertise of the research study partners in financial exploitation to update the instrument and to add items. The scale was reviewed by member agencies of the New York City Elder Abuse Network for review and to ensure that all domains were being captured.

Ultimately, the research partners arrived at five financial exploitation items, three of which were designated “high severity items” and two of which were designated “modest severity.” The high severity items were: (1) whether or not someone stole or misappropriated money or property without permission, (2) whether someone forced you or misled the subject into surrendering rights or property or coerced them into signing or changing a legal document (such as a will, deed or power of attorney) and (3) whether someone impersonated the subject to obtain property or services. The modest severity items were (1) whether someone who had agreed to contribute to household finances had stopped doing so, and (2) whether someone who had been contributing to household finances had stopped doing so, even though they had the ability to continue, such that there was no money left at the end of the month for necessities such as food or rent.
The high severity items were deemed as “positive” when endorsed with any frequency, irrespective of the severity ranking. The modest severity items were deemed positive when endorsed as occurring greater than ten times annually and rated as very serious by the subject.

**Elder Mistreatment Domain (Emotional, Physical and Sexual Abuse).** The version of the Conflict Tactics Scale (CTS) as modified by Pillemer (Pillemer and Finkelhor, 1988) was adopted for use in the study, using a frequency and importance ranking for each item. Two of the CTS items were assigned to what is termed in the instrument as a “verbal” (emotional/psychological) abuse domain (when another party either (a) insulted or swore at the respondent, or (b) threatened to hit or throw something at the respondent) while the rest were attributed to a “physical abuse domain;” the prevalence of mistreatment within those two domains is reported separately. The physical abuse items were deemed as “positive” when endorsed with any frequency, irrespective of the severity ranking. The first emotional abuse item (insulted or sworn at the respondent) was deemed “positive” when endorsed as occurring greater than ten times annually and rated as very serious by the subject, and the second emotional abuse item (threatening to throw something at the respondent) was deemed “positive” when occurring with any frequency or seriousness.

The CTS and its preamble assert that conflict occurs in all families, and that it is the way families choose to resolve those conflicts that potentially results in family violence. Because the objective of the study was to capture elder mistreatment perpetrated by any individual in a trusting relationship with the subject (e.g., paid home attendants, neighbors) in addition to family members, the preamble of the instrument was modified to include such individuals. In addition to specific categories of mistreatment, information was collected on the individuals alleged to have been the perpetrators in elder mistreatment episodes as described by the subjects. Our coding strategy permitted the classification of up to two perpetrators in mistreatment episodes.

Finally, an open-ended query was included at the completion of the CTS in which subjects were asked if they had been victims of elder mistreatment in any manner that was not ascertained in the existing instrument, so as not to miss cases of elder abuse not included in the predetermined categories chosen for the study. Subjects were also encouraged to provide qualitative detail about any and all episodes of mistreatment; these were recorded in open text fields.

The survey instrument was pilot tested with ten elder abuse victims served by the New York City Department for the Aging. The ten known victims were administered the survey in a telephone interview by the Cornell Survey Research Institute interview staff employed for the subsequent study. All but one individual endorsed elder mistreatment by at least one item in the instrument. That individual has modestly advanced cognitive impairment.

The study also captured data elements regarding individual subjects that were potential covariates of elder mistreatment. (Variables that may be predictive of risk for elder abuse.) The survey protocol collected basic demographic information about age, gender, marital status, household composition (number of individuals in household and relationship to subject) and income. Clinical variables included ADL and IADL status as well as self-reported health status. Cognition was assessed through the brief screening procedure described above.

The research instrument and the protocol for the Self-Reported Prevalence component of the study were approved by Cornell University’s Institutional Review Board.
Self-Reported Prevalence vs. Incidence

One of the primary goals of the Self-Reported Study was to estimate the prevalence and incidence rates of elder abuse in New York State. **Prevalence** refers to the number of older adults who have ever experienced elder mistreatment since turning 60. **Incidence** refers to the number of new cases of elder abuse within a specified period of time; for the purposes of this study, this was the year immediately preceding the administration of the survey interview in 2009. Thus the survey instrument was designed to capture respondent experiences with elder mistreatment within two time frames: since turning 60 and also, in greater detail, in the year preceding the interview.

As described previously, some items required a positive indication of frequency and/or severity to be included in the findings as an elder abuse event. For items in which the criteria for a positive indication of incidence in the past year required a threshold to be met for severity or frequency, and in which the respondent affirmed a serious event but could not definitively designate it as occurring within the past year, the event was still qualified as incident. There were several rationales for this decision. First, the research team believes that for events that may have occurred more than one year ago, the ability of a respondent to report accurately both a frequency and severity for remote events is more limited than for recent events. Second, many elder mistreatment events are chronic and their impact is enduring (e.g., ongoing poverty from a single episode of financial exploitation, disability from injuries that occur from repeated or a single episode of mistreatment). Elder mistreatment may affect victims in a lifelong fashion producing new and ongoing disability with each passing year. Third, the decision to include in the incidence count those events for which there is a report of severity above the threshold for inclusion accompanied by a lack of report of any frequency creates a bias in the direction of higher incidence in the past year. However, to exclude those events in the incidence count but include them in the prevalence count because of the inability of the respondent to report on the time of occurrence would create a bias in the other direction (as some events most likely did occur in the past year because of error in time recall).

It should be understood that other biases in this study operate in the conservative direction (i.e., produce conservatively low estimates of both incidence and prevalence). For example, some categories of older New Yorkers could not be included in the study, e.g., older persons with cognitive or communication impairment or those who lacked access to a telephone. As a result, the study design and the criteria chosen for inclusion of respondent reports in incidence and prevalence data have produced the most conservative (lowest) ratio for underreporting.

The one-year incidence rate was the one used to calculate the ratio of self-reported cases to documented cases in order to present a meaningful comparison of data. The Documented Case findings were also based on case data from a one-year period, approximately contemporaneous with the one-year period Self-Reported Study respondents were asked to report on.

The decision to assign events reported as serious by respondents but for which they lacked a report of frequency does not affect prevalence rates at all. Incident cases, those occurring in the past year, are included in the prevalence count no matter when they occurred because, by definition, they occurred since the respondent reached age 60.
METHODOLOGY: DOCUMENTED CASE STUDY

The Elder Abuse Documented Case Study utilized an on-line survey method: designated representatives of every program and agency responsible for specifically serving elder abuse and older victims of domestic violence in New York State operating at the county level were asked to complete a web-based survey on cases of elder abuse served by that program or agency in calendar year 2008. The survey included questions on elder abuse cases served that to the extent possible mirrored questions used for the statewide Self-Reported Prevalence Study.

The online survey included an invitation to participate in the research project as well as assurance that agencies could choose not to participate without penalty and that the rights of respondents were protected by the Fordham University Institutional Review Board approval process. Response to the survey constituted an informed consent to participate.

Definitions of elder abuse for the purpose of data collection were included in the survey instrument. Respondents were asked to report on case variables in the aggregate, based on availability of computerized data fields and statistical reports. Almost all agencies invited to participate were part of statewide service delivery systems and, for many, reporting on documented case data is part of their contractual requirements for their state funding or oversight agency. Although all county agencies surveyed were part of a statewide service delivery system, only a few of the state systems asked to participate were able to generate county-level demographic data for their programs.

The service delivery system approach to data collection for the Documented Case Study was recommended by the study Advisory Committee members; the service delivery systems chosen were the major service entities in the state to come into regular contact with adult abuse victims, older adult community residents, domestic violence victims and older adult crime victims.

Development of Survey Instrument

The instrument for the Documented Case Study was developed in conjunction with the development of the Self-Reported Prevalence Study telephone survey instrument and with input from study Advisory Committee members and experts in the field of elder abuse in New York State. In addition, it incorporated findings from reviews of instruments developed or utilized in other elder abuse studies.

A consensus building process among research team members and stakeholders was then undertaken to include common definitional standards to the extent possible in the Self-Reported Prevalence Study and the Documented Case Study.

The minimum data set captured by the survey included:

Agency/ Organization: data concerning the respondent organization.
Total and Type of Cases: number of unduplicated elder abuse cases, excluding self neglect, served in the calendar year reported.

Profile of Elder Abuse Victims Served: number of victims in defined age categories; gender; race; living arrangement between victims and abusers; and poverty status of victims.

Profile of Perpetrators of Elder Abuse: unduplicated number of perpetrators by age category and relationship of perpetrators to victims.

Referrals In: Agencies/Organizations: types of case referral sources and numbers of victims referred by each type of referral source.

Referrals Out: Agencies/Organizations: types of agencies or organizations to which elder abuse clients were referred. Respondents were also asked to provide an aggregate, unduplicated number of elder abuse cases for which a Domestic Incident Report (DIR) was completed. (DIRs are completed by law enforcement in New York State when they are called out on a domestic violence case. DIRs are records of the police contact. Police jurisdictions file them with NYS Division of Criminal Justice Services. New York State Police and New York City Police Department maintain their own DIR files.)

Development of Survey

The Elder Abuse Documented Case Survey was developed by the research team with the assistance of study Advisory Committee members, through in-person and telephone interviews with service providers in New York State at both the state and local levels, elder abuse and domestic violence experts, and through reviews of relevant studies and instruments used to collect data on elder abuse in the United States and internationally.

Once the survey design was completed, it was pilot tested with seven agencies serving elder abuse victims in New York State. These agencies volunteered to complete the survey and offer feedback on ease of use, availability of data requested and comprehension of questions and terms used.

Development of Sampling Frame

A sampling frame of non-institutionalized settings was developed with the assistance of the study Advisory Committee members and other state and local officials. Key gatekeepers for each service system identified as relevant for survey participation as part of the study were identified and asked to serve as access points for the survey sample and distribution. Service systems identified included:

- Adult Protective Services (State and New York City databases)
- Law enforcement (State and New York City)
- Area Agencies on Aging and their contract agencies where applicable
- Domestic violence programs (both residential and non-residential)
- Elder abuse programs (county-level agencies and programs)
- Office of Victim Services (OVS) programs (including both elder abuse programs and domestic violence programs, regardless of whether free-standing or located in host agencies)
- Elder abuse coalitions in New York State (county and regional coalitions)
- District Attorney (DA) offices (county offices).

Survey Distribution Strategy

Surveys were sent by e-mail to key contact persons at the county level. These included program directors, agency executive directors and project managers. A total of seven service systems (both local and state-wide) were included in the sampling frame. Within those systems, a total of 419 agencies, institutions and programs were included in the sampling frame and sent an invitation to participate, with a link to the on-line survey and a PDF of the survey. Participants were given the option of completing the survey on line or printing out the PDF of the survey, completing it on the printed survey and faxing it back to the study team for data input.

In most cases respondent agencies were sent a letter of introduction from the state departments providing oversight of their operations outlining the importance of the study and encouraging completion of the survey. Project staff followed up with telephone and e-mail correspondence to urge completion and address any confusion or questions regarding the survey.

The Documented Case survey instrument and administration protocol were approved by Fordham University’s Institutional Review Board. The survey instrument used in the Documented Case Study may be found in Appendix B.

RESULTS: SELF-REPORTED CASES

Study Population

A total of 4,156 subjects were interviewed; 4,000 subjects were interviewed directly, and in 156 cases proxy respondents completed the interview. Data collection for the Self-Reported Study began on May 1, 2009 and was completed on July 22, 2009. A total of 22,359 contacts were made or attempted in order to yield 4,156 individuals who were qualified and willing to complete the survey. There were 1,368 persons contacted for whom eligibility for the study was confirmed but who refused to participate; 111 individuals for whom eligibility was not determined refused. The average interview took ten minutes; the median length was 12 minutes. The range was a minimum of six minutes to a maximum of 66 minutes.

Because segregating results by respondent type did not substantially affect the results for the purposes of this report, both proxy respondents and direct interviewees have been pooled.
Characteristics of Self-Reported Study Sample

Of the 4,156 individuals who responded to the survey, 64.5% were female, 35.5% male. The age range was 60 to 101 years of age with a median age of 74. The mean age of the sample was 74.3 years. Tables 1, 2 and 3 describe the marital status, ethnic background and income of all respondents.

<table>
<thead>
<tr>
<th>Marital Status of Respondents</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married</td>
<td>47.2</td>
</tr>
<tr>
<td>Widowed</td>
<td>32.7</td>
</tr>
<tr>
<td>Separated</td>
<td>1.8</td>
</tr>
<tr>
<td>Single/Divorced</td>
<td>7.5</td>
</tr>
<tr>
<td>Single/never Married</td>
<td>10.6</td>
</tr>
<tr>
<td>Refused</td>
<td>0.3</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Household Income</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $10K</td>
<td>5.8</td>
</tr>
<tr>
<td>$10-20K</td>
<td>13.3</td>
</tr>
<tr>
<td>$20-30K</td>
<td>13.9</td>
</tr>
<tr>
<td>$30-40K</td>
<td>12.5</td>
</tr>
<tr>
<td>$40-50K</td>
<td>15.2</td>
</tr>
<tr>
<td>$50-75K</td>
<td>16.9</td>
</tr>
<tr>
<td>$75-100K</td>
<td>6.5</td>
</tr>
<tr>
<td>$100-150K</td>
<td>4.9</td>
</tr>
<tr>
<td>$150K +</td>
<td>2.9</td>
</tr>
<tr>
<td>Don’t know</td>
<td>2.0</td>
</tr>
<tr>
<td>Refused</td>
<td>6.0</td>
</tr>
</tbody>
</table>

Of the surveys completed, 98.4% (4,088) were conducted in English; 1.6% of interviews (68) utilized the Spanish version of the survey.

A third of subjects had a high school diploma or GED, and nearly half had completed at least some college or beyond. Mean household income was between $30,000 and $40,000. Half the sample were married or lived with a partner. Nearly two thirds of subjects self-rated their health as “good,” “very good” or “excellent.” Very few subjects were IADL-impaired and even fewer were ADL-impaired, as is typical of a study that solicits information from telephone respondents who must possess enough cognitive and physical ability to use a telephone and participate in such an interview.

Subjects were drawn from all regions of New York State given the sampling strategy undertaken (Table 4). For the purpose of the study, the state was divided into seven regions (see Figure 2): Western, Finger Lakes, Central/Southern Tier, Capital Region/North Country/Mohawk Valley, Mid-Hudson, New York City, and Long Island.
Map of New York State Regions

REGION 1: NEW YORK CITY (Bronx, Kings, New York, Queens, Richmond)
REGION 2: LONG ISLAND (Nassau, Suffolk)
REGION 3: MID-HUDSON (Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester)
REGION 5: CENTRAL NEW YORK AND SOUTHERN TIER (Broome, Cayuga, Chemung, Chenango, Cortland, Delaware, Madison, Onondaga, Oswego, Otsego, Steuben, Tioga, Tompkins)
REGION 6: FINGER LAKES (Genesee, Livingston, Monroe, Ontario, Orleans, Schuyler, Seneca, Wayne, Wyoming, Yates)
REGION 7: WESTERN NEW YORK ( Allegany, Cattaraugus, Chautauqua, Erie, Niagara)

The regional breakdown of New York State was based on the regional areas used by New York State Office for the Aging for service planning purposes. In each case the regions represent separate geographic regions, important population clusters and distinct economic centers. The intent of the study partners was to report on each of the ten regions of state separately but some aggregation of regions became necessary in order to assure an adequate sample for the data to be useful and to allow meaningful comparison between regions.
Table 4

Respondent and Elder Population Distribution by Region

<table>
<thead>
<tr>
<th>Region</th>
<th>Region Name/ (number of counties)</th>
<th>Respondents (Self Report Study)</th>
<th>% of all respondents</th>
<th>Approx. population – total region population (2008 US census figures)</th>
<th>Over 60 population in region using 2008 US Census population estimates</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>NYC (5)</td>
<td>1,378</td>
<td>33.2</td>
<td>8.4M</td>
<td>1,394,486</td>
</tr>
<tr>
<td>2</td>
<td>Long Island (2)</td>
<td>579</td>
<td>13.9</td>
<td>2.7M</td>
<td>545,512</td>
</tr>
<tr>
<td>3</td>
<td>Mid- Hudson (7)</td>
<td>428</td>
<td>10.3</td>
<td>2.2M</td>
<td>421,949</td>
</tr>
<tr>
<td>4</td>
<td>Capital Region (8)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Mohawk Valley (7)</td>
<td>279</td>
<td>13.0</td>
<td>1.89M</td>
<td>382,339</td>
</tr>
<tr>
<td></td>
<td>North Country (5)</td>
<td>139</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>126</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Central NY (6)</td>
<td>246</td>
<td>9.0</td>
<td>1.48M</td>
<td>288,053</td>
</tr>
<tr>
<td></td>
<td>Southern Tier (7)</td>
<td>128</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Finger Lakes (10)</td>
<td>362</td>
<td>8.7</td>
<td>1.2M</td>
<td>232,989</td>
</tr>
<tr>
<td>7</td>
<td>Western NY (5)</td>
<td>492</td>
<td>11.8</td>
<td>1.4M</td>
<td>293,132</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>4,156</td>
<td></td>
<td>19.27M</td>
<td>3,558,460</td>
</tr>
</tbody>
</table>

Table 5 shows the major prevalence results of the Self-Reported Case Study; rates are expressed as elder abuse events per thousand subjects interviewed and reported by domain. Data in Table 5 represent prevalence rates for elder abuse in New York State, that is, mistreatment events reported by study respondents as having occurred since turning 60.

The lowest rates of mistreatment are in the sub-domain of neglect (failing to provide IADL and ADL assistance to older adults who were identified as impaired in one or more ADLs or IADLs). The overall rate of IADL neglect was 14.9 per 1,000 individuals interviewed, and for ADL neglect it was 4.1 per thousand individuals interviewed.

The highest rate of mistreatment since a subject turned 60 years of age occurred for verbal/emotional abuse, with a reported rate of 85.4 victims per thousand subjects interviewed. The rate for major financial exploitation (theft of money or property, using items without permission, impersonation to get access, forcing or misleading to get items such as money, bank cards, accounts, power of attorney) was 41.6 per thousand; a
rate of 10.8 per thousand was reported for moderate financial exploitation (e.g., “Unwilling to contribute to household expenses to the extent that there was not enough money for food or other necessities”).

The rate for physical abuse events was 22.6 per thousand. Survey subjects were also invited at the end of the survey questionnaire to report any other mistreatment experienced since turning 60. They reported other elder abuse events at the rate of 4.1 per thousand subjects interviewed.

The overall prevalence rate for any non-financial event was 109.2 per thousand interviewed. The rate for any form of financial exploitation was 47.9 per thousand. The overall prevalence rate for any form of elder abuse was 141.2 per thousand subjects interviewed.

Table 5

Prevalence Rates of Self-Reported Elder Abuse in New York State by Mistreatment Domain
N=4,156

<table>
<thead>
<tr>
<th>Domain and Item</th>
<th>n</th>
<th>Rate per 1,000 (95% Confidence Interval)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Neglect</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>■ IADL Assistance</td>
<td>92</td>
<td>14.9</td>
</tr>
<tr>
<td>■ ADL Assistance</td>
<td>17</td>
<td>4.1</td>
</tr>
<tr>
<td><strong>Financial Exploitation</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>■ Major Activities</td>
<td>173</td>
<td>41.6</td>
</tr>
<tr>
<td>■ Moderate Activities</td>
<td>45</td>
<td>10.8</td>
</tr>
<tr>
<td><strong>Verbal/Emotional Abuse</strong></td>
<td>345</td>
<td>85.4</td>
</tr>
<tr>
<td><strong>Physical Abuse</strong></td>
<td>94</td>
<td>22.6</td>
</tr>
<tr>
<td>Victims of other elder abuse events as reported by respondents</td>
<td>17</td>
<td>4.1</td>
</tr>
</tbody>
</table>

**Cumulative Rates of Elder Abuse Within and Across Domains**

- Victim of any IADL/ADL neglect, verbal/emotional elder abuse event, or physical elder abuse event at any time since turning age 60: 454
- Victim of any major or moderate financial exploitation event since turning age 60: 199

**Total Cumulative Prevalence Rate**

- Victim of any IADL/ADL neglect, major or moderate financial exploitation event, verbal/emotional elder abuse event or physical elder abuse event at any time since turning age 60: 587

i This category reflects positive responses to a “catch all” question asked at the end of the survey questionnaire: “Have you ever experienced elder abuse or neglect?” Descriptions of the type of mistreatment experienced were also recorded.
Table 6 shows the self-reported financial and self-reported non-financial prevalence rates organized by type and by geographic regions of the state. The rates represent the number of survey respondents who reported having experienced various forms of mistreatment since turning 60. Rates are not mutually exclusive, as respondents may have reported having been subjected to more than one form of abuse. The total New York State rate, for example, is 141.2, which is less than the sum of the two rates shown in the table. Total prevalence rates among urban, suburban and rural counties do not vary widely; however, when differences between rates by category of abuse are examined, the data reveals a rate of financial abuse in urban counties that is nearly double that reported in rural counties. The study reveals variability in rates for the prevalence of abuse among the regions of New York State but, based on study data alone, it is difficult to account for the range of reported rates.

One should also be mindful that prevalence rates are distributed by region based on the residence of the respondent at the time of the survey. The elder abuse event reported may have occurred years or even decades previously since the respondent turned 60 and may have taken place in a different region or even outside New York State.

Table 6

<table>
<thead>
<tr>
<th>Geographic Area</th>
<th>Self-reported Rate per 1,000 Non-financial</th>
<th>Self-reported Rate per 1,000 Financial</th>
<th>Total Self-reported Prevalence Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York State</td>
<td>109.2</td>
<td>49.9</td>
<td>141.2</td>
</tr>
<tr>
<td><strong>County Types</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Urban</td>
<td>105.6</td>
<td>56.4</td>
<td>138.2</td>
</tr>
<tr>
<td>Suburban</td>
<td>117.3</td>
<td>40.3</td>
<td>141.5</td>
</tr>
<tr>
<td>Rural</td>
<td>110.2</td>
<td>29.9</td>
<td>127.6</td>
</tr>
<tr>
<td><strong>Regions</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York City</td>
<td>114.7</td>
<td>66.0</td>
<td>150.9</td>
</tr>
<tr>
<td>Long Island</td>
<td>126.1</td>
<td>44.9</td>
<td>150.3</td>
</tr>
<tr>
<td>Mid-Hudson</td>
<td>109.8</td>
<td>42.1</td>
<td>140.2</td>
</tr>
<tr>
<td>Capital Region, Mohawk Valley, North Country</td>
<td>95.8</td>
<td>29.5</td>
<td>116.0</td>
</tr>
<tr>
<td>Central New York, Southern Tier</td>
<td>112.3</td>
<td>40.1</td>
<td>136.4</td>
</tr>
<tr>
<td>Finger Lakes</td>
<td>85.6</td>
<td>38.7</td>
<td>107.7</td>
</tr>
<tr>
<td>Western New York</td>
<td>103.7</td>
<td>38.6</td>
<td>126.0</td>
</tr>
</tbody>
</table>
Table 7 shows incidence rates as reported by respondents in the Self-Reported Study; rates are again expressed as elder abuse events per 1,000 subjects interviewed and reported by domain. Data in Table 7 represents mistreatment events reported by respondents in the year preceding the survey. The lowest rates of mistreatment are in the sub-domain of neglect (failing to provide IADL and ADL assistance to older adults who were identified as impaired in one or more ADLs or IADLs). This is largely the result of extremely low rates of functional dependency in the sample (which creates fewer “opportunities” for neglect to occur). The overall rate of IADL neglect was 14.9 per 1,000 individuals interviewed and for ADL neglect it was 3.4 per 1,000 individuals interviewed.

Higher rates of mistreatment are seen for other elder mistreatment domains. The highest rate of mistreatment occurred for major financial exploitation (theft of money or property, using items without permission, impersonation to get access, forcing or misleading to get items such as money, bank cards, accounts, power of attorney) with a rate of 41 per 1,000 surveyed. Surprisingly, what was regarded as moderate financial exploitation (e.g., an adult child unwilling to contribute to household finances despite having agreed to do so) was less common than more egregious forms. This may result from the stringent criteria that for moderate financial exploitation to exist the respondent had to endorse it as occurring greater than ten times in the prior year and rate its impact as very serious.

Rates of any emotional abuse (being chronically cursed, insulted or threatened with being hit) were 16.4 per thousand subjects interviewed. The rate for any physical abuse episode was 22.4 per thousand subjects interviewed; the most common physical abuse type was being pushed or grabbed, followed by someone trying to slap the respondent or throwing something at them.

Overall the incidence of elder neglect (failure of a designated caregiver to provide assistance with basic or instrumental activities of daily living) was 17 per thousand individuals interviewed, while the rate for financial exploitation was 42.1 per thousand subjects interviewed. Using a modified version of the Conflicts Tactics Scale, the prevalence of verbal/emotional and physical abuse was 16.4 and 22.4 per thousand subjects studied, respectively. The cumulative incidence of any form of non-financial elder mistreatment was 46.2 per thousand subjects studied (95% confidence intervals 39.8 to 52.6), consistent with other studies conducted internationally. The total cumulative incidence for any elder abuse event in the year preceding the survey, including IADL/ADL neglect, major or moderate financial exploitation, psychological/verbal abuse or physical abuse was 76.0 per thousand respondents.
### Table 7

Incidence Rates of Self-Reported Elder Abuse in New York State by Mistreatment Domain
N=4,156

<table>
<thead>
<tr>
<th>Domain and Item</th>
<th>n</th>
<th>Rate per 1,000 (95% Confidence Interval)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Neglect</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IADL Assistance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with shopping</td>
<td>25</td>
<td>6.0 (2.6, 11.4)</td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with meal preparation</td>
<td>11</td>
<td>2.6 (1.1, 5.3)</td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with housework</td>
<td>35</td>
<td>8.4 (4.9, 13.9)</td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with medication admin</td>
<td>0</td>
<td>0 (0, 0)</td>
</tr>
<tr>
<td>ADL Assistance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with feeding</td>
<td>3</td>
<td>0.7 (0.2, 2.6)</td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with dressing</td>
<td>2</td>
<td>0.5 (0.1, 2.8)</td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with ambulation</td>
<td>5</td>
<td>1.2 (0.4, 3.6)</td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with transfers</td>
<td>1</td>
<td>0.2 (0.0, 1.2)</td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with bathing</td>
<td>3</td>
<td>0.7 (0.2, 2.8)</td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with toileting</td>
<td>1</td>
<td>0.2 (0.0, 1.2)</td>
</tr>
<tr>
<td>■ Failure of designated/responsible caregiver to assist with any specific task</td>
<td>3</td>
<td>0.7 (0.2, 2.8)</td>
</tr>
<tr>
<td><strong>Financial Exploitation</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Major Activities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>■ Someone stole or used items without permission</td>
<td>144</td>
<td>34.6 (27.1, 42.5)</td>
</tr>
<tr>
<td>■ Forced or misled you to give away something that belonged to you</td>
<td>27</td>
<td>6.5 (3.9, 10.5)</td>
</tr>
<tr>
<td>■ Pretended to be you to get goods or money</td>
<td>20</td>
<td>4.8 (2.8, 7.6)</td>
</tr>
<tr>
<td>Moderate Activities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>■ Stopped contributing to household finances</td>
<td>2</td>
<td>0.5 (0.1, 2.9)</td>
</tr>
<tr>
<td>■ Unwilling to contribute to household expenses</td>
<td>2</td>
<td>0.5 (0.1, 2.9)</td>
</tr>
<tr>
<td><strong>Verbal Abuse</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>■ Insulted or cursed at you</td>
<td>17</td>
<td>4.1 (2.2, 7.7)</td>
</tr>
<tr>
<td>■ Threatened to hit or throw something at you</td>
<td>57</td>
<td>13.7 (10.3, 17.7)</td>
</tr>
<tr>
<td><strong>Physical Abuse</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>■ Touched you sexually against your will</td>
<td>11</td>
<td>2.6 (1.1, 5.0)</td>
</tr>
<tr>
<td>■ Thrown something at you</td>
<td>21</td>
<td>5.1 (2.8, 8.5)</td>
</tr>
<tr>
<td>■ Tried to slap or hit you</td>
<td>21</td>
<td>5.1 (2.8, 8.5)</td>
</tr>
<tr>
<td>■ Pushed or grabbed you</td>
<td>41</td>
<td>9.9 (7.1, 13.4)</td>
</tr>
<tr>
<td>■ Slapped you</td>
<td>18</td>
<td>4.3 (2.4, 6.9)</td>
</tr>
<tr>
<td>■ Forced you to have sex against your will</td>
<td>1</td>
<td>0.2 (0.0, 1.4)</td>
</tr>
<tr>
<td>■ Kicked, hit, or bit you with a fist</td>
<td>13</td>
<td>3.1 (1.6, 5.5)</td>
</tr>
<tr>
<td>■ Tried to hit you with something else</td>
<td>12</td>
<td>2.9 (1.5, 4.7)</td>
</tr>
<tr>
<td>■ Locked you in a room</td>
<td>1</td>
<td>0.2 (0.0, 1.2)</td>
</tr>
<tr>
<td>■ Beat you up</td>
<td>5</td>
<td>1.2 (0.5, 2.9)</td>
</tr>
<tr>
<td>■ Threatened you with a knife or gun</td>
<td>5</td>
<td>1.2 (0.5, 2.9)</td>
</tr>
<tr>
<td>■ Used a knife or gun against you</td>
<td>0</td>
<td>0 (0, 0)</td>
</tr>
<tr>
<td>■ Committed other violence against you</td>
<td>11</td>
<td>2.6 (1.4, 4.1)</td>
</tr>
</tbody>
</table>
Table 7 (continued)

<table>
<thead>
<tr>
<th>Domain and Item</th>
<th>n</th>
<th>Rate per 1,000 (95% Confidence Interval)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cumulative Rates of Elder Abuse Within and Across Domains</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure of designated/responsible caregiver to assist with one or more IADLs</td>
<td>62</td>
<td>14.9</td>
</tr>
<tr>
<td>Failure of designated/responsible caregiver to assist with one or more ADLs</td>
<td>14</td>
<td>3.4</td>
</tr>
<tr>
<td>Victim of at least one major financial exploitation event(\text{iii})</td>
<td>171</td>
<td>41.1</td>
</tr>
<tr>
<td>Victim of at least one moderate financial exploitation event(\text{iv})</td>
<td>4</td>
<td>1.0</td>
</tr>
<tr>
<td>Victim of at least one psychological/verbal elder abuse event</td>
<td>68</td>
<td>16.4</td>
</tr>
<tr>
<td>Victim of at least one physical elder abuse event (including sexual abuse)</td>
<td>93</td>
<td>22.4</td>
</tr>
<tr>
<td>Victim of any IADL/ADL neglect, psychological/verbal elder abuse event, or physical elder abuse event</td>
<td>192</td>
<td>46.1</td>
</tr>
<tr>
<td>Victim of any major or moderate financial exploitation event</td>
<td>175</td>
<td>42.1</td>
</tr>
<tr>
<td><strong>Total Cumulative Incidence Rate</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Victim of any IADL/ADL neglect, major or moderate financial exploitation event, psychological/verbal elder abuse event or physical elder abuse event</td>
<td>316</td>
<td>76.0</td>
</tr>
</tbody>
</table>

\(\text{iii}\) Respondents were asked to identify other areas of assistance need not covered in the standard IADL items. Examples provided included assistance with laundry, arranging transportation, driving the respondent and paying bills.

\(\text{iv}\) Despite a previous agreement to do so and resources still available to do so.

\(\text{v}\) To the extent that there was not enough money at the end of the month for necessities such as food.

\(\text{vi}\) Examples provided by respondents included breaking down a bedroom door, death threats, being spit at.

\(\text{vii}\) For example, theft of money or property, using items without permission, impersonation to get access, forcing or misleading to get items such as money, bank cards, accounts, power of attorney.

\(\text{viii}\) For example, an adult child unwilling to contribute to household finances despite having agreed to do so.

Self-reported financial and self-reported non-financial incidence rates for the state as a whole and for each county type and state region are displayed in Table 8. The rates are again not mutually exclusive. The total New York State rate is 76.0, which is less than the sum of the two rates shown in the table. The data in this table points to higher rates of abuse overall in non-financial and financial categories in more populated areas (urban and suburban counties). New York City exhibits the highest incidence of elder abuse (number of respondents per 1,000 reporting elder abuse events in the year preceding the survey) of any region in non-financial abuse and financial abuse categories as well as in the overall rate. As in the table of prevalence rates (Table 6), variability in rates of abuse among the regions of New York State are evident but cannot be explained adequately using data gathered through this study alone.
Table 8

Incidence Rates of Self-Reported Elder Abuse in New York State by Geographic Area

<table>
<thead>
<tr>
<th>Geographic Area</th>
<th>Self-reported Rate per 1,000 Non-financial</th>
<th>Self-reported Rate per 1,000 Financial</th>
<th>Total Self-reported Prevalence Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York State</td>
<td>46.2</td>
<td>42.1</td>
<td>76.0</td>
</tr>
<tr>
<td>County Types</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Urban</td>
<td>51.4</td>
<td>47.2</td>
<td>84.8</td>
</tr>
<tr>
<td>Suburban</td>
<td>41.2</td>
<td>35.8</td>
<td>68.9</td>
</tr>
<tr>
<td>Rural</td>
<td>36.2</td>
<td>29.9</td>
<td>56.7</td>
</tr>
<tr>
<td>Regions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York City</td>
<td>55.2</td>
<td>53.0</td>
<td>92.2</td>
</tr>
<tr>
<td>Long Island</td>
<td>44.9</td>
<td>38.0</td>
<td>74.3</td>
</tr>
<tr>
<td>Mid-Hudson</td>
<td>37.4</td>
<td>39.7</td>
<td>70.1</td>
</tr>
<tr>
<td>Capital Region, Mohawk Valley, North Country</td>
<td>35.0</td>
<td>29.5</td>
<td>55.2</td>
</tr>
<tr>
<td>Central New York, Southern Tier</td>
<td>53.5</td>
<td>34.8</td>
<td>80.2</td>
</tr>
<tr>
<td>Finger Lakes</td>
<td>35.9</td>
<td>35.9</td>
<td>58.0</td>
</tr>
<tr>
<td>Western New York</td>
<td>44.7</td>
<td>36.6</td>
<td>71.1</td>
</tr>
</tbody>
</table>

The Self-Reported Study collected basic data from respondents about their abusers. Tables 9 and 10 display data reported regarding perpetrators of mistreatment committed in the year preceding the survey. In all, 316 respondents indicated that they had been abused. They individually described having been abused by one to five perpetrators. In 74% of the cases, there was a single abuser; 17% of respondents described two abusers. In 9% of cases, respondents cited more than two abusers.
Table 9

Self-Reported Study
Number of Abusers in Individual Cases

<table>
<thead>
<tr>
<th>Total Number of Respondents: 316</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Number of Reported Abusers in Individual Cases</strong></td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td>3</td>
</tr>
<tr>
<td>4</td>
</tr>
<tr>
<td>5</td>
</tr>
</tbody>
</table>

Table 10 shows revealing patterns in the data collected regarding the relationship between victims and abusers organized by mistreatment domains. The survey questionnaire allowed collection of data on up to two abusers for each type of abuse described. A total of 428 abusers are included in the count as 26% of the 316 respondents described abuse by multiple perpetrators. Overall, spouses/partners and adult children were responsible for 40% of the mistreatment reported.

Other relatives were cited as perpetrators in 12% of the abuse reported; home health aides were also cited in 12% of the incidents described. Abuse by home health aides clustered around two categories of mistreatment: IADL neglect and major financial exploitation. Of the 428 reported abusers, 177 or 41.4% were involved in major financial exploitation activities. This correlates with the finding that major financial exploitation was the type of mistreatment most commonly reported by respondents as having occurred in the twelve-month period immediately preceding the survey. The most common perpetrators of major financial exploitation were adult children, grandchildren, other relatives, friends and paid home care aides.

Spouses/partners were described as the most common perpetrators of emotional abuse and physical abuse. Ninety-eight abusers or 23% of the total number cited by respondents were involved in physical abuse events. Friends were named as abusers, primarily in major financial exploitation cases, 11% of the time. It is also revealing to note that, following spouses or partners, adult children, other relatives, friends and other non-relatives were also described as the most common perpetrators of physical abuse (which includes any instances of sexual abuse.) In four cases, respondents indicated they did not know the relationship of the abuser; six respondents refused to divulge the relationship of the abuser.

The data displayed in this table reveals patterns that may be helpful in elder abuse investigations and in preventive efforts targeting particular forms of abuse.
Table 10

Self-Reported Study
Distribution of Abusers by Relationship and Type of Mistreatment
Total Number of Abusers: 428

<table>
<thead>
<tr>
<th>Abuser</th>
<th>IADL Neglect</th>
<th>ADL Neglect</th>
<th>Major Financial Exploitation</th>
<th>Moderate Financial Exploitation</th>
<th>Emotional Abuse</th>
<th>Physical Abuse</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouse/Partner</td>
<td>13</td>
<td>2</td>
<td>13</td>
<td>0</td>
<td>24</td>
<td>35</td>
<td>87</td>
</tr>
<tr>
<td>Adult Child</td>
<td>21</td>
<td>3</td>
<td>32</td>
<td>2</td>
<td>13</td>
<td>13</td>
<td>84</td>
</tr>
<tr>
<td>Son/Daughter-in-Law</td>
<td>3</td>
<td>0</td>
<td>6</td>
<td>0</td>
<td>3</td>
<td>2</td>
<td>14</td>
</tr>
<tr>
<td>Grandchild</td>
<td>2</td>
<td>0</td>
<td>21</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>29</td>
</tr>
<tr>
<td>Other Relative</td>
<td>2</td>
<td>1</td>
<td>24</td>
<td>1</td>
<td>10</td>
<td>12</td>
<td>50</td>
</tr>
<tr>
<td>Neighbor</td>
<td>1</td>
<td>0</td>
<td>7</td>
<td>0</td>
<td>5</td>
<td>2</td>
<td>15</td>
</tr>
<tr>
<td>Friend</td>
<td>4</td>
<td>0</td>
<td>25</td>
<td>0</td>
<td>5</td>
<td>11</td>
<td>45</td>
</tr>
<tr>
<td>Other Non-Relative</td>
<td>5</td>
<td>0</td>
<td>12</td>
<td>0</td>
<td>7</td>
<td>17</td>
<td>41</td>
</tr>
<tr>
<td>Paid Home Care Aide</td>
<td>14</td>
<td>9</td>
<td>29</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>53</td>
</tr>
<tr>
<td>Don't Know</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Refused</td>
<td>0</td>
<td>0</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Totals</td>
<td>66</td>
<td>15</td>
<td>177</td>
<td>4</td>
<td>68</td>
<td>98</td>
<td>428</td>
</tr>
</tbody>
</table>

Self-Reported Study: Discussion

Older New Yorkers confirm, by their own responses in the Self-Reported Study, that they experience mistreatment in significant numbers in all parts of the state. Prevalence and incidence rates uncovered by the Self-Reported Study and reported in Tables 5 through 8 also demonstrate revealing patterns of mistreatment across New York State. Although financial exploitation was the most common form of abuse cited by respondents as having occurred in the 12 months preceding the administration of the survey questionnaire, when asked about any abuse event since turning age 60, the most commonly reported type of mistreatment was emotional abuse.
Nonetheless, the prevalence rate for any form of financial exploitation was still significant, 47.2 per 1,000 respondents. When compared by region and type of county, prevalence rates of mistreatment reported by respondents since turning 60 are similar in the three major categories of counties: urban, suburban and rural; however, when examined on a regional basis, prevalence data reveals some marked differences. New York City and Long Island regions have prevalence rates that are nearly 50% higher than the region with the lowest prevalence rate. On a regional basis the difference in rates for any form of financial exploitation is even more dramatic. New York City older adults reported having been financially exploited since turning 60 at a rate that was 47% higher than the region with the next lowest rate (Long Island).

By contrast, the incidence data (Tables 7 and 8) shows that the highest rate of recent elder abuse (occurring in the past 12 months) was in the major financial category. Incidence rates also show much more variability among types of counties. Older rural residents reported having been abused in the prior 12 months a third less often than urban residents. Older suburban residents also reported abuse at an incidence rate that was 19% lower than urban residents. It is beyond the scope of the study to definitively explain the difference in rates by region and type of county. The patterns that emerge from the Self-Reported Study data do suggest further investigation is warranted of the factors accounting for the vulnerability of older adults to abuse in some regions, in particular, urban areas, and in specific categories of abuse, especially financial and emotional abuse.

RESULTS: DOCUMENTED CASES

Documented Case Study
Aggregate System-wide Data

Service systems surveyed through the Elder Abuse Documented Case Study included: Adult Protective Services (APS); Area Agencies on Aging (AAA); law enforcement; domestic violence programs (DV); District Attorney offices (DA); community-based agencies, most of which are funded by the New York State Office of Victim Services (OVS); and elder abuse coalition member agencies not otherwise part of the above-listed state service delivery systems. New York City (NYC) APS was surveyed separately from the NYS APS data system as New York City utilizes a different computerized data collection system from the rest of NYS. Law enforcement data outside of New York City was obtained through Domestic Incidence Reports (DIR) and exclude abuse and neglect by non-family members. Law enforcement data gathered within New York City was obtained through the New York City Police Department (NYPD) and includes both family and non-family members.

Data was collected for all 62 counties of New York State. A total of 419 individual surveys were sent out and 325 surveys were completed for a robust response rate of 78%. Of these, 78 agencies that do serve elder abuse victims had no cases during calendar year 2008; an additional 16 agencies serving elder abuse victims do not have computer systems to record and report the statistics requested. This resulted in 231 agencies reporting data on known cases of elder abuse.

Table 11 shows the response rate for the Documented Case Study organized by service system responding to the questionnaire. Community-based agencies include those programs funded by the Office of Victim Services for elder abuse or domestic violence services. Services could be located in a stand-alone agency or as part of a
District Attorney’s office, a domestic violence organization or a hospital. Also included are those community-based organizations that are not funded by the Office of Victim Services but receive funding from other sources. Of the 124 OVS programs that were sent the survey, 75 completed the survey with demographic information; 49 programs did not respond. Overall data was also obtained through the statewide OVS reporting system.

The sum total of agencies within each service system exceeds the total number of unduplicated agencies (419) as some programs are counted in multiple categories. As an example, the New York City Department for the Aging receives OVS funding for elder abuse and is therefore counted under community-based agencies. It is also, however, an Area Agency on Aging (AAA) and so is also counted under AAA; therefore, its programs will be captured in both service systems, but were counted only once within the unduplicated information.

All 59 AAAs in New York State were initially sent an email asking whether they assist elder abuse victims (beyond identifying and referring to other organizations) and, if so, whether they had reporting systems in place to answer a survey on the number of victims served. Of the 59, 23 responded that they in fact serve elder abuse victims but only eight indicated that they were able to retrieve elder abuse case data necessary to respond to the survey. These eight AAA agencies were sent a survey to complete.

Table 11

**Documented Case Study**

**Response Rate by Service System and Organization**

<table>
<thead>
<tr>
<th>Organizations</th>
<th>Total Number of Surveys</th>
<th>Number Completed</th>
<th>% Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Number Unduplicated</strong></td>
<td>419</td>
<td>325</td>
<td>78%</td>
</tr>
<tr>
<td>Community Based Agencies</td>
<td>254</td>
<td>191</td>
<td>75%</td>
</tr>
<tr>
<td>Adult Protective Services</td>
<td>62</td>
<td>62</td>
<td>100%</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>62</td>
<td>62</td>
<td>100%</td>
</tr>
<tr>
<td>Coalition Member Agencies</td>
<td>42</td>
<td>9</td>
<td>21%</td>
</tr>
<tr>
<td>District Attorneys</td>
<td>62</td>
<td>36</td>
<td>58%</td>
</tr>
<tr>
<td>Domestic Violence Programs and Shelters</td>
<td>106</td>
<td>76</td>
<td>72%</td>
</tr>
<tr>
<td>Area Agencies on Aging</td>
<td>8</td>
<td>2</td>
<td>25%</td>
</tr>
</tbody>
</table>

**Response Rate by Region**

Of the 419 agencies/programs determined qualified to respond to the survey, a total of 78% completed the survey. The response rates outlined in Table 12 varied considerably across the regions of the state ranging from 65% in Region 3 (Mid-Hudson) to 98% in Region 6 (Finger Lakes.)
**Table 12**

Documented Case Study-Response Rate by Region

<table>
<thead>
<tr>
<th>Organizations</th>
<th>Total Number of Agencies</th>
<th>Number Completed</th>
<th>% Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Number (Unduplicated)</strong>*</td>
<td>419</td>
<td>325</td>
<td>78%</td>
</tr>
<tr>
<td>Region 1: New York City</td>
<td>111</td>
<td>105</td>
<td>95%</td>
</tr>
<tr>
<td>Region 2: Long Island</td>
<td>16</td>
<td>15</td>
<td>94%</td>
</tr>
<tr>
<td>Region 3: Mid-Hudson</td>
<td>60</td>
<td>39</td>
<td>65%</td>
</tr>
<tr>
<td>Region 4: Capital Region, Mohawk Valley, North Country</td>
<td>95</td>
<td>90</td>
<td>95%</td>
</tr>
<tr>
<td>Region 5: Central New York, Southern Tier</td>
<td>68</td>
<td>53</td>
<td>78%</td>
</tr>
<tr>
<td>Region 6: Finger Lakes</td>
<td>56</td>
<td>55</td>
<td>98%</td>
</tr>
<tr>
<td>Region 7: Western New York</td>
<td>32</td>
<td>25</td>
<td>78%</td>
</tr>
</tbody>
</table>

*The total number of regional agencies will not add up to the total number of unduplicated agencies because some agencies serve more than one county across regions. Respondent agencies were asked to submit a separate survey for each county served.

**Rates of Documented Cases by Region**

Table 13 illustrates the overall distribution of documented cases by county type and by the geographic regions of New York chosen for this study.

In total, 11,432 victims were served throughout New York State, yielding a rate of 3.24 per 1,000 older adults. The highest rate was in New York City (3.55 reported cases per 1,000 older adult residents) compared to the region with the lowest rate of documented cases, Central New York and the Southern Tier (2.30 cases per 1,000.)

Of the 325 agencies that could report numbers of victims, 78 reported serving zero victims during calendar year 2008 (24% of the agencies). It should be noted that a statistical adjustment was made in determining the final number of elder abuse victims to account for cases served by multiple organizations during the study period (e.g., APS and law enforcement.)

Agencies were asked to report demographic and service information for both victims and perpetrators. However, not all organizations were able to respond fully to all of the questions asked. In some cases, agencies were able to give information on one data element, such as type of mistreatment, but were unable to provide
information on other items, such as whether the victim and perpetrator live together. The availability of data for each question will be addressed at the end of this section.

When the results of the survey were sorted by region, in all cases at least some organizations supplied information on demographic and service information for both victims and perpetrators. Once again, in some cases agencies were able to give information on at least one or more data elements but were unable to provide information on all items.

Adjustment for Duplication of Victims

The count used in this documented rate was adjusted for estimated duplication of victims within different service organizations. Information was received from the agencies regarding the number of cases they referred to other agencies and the number that were referred to them by other agencies. A detailed analysis of the mapping of referrals to and from all agencies, separately for each county of the state, was carried out. The patterns and proportions of duplication of cases appearing in the records of two or more agencies were then determined. The duplication was then removed from the documented case counts.

Table 13

Rates of Documented Elder Abuse in New York State by Geographic Area

N=11,432

<table>
<thead>
<tr>
<th>Region</th>
<th>N</th>
<th>Rate per 1,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York State</td>
<td>11,432</td>
<td>3.24</td>
</tr>
<tr>
<td>County Types*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Urban</td>
<td>7,298</td>
<td>3.55</td>
</tr>
<tr>
<td>Suburban</td>
<td>3,190</td>
<td>3.08</td>
</tr>
<tr>
<td>Rural</td>
<td>944</td>
<td>2.16</td>
</tr>
<tr>
<td>Regions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York City</td>
<td>5,303</td>
<td>3.79</td>
</tr>
<tr>
<td>Long Island</td>
<td>1,998</td>
<td>3.61</td>
</tr>
<tr>
<td>Mid-Hudson</td>
<td>1,031</td>
<td>2.52</td>
</tr>
<tr>
<td>Capital Region, Mohawk Valley, North Country</td>
<td>1,018</td>
<td>2.73</td>
</tr>
<tr>
<td>Central New York, Southern Tier</td>
<td>641</td>
<td>2.30</td>
</tr>
<tr>
<td>Finger Lakes</td>
<td>770</td>
<td>3.37</td>
</tr>
<tr>
<td>Western New York</td>
<td>671</td>
<td>2.34</td>
</tr>
</tbody>
</table>

* County types were determined by guidelines set forth by the New York State Office of Mental Health.
Victim Information  
by type of reported abuse experienced  

Table 14 outlines the type of abuse reported and details characteristics of victims. A small number of agencies were unable to report type of mistreatment (n = 36 or 15.9%). Among the agencies that did report this information, 47% were emotional abuse victims, 32.7% were financial abuse victims, 10.9% were neglect victims, 38.6% were physical abuse victims, and 0.99% were sexual abuse victims. (It should be noted that the sum of the percentages exceeds 100% because some victims experienced more than one type of abuse.) For those agencies that were able to report some information on type of mistreatment, in 22.6% of the cases, information about type of abuse experienced by victims was missing. A total of 15.6% of all respondent agencies could not retrieve data on type of elder abuse at all.

Age breakdown of reported victims  

A small number of agencies were unable to report an age breakdown for victims (n = 33 or 14%). Of those victims with age range reported by respondent agency/programs, 17% were in the 60-64 age category; 41.9% were in the 65-74 age category; 28.1% were in the 75-84 age category; and 13% fell into the 85+ age category. For those agencies that were able to report some information on age information, in 15% of the cases data regarding the age of victims was missing.

Gender breakdown of reported victims  

A small number of agencies were unable to report gender for victims (n = 30 or 13%). The gender breakdown for those victims whose gender was reported by respondent agency/programs was: 32.8% male and 67.2% female. For those agencies that were able to report some information on gender, in 13.8% of cases, data related to victim gender was missing.

Race/ethnicity breakdown for reported victims  

Agencies tended to collect less racial and ethnic data on their victims than other demographics; a total of 44 or 19.1% of agencies were unable to report this information. As reported by those agencies that did have racial and ethnic information on victims, 69.3% were Caucasians; 27.9% were African Americans; 3% were Asian/Pacific Islanders; 16.4% were Hispanic/Latino; 0.75% were American/Aleut Eskimos; and 10.5% “other” races. For those agencies that were able to report some information on race and ethnicity, 50.8% of the data related to victim race or ethnicity was missing. It should be noted that some agencies permitted elder abuse victims to declare more than one ethnic category; as a result the sum of percentages exceeds 100.
Living arrangements of victim

Close to one-half of the agencies were unable to report information on living arrangements of the victims (n = 111 or 48.1%). Of victims for whom respondent agency/programs reported on living arrangements, 45.8% lived alone; 16.9% lived with spouses or partners; 17.3% lived with adult children; 7% lived with sons-in-law or daughters-in-law; 6.3% lived with grandchildren; 4.7% lived with other relatives and 8.8% lived with other non-relatives. (Percentages add up to more than 100 as some victims fell into more than one category.) For those agencies that were able to report some information on living arrangement of the victim, in 78% of cases, the data that made up victim information on living arrangements was missing.

Lives with abuser

Almost one-half of the agencies were unable to report information on whether the victim and abuser lived together (n = 109 or 47.2%). Of those agencies that could give this information, over one-third (39.4%) of the victims lived with their abusers.

Living in poverty

Agencies were asked to provide aggregate data regarding number of victims living below the poverty threshold (i.e., incomes below the federal poverty level for 2008). In 2008 this amount was $10,400 for one person, $14,000 for a two-person family. Only a small percentage of responding agencies were able to give information on whether elder abuse victims were living at or below the poverty threshold; 83.6% of the agencies could not report this information. However, of those that responded, 59.3% victims were identified as living at or below the poverty threshold.
Table 14

Documented Case Data – All Service Systems Statewide
Victim Information

<table>
<thead>
<tr>
<th>ELDER ABUSE AGGREGATE DATA</th>
</tr>
</thead>
<tbody>
<tr>
<td>VICTIM INFORMATION</td>
</tr>
<tr>
<td>Total Number of Agencies submitting information on victims = 231</td>
</tr>
<tr>
<td>Type of Mistreatment</td>
</tr>
<tr>
<td>Emotional Abuse</td>
</tr>
<tr>
<td>Financial Abuse</td>
</tr>
<tr>
<td>Neglect</td>
</tr>
<tr>
<td>Physical</td>
</tr>
<tr>
<td>Sexual</td>
</tr>
<tr>
<td>Cases Missing Mistreatment Data</td>
</tr>
<tr>
<td>Total Number of Agencies Missing All Mistreatment Information</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Age Groups</th>
</tr>
</thead>
<tbody>
<tr>
<td>60-64</td>
</tr>
<tr>
<td>65-74</td>
</tr>
<tr>
<td>75-84</td>
</tr>
<tr>
<td>85+</td>
</tr>
<tr>
<td>Cases Missing Age Data</td>
</tr>
<tr>
<td>Total Number of Agencies Missing All Age Information</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Gender</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
</tr>
<tr>
<td>Female</td>
</tr>
<tr>
<td>Cases Missing Gender Data</td>
</tr>
<tr>
<td>Total Number of Agencies Missing All Gender Data</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
</tr>
<tr>
<td>Native American/Aleut Eskimo</td>
</tr>
<tr>
<td>Caucasian</td>
</tr>
<tr>
<td>Race Other</td>
</tr>
<tr>
<td>Cases Missing Race/Ethnicity Data</td>
</tr>
<tr>
<td>Total Number of Agencies Missing All Race/Ethnicity Information</td>
</tr>
</tbody>
</table>
Abuser information

Table 15 relates to demographics of reported abusers. A total of 187 agencies/programs reported information on abusers of elder abuse victims (80.9% of all agencies reporting cases during this period), representing 10,530 abusers in New York State during calendar year 2008.

Age groups of abusers

Over one-third of the agencies were unable to report age information for abusers (n = 72 or 38.5%). Of those agencies that could give this information, 7.7% reported abusers were in the younger than age 18 years category; 44.8% were in the 18-45 age category; 25.6% were in the age 46-59 age category; and 22% were in the 60 years and older category. For those agencies that were able to report some information on age of the abuser, in 47.1% of cases, abuser information regarding age was missing.

Abuser gender

A small number of agencies were unable to report gender for abusers (n = 2 or 1.1%). Respondent agency/programs that identified gender of abuser reported 66.3% male abusers and 33.7% female abusers. Among those agencies that were able to report some information on gender, in 18.3% of cases, data elements concerning abuser gender were missing.
Abuser relationship with victim

A small number of agencies were unable to report the abuser’s relationship with victim (n = 8 or 4.3%). Respondent agency/programs reported on the relationship between victim and abuser as: spouses or partners, 26%; own adult children, 39.7%; sons or daughters-in-law, 2%; grandchildren, 9.5%; friends or neighbors, 3.5%; paid home care workers, 0.65%; other relatives, 13.1%; and other non-relatives, 5.6%. For those agencies that were able to report some information on relationship, in 21.6% of cases, the relationship information was missing.

Table 15

Documented Case Data – All Service Systems Statewide-Abuser Information

<table>
<thead>
<tr>
<th>ELDER ABUSE AGGREGATE DATA</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABUSER INFORMATION</td>
</tr>
<tr>
<td>Total Number of Abusers = 10,530</td>
</tr>
<tr>
<td>Total number agencies submitting information on abusers = 187</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Age Groups</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>18 or younger</td>
<td>7.7%</td>
</tr>
<tr>
<td>18-45</td>
<td>44.8%</td>
</tr>
<tr>
<td>46-59</td>
<td>25.6%</td>
</tr>
<tr>
<td>60 and older</td>
<td>22.0%</td>
</tr>
</tbody>
</table>

| Cases Missing Age Data | 47.1% |
| Total Number of Agencies Missing All Age Information | 38.5% |

<table>
<thead>
<tr>
<th>Gender</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>66.3%</td>
</tr>
<tr>
<td>Female</td>
<td>33.7%</td>
</tr>
</tbody>
</table>

| Cases Missing Gender Data | 18.3% |
| Total Number of Agencies Missing All Gender Information | 1.1% |

<table>
<thead>
<tr>
<th>Relationship</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouse/Partner</td>
<td>26.0%</td>
</tr>
<tr>
<td>Own Adult Children</td>
<td>39.7%</td>
</tr>
<tr>
<td>Son-in-law/Daughter-in-law</td>
<td>2.0%</td>
</tr>
<tr>
<td>Grandchild</td>
<td>9.5%</td>
</tr>
<tr>
<td>Friends/Neighbors</td>
<td>3.5%</td>
</tr>
<tr>
<td>Paid Home Assistant</td>
<td>0.65%</td>
</tr>
<tr>
<td>Other Relatives</td>
<td>13.1%</td>
</tr>
<tr>
<td>Other non-relatives</td>
<td>5.6%</td>
</tr>
</tbody>
</table>

| Cases Missing Abuser Relationship Data | 21.6% |
| Total Number of Agencies Missing All Abuser Relationship Information | 4.3% |
Information on sources of elder abuse referrals received by respondent agencies

Data presented in Table 16 and described below refers to both formal and informal system referrals. Over 40% of all respondent agencies were missing all information in this category (n=97 or 41.9%). For those agencies that were able to report some information on sources of referrals, in 51.5% of the cases the source of referral was missing.

Formal service system referrals received by respondent agency/programs

Respondent agency/programs reported receiving elder abuse referrals from the following agencies: Adult Protective Services (1.4%), district attorneys (4.4%), domestic violence programs (0.90%), elder abuse programs (2.2%), law enforcement (22.1%), community-based agencies (8.1%), financial services (1.1%), healthcare programs (9.1%), homecare programs (4.4%) and Area Agencies on Aging (2.4%).

Informal system referrals

Respondent agency/programs also received referrals from elder abuse victims themselves (17.6%), perpetrators (0.05%), family members (14%), friends and neighbors (3.8%), concerned citizens (0.88%), anonymous sources (4.8%) and “other information sources” (8.9%).

A number of referrals were received from “other” sources (8.9%). These included referrals from formal service programs or professionals as well as from informal sources. The most common sources described were acquaintances, landlords and courts. Referrals were also received from social workers, housing authorities, the Veterans Administration and Departments of Social Services. Further information about “other” referral sources is contained in Appendix D, Documented Case Data by Region: Discussion.

Information on referrals of victims to respondent agencies

Table 16 below also documents referrals made by agencies on behalf of elder abuse victims. Close to one-third of all respondent agencies were missing all information in this category (n=71 or 30.7%). For those agencies that were able to report some information on where referrals of victims were made for further service, in 60% of cases, the referral information was missing. In addition, in over one-third of the cases agencies indicated that victims were not referred to any other programs or agencies (36.7%). Referrals may or may not result in a case being closed, but can be part of an overall service plan for the victim. Of the total number of victims that were referred for assistance, 17.9% of victims were referred to Adult Protective Services. Respondent agency/programs also reported referring 30.1% of victims to community-based agencies, 15.2% of the cases to District Attorney offices, 9.8% of the cases to domestic violence programs, 16% of the cases to elder abuse programs, 15.7% of the cases to Family Court, 22.6% of the cases to healthcare services, 18.2% of the cases to law enforcement, 3.3% of the cases to Area Agencies on Aging, and 21.3% of the cases to “other.”
Referrals to “other” services or programs comprised 21.3% of referrals reported. Respondents provided the following examples of “other” referrals: financial assistance, housing, immigration, lock replacement, places of worship, attorneys, Medicaid unit, Veterans Administration, Family Court. Additional information about referrals made for assistance to clients in elder abuse cases can be found in Appendix D, Documented Case Data by Region: Discussion.

**Domestic Incident Reports (DIR)**

Three-fifths (58%) of agency responders could not report information on whether DIRs were submitted on behalf of reported victims. Of those respondent agency/programs that did report information on DIRs, 70.2% of elder abuse victims had DIRs filed on their behalf.

A table of Documented Case Data displayed by region along with a discussion of the results by region can be found in Appendices C and D.

**Table 16**

**Documented Case Data – All Service Systems Statewide**

<table>
<thead>
<tr>
<th>Source of Referral: Formal Sources</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult Protective Services</td>
<td>1.4%</td>
</tr>
<tr>
<td>Community Agency</td>
<td>8.1%</td>
</tr>
<tr>
<td>District Attorney</td>
<td>4.4%</td>
</tr>
<tr>
<td>Domestic Violence Programs</td>
<td>0.90%</td>
</tr>
<tr>
<td>Elder Abuse Programs</td>
<td>2.2%</td>
</tr>
<tr>
<td>Financial Institution</td>
<td>1.1%</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>22.1%</td>
</tr>
<tr>
<td>Health Care Provider</td>
<td>9.1%</td>
</tr>
<tr>
<td>Homecare</td>
<td>4.4%</td>
</tr>
<tr>
<td>Office for the Aging</td>
<td>2.4%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Source of Referral: Informal Sources</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anonymous</td>
<td>4.8%</td>
</tr>
<tr>
<td>Concerned Citizen</td>
<td>0.88%</td>
</tr>
<tr>
<td>Family Member</td>
<td>14.0%</td>
</tr>
<tr>
<td>Friends/Neighbors</td>
<td>3.8%</td>
</tr>
<tr>
<td>Perpetrator</td>
<td>0.05%</td>
</tr>
<tr>
<td>Victim</td>
<td>17.6%</td>
</tr>
</tbody>
</table>
Looking at the completeness of the data among the various data elements, that is, the availability of the data to provide a comprehensive look at cases reported to agencies and programs serving elder abuse victims throughout New York State, there were two aspects that were examined: 1. those agencies that were unable to give us any information on the data elements requested and 2. those agencies that could provide some information but not for every case or for all the categories surveyed. (For example, they could provide a gender or age breakdown but not for all victims served.) Factoring these two elements together, the following observations about the availability of data from agencies can be made:

**Elder abuse case information most consistently available from agencies**

- Type of mistreatment
- Gender of victims
- Age of victims
- Gender of abusers
- Relationship of abuser and victim
Elder abuse case information less consistently available from agencies

- Race and ethnicity of victim
- Referrals to other agencies

Elder abuse case information most frequently not available from respondent agencies

- Living arrangement of victim
- Age of abusers
- Whether the victim and abuser live together
- Poverty
- Source of referrals
- DIR reports

Our findings also revealed surprising gaps in data collected. For example, data on whether victims live with abusers is not collected in all systems that document serving elder abuse victims. While APS and law enforcement collect the most complete case data of all service systems at the county level, some data elements requested in the Documented Case Survey were consistently missing in all systems, even among these two.

Ability of Organizations to Provide Victim Information by Service System

In the Documented Case Study, organizations were asked to complete demographic information based on what was determined to be a “minimum dataset” of elder abuse information. Information was collected on type of mistreatment, information on victims (age, gender, race/ethnicity, living arrangement, whether the victim lived with the abuser, poverty status) and information on the abusers (age, gender, relationship of abuser).

Table 17 displays the percentage of individual organizations within major service systems that were able to provide data about specific categories of demographic data related to type of mistreatment, victims and perpetrators of abuse. For example, 94.7% of county Adult Protective Services (APS) units were able to provide information on the type of mistreatment; all law enforcement units responding to the survey were able to provide this information, while only 61.1% of District Attorney offices and 74% of community-based organizations could report on the type of mistreatment experienced by victims.

In general, APS and law enforcement maintained the most comprehensive data systems, with the vast majority of counties able to complete most of the demographic categories. In both systems, there were a few items that were not included in their standardized data systems and, therefore, information was not available in those categories. District Attorneys and community-based organizations had data systems from which extracting quantitative information proved to be the most difficult, with significantly less information collected on the victims than on abusers.

The findings displayed in this table highlight the gaps in documentation of data about elder abuse across the service systems surveyed by the Documented Case Study. Appendix E, Documented Case Study – Aggregate Data by Service System, along with Appendix F, Documented Case Study – Service System Data: Discussion, provide a more detailed examination of the responses of each service system surveyed to the Documented Case Study request for elder abuse case information.
Documented Case Study Data

Percent of Organizations Providing Victim Information by Service System

<table>
<thead>
<tr>
<th>Minimum data set information for elder abuse</th>
<th>Adult Protective Services</th>
<th>Law Enforcement</th>
<th>District Attorney</th>
<th>Community Based Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of mistreatment</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>94.7%</td>
<td>100.0%</td>
<td>61.1%</td>
<td>74.0%</td>
</tr>
<tr>
<td>Gender</td>
<td>94.7%</td>
<td>100.0%</td>
<td>44.4%</td>
<td>78.1%</td>
</tr>
<tr>
<td>Race/ethnicity</td>
<td>94.7%</td>
<td>100.0%</td>
<td>50.0%</td>
<td>81.2%</td>
</tr>
<tr>
<td>Living arrangements</td>
<td>94.7%</td>
<td>0.0%</td>
<td>38.9%</td>
<td>68.7%</td>
</tr>
<tr>
<td>Lives with Abuser</td>
<td>0.0%</td>
<td>100.0%</td>
<td>16.7%</td>
<td>64.6%</td>
</tr>
<tr>
<td>Poverty Status</td>
<td>0.0%</td>
<td>0.0%</td>
<td>22.2%</td>
<td>60.4%</td>
</tr>
<tr>
<td><strong>Information on abusers</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>9.3%</td>
<td>100.0%</td>
<td>80.0%</td>
<td>75.0%</td>
</tr>
<tr>
<td>Gender</td>
<td>100.0%</td>
<td>100.0%</td>
<td>0.0%</td>
<td>96.9%</td>
</tr>
<tr>
<td>Relationship of abuser</td>
<td>100.0%</td>
<td>100.0%</td>
<td>60.0%</td>
<td>93.7%</td>
</tr>
</tbody>
</table>

**Documented Case Study: Discussion**

In addition to identifying clear issues with the way data about elder abuse cases is collected across service systems, the Documented Case component of the study demonstrates significant reporting trends in the state. Urban areas tend to have higher reported case rates than rural counties. When the data is sorted by urban versus rural counties, one finds that cases are referred to elder abuse programs and agencies 64% more often in urban counties than in rural counties.

The study does not attempt to tease out the reasons for the disparity in documented cases between urban and rural counties but some explanations can be offered for further exploration. One can speculate that population density in urban areas, in particular in New York City, may foster easier identification of mistreatment of older adults.

While there is little difference among urban, suburban and rural counties in types of abuse reported (for all regions, emotional abuse is the most common abuse category reported), rates of underreporting may be linked to social isolation of the population served. Urban counties tend to be more “service rich” than rural counties. This is evident in New York City and in Monroe County, for example, in which not-for-profit agencies sponsor programs specifically designed to aid elder abuse clients, supplementing the work of Adult Protective Service in those counties. In addition urban counties are more likely to have the critical mass of cases and the financial resources to support elder abuse specialists in law enforcement or in the District Attorney’s office.

On the other hand, rural counties may lack not only the service infrastructure to identify and serve older adult victims of abuse, but also the systems needed to document cases other than in case records.
COMPARISON OF SELF-REPORTED AND DOCUMENTED CASE DATA

Table 18 displays overall rates of self-reported abuse and documented case for the state as a whole. The data is presented for all forms of abuse and by each mistreatment category as well. The table demonstrates that although respondents in the study reported having been abused in the year preceding the survey at the rate of 76 individuals per 1,000, only 3.2 persons per 1,000 received intervention from any of the service systems surveyed during the same time period under consideration. The enormous gap between the self-reported rate and the documented case rate means that for every case in the formal service system, approximately 24 others were not referred to services. Despite the high rate of financial abuse reported by Self-Reported Study respondents, the comparison of the data demonstrates that only one out of 44 financial abuse cases received service for this form of mistreatment from agencies serving elder abuse victims. The ratio of reported neglect cases to documented neglect case was also especially high (57.2 self reported cases for every documented case). Physical abuse and emotional abuse ratios were by comparison moderate but still involved nearly 20 and 12 victims, respectively, who were not referred to elder abuse service providers for every victim who received intervention.

Table 18

Rates of Elder Abuse in New York State: Comparison of Self-Reported One-Year Incidence and Documented Case Data

<table>
<thead>
<tr>
<th></th>
<th>Documented Rate per 1,000</th>
<th>Self-reported Rate per 1,000</th>
<th>Ratio of Self-Reported to Documented</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York State - All forms of abuse</td>
<td>3.24</td>
<td>76.0</td>
<td>23.5</td>
</tr>
<tr>
<td>Financial</td>
<td>.96</td>
<td>42.1</td>
<td>43.9</td>
</tr>
<tr>
<td>Physical and Sexual</td>
<td>1.13*</td>
<td>22.4*</td>
<td>19.8</td>
</tr>
<tr>
<td>Neglect</td>
<td>.32</td>
<td>18.3</td>
<td>57.2</td>
</tr>
<tr>
<td>Emotional</td>
<td>1.37</td>
<td>16.4</td>
<td>12.0</td>
</tr>
</tbody>
</table>

*The Documented Case rate includes physical abuse cases only. Physical and sexual abuse data were combined in the Self-Reported Study. The sexual abuse rate for the Documented Case Study was 0.03 per 1,000.

It should be noted that the sum of the rates exceeds the total rates in both the Documented Case and Self-Reported Studies because some victims experienced more than one type of abuse.
Rates of Elder Abuse by Geographic Area

Table 19 breaks down rates of mistreatment uncovered in both the Self-Reported Study and the Documented Case Study by type of county (urban, suburban and rural) and by region of the state. It further displays data showing a comparison of rates established in each component of the study by type of county and region and also broken down by non-financial and financial abuse categories.

Rates of self-reported and documented elder abuse varied considerably by region. Residents of urban counties tend to report higher rates of mistreatment than other types of counties. Older adult residents of New York City included in the sample reported a mistreatment rate of 92.2 per 1,000, a rate 67% higher than that reported by older residents of the region with the lowest rate, Region 4 (Capital Region/Mohawk Valley/North Country). Overall urban residents surveyed reported 23% to 50% higher rates of abuse than residents in suburban and rural counties, respectively. Although rates for subcategories of abuse (non-financial vs. financial) also varied somewhat by region, the data demonstrates that financial exploitation figures prominently as a major form of mistreatment in every quarter of the state with self-reported rates ranging from a low of 29.5 per 1,000 in the Capital Region/Mohawk/North Country region to a high of 53.0 per 1,000 in New York City.

Rates of documented elder abuse also varied by region. The highest rate was in New York City (3.79 reported cases per 1,000 older adult residents) compared to the region with the lowest rate of documented cases, Central New York/Southern Tier (2.30 cases per 1,000). In spite of reaching more elders per 1,000 through its network of elder abuse programs and services, the data shows that due to the higher rate of mistreatment uncovered in New York City versus other areas of the state, for every case served, 24 other victims still remain outside the system and are potentially in need of intervention. Likewise, the lower rate of documented cases in the Central New York/Southern Tier region is juxtaposed with a higher reported rate (80 per 1,000) than the average for the state resulting in only one out of 35 older adult victims known to the elder abuse service system in that region in a one-year period.
Table 19

Comparison of Self-Reported One-Year Incidence and Documented Case Rates of Elder Abuse by Geographic Area

<table>
<thead>
<tr>
<th>Region</th>
<th>Documented Rate per 1,000</th>
<th>Self-reported Rate per 1,000</th>
<th>Ratio of Self-Reported to Documented</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York State</td>
<td>3.24</td>
<td>76.0</td>
<td>23.5</td>
</tr>
<tr>
<td>County Types</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Urban</td>
<td>3.55</td>
<td>84.8</td>
<td>23.9</td>
</tr>
<tr>
<td>Suburban</td>
<td>3.08</td>
<td>68.9</td>
<td>22.4</td>
</tr>
<tr>
<td>Rural</td>
<td>2.16</td>
<td>56.7</td>
<td>26.3</td>
</tr>
<tr>
<td>Regional Breakdown</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York City</td>
<td>3.79</td>
<td>92.2</td>
<td>24.3</td>
</tr>
<tr>
<td>Long Island</td>
<td>3.61</td>
<td>74.3</td>
<td>20.6</td>
</tr>
<tr>
<td>Mid-Hudson</td>
<td>2.52</td>
<td>70.1</td>
<td>27.8</td>
</tr>
<tr>
<td>Capital Region, Mohawk Valley, North Country</td>
<td>2.73</td>
<td>55.2</td>
<td>20.2</td>
</tr>
<tr>
<td>Central New York, Southern Tier</td>
<td>2.30</td>
<td>80.2</td>
<td>34.9</td>
</tr>
<tr>
<td>Finger Lakes</td>
<td>3.37</td>
<td>58.0</td>
<td>17.2</td>
</tr>
<tr>
<td>Western New York</td>
<td>2.34</td>
<td>71.1</td>
<td>30.4</td>
</tr>
</tbody>
</table>
Comparison of Victim Demographic Data

Table 20 displays a comparison of demographic characteristics of Self-Reported Study respondents with Documented Case Study clients. Under Race/Ethnicity, it should be noted that in the Documented Case Study, some agencies permitted elder abuse victims to declare more than one ethnic category; as a result the sum of percentages exceeds 100. In the Self-Reported Study column, respondents who self identified as Hispanic/Latino in addition to another category are reported in a separate statistic (7.6%). As a result, the sum of all categories again exceeds 100 percent. Note that in Table 20, “Missing” in the Documented Case Study column indicates the percentage of cases in which responding organizations were unable to supply the data requested. In the Self-Reported Study column, “Missing” indicates the percentage of telephone survey respondents who declined to supply the requested information. “Missing” data is not included in the total sums for each demographic category.

The comparison of demographic data in Table 20 reveals similar trends in both the Self-Reported and Documented Case data except in the area of Race/Ethnicity. The percentage of Hispanic/Latino and Asian/Pacific Islander victims served by Documented Case Study respondent organizations was approximately twice the percentage of Self-Reported Study respondents who self-identified as Hispanic/Latino or Asian/Pacific Islander. On the other hand, Native Americans/Aleut Eskimos were represented in the Documented Case findings at less than half the rate they were found in the Self-Reported Study. It should also be noted, however, that responding organizations in the Documented Case Study were as a whole unable to provide racial/ethnic data in half of the cases.

Table 20

<table>
<thead>
<tr>
<th>Victim Demographic Information</th>
<th>Comparison of Documented Case Data and Self-Reported Data</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Information about victims</strong></td>
<td><strong>Percent of victims for which data is available</strong></td>
</tr>
<tr>
<td><strong>Documented Case Study</strong></td>
<td><strong>Self-Reported Study</strong></td>
</tr>
<tr>
<td><strong>Age groups</strong></td>
<td><strong>Percent of Victims</strong></td>
</tr>
<tr>
<td>60-64</td>
<td>17.0</td>
</tr>
<tr>
<td>65-74</td>
<td>41.9</td>
</tr>
<tr>
<td>75-84</td>
<td>28.1</td>
</tr>
<tr>
<td>85+ (Missing)</td>
<td>13.0</td>
</tr>
<tr>
<td></td>
<td>14.9</td>
</tr>
<tr>
<td><strong>Gender</strong></td>
<td><strong>Percent of Victims</strong></td>
</tr>
<tr>
<td>Male</td>
<td>32.8</td>
</tr>
<tr>
<td>Female</td>
<td>67.2</td>
</tr>
<tr>
<td>(Missing)</td>
<td>13.8</td>
</tr>
<tr>
<td></td>
<td>35.8</td>
</tr>
<tr>
<td></td>
<td>64.2</td>
</tr>
<tr>
<td></td>
<td>0.0</td>
</tr>
<tr>
<td><strong>Race/Ethnicity</strong></td>
<td><strong>Percent of Victims</strong></td>
</tr>
<tr>
<td>African American</td>
<td>27.9</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
<td>3.0</td>
</tr>
<tr>
<td>Caucasian</td>
<td>69.3</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
<td>16.4</td>
</tr>
<tr>
<td>Native American/Aleut Eskimo</td>
<td>0.8</td>
</tr>
<tr>
<td>Race, other</td>
<td>10.5</td>
</tr>
<tr>
<td>(Missing)</td>
<td>50.8</td>
</tr>
<tr>
<td></td>
<td>26.3</td>
</tr>
<tr>
<td></td>
<td>1.6</td>
</tr>
<tr>
<td></td>
<td>65.5</td>
</tr>
<tr>
<td></td>
<td>7.6</td>
</tr>
<tr>
<td></td>
<td>1.9</td>
</tr>
<tr>
<td></td>
<td>2.9</td>
</tr>
<tr>
<td></td>
<td>1.9</td>
</tr>
</tbody>
</table>
CONCLUSIONS

This study is groundbreaking in a number of ways. It is the first study that has undertaken to examine elder abuse in New York State through two different but complementary methods, by obtaining data on self-reported cases of elder abuse, by surveying the number of documented cases in the state and comparing the results to achieve a rate of underreporting. It is one of the largest studies of its kind, with over 4,100 subjects interviewed and 325 service organizations responding to the Documented Case survey. It has identified some important and unique findings that will guide not only government and agency policymaking and professional practice with older adults and their families in New York State but also provide a methodology for studying elder abuse at the state level that can be replicated and adapted by other states as well.

What follows is a summary of original goals of the study and research findings, which address the three components of the study.

1. To estimate the prevalence of various forms of elder abuse in a large, representative, statewide sample of older New Yorkers through direct subject interview.

One of the primary goals of the study was to obtain a prevalence rate for elder abuse events in New York State using sound research methods. The Self-Reported Elder Abuse component of the study found an overall prevalence rate of 141.2 per 1,000 and an incidence rate of 76 per 1,000 among older adult respondents across all sectors of the state.

Applying the incidence rate to the general population of older New Yorkers, an estimated 260,000 older adults in the state were victims of at least one form of elder abuse in the year preceding the survey.

Further analysis of the Self-Reported Study data uncovers interesting differences in patterns of abuse for prevalence (any elder abuse event experienced since turning 60) and incidence (new elder abuse events experienced in the year preceding the survey). When the Self-Reported Study incidence data is broken down further by type of abuse, it is revealing to find the predominance of financial exploitation among all elder abuse events reported by respondents in the year preceding the survey. The study findings show that 46.2 per thousand older New Yorkers ages 60 years and older have experienced neglect, emotional abuse or physical (including sexual) abuse; 41.1 per thousand have experienced major financial exploitation, while 42.1 per thousand have experienced either major or moderate financial exploitation. This stands in contrast to the findings of the prevalence data, which revealed that the most common form of elder mistreatment experienced by older New Yorkers since turning 60 was emotional abuse, which was reported at a rate of 85.4 per thousand respondents. Prevalence and incidence rates, on the other hand, for neglect and physical abuse (which includes sexual abuse) were very similar.

The mistreatment rates for both categories of abuse show decided disparity between regions and between rural/suburban counties and counties considered urban. The most marked divergence in reported abuse was between urban areas and rural, a difference of 15 to 17 cases per thousand in non-financial and financial cases respectively. New York City respondents reported a much higher rate of mistreatment than in almost all other regions of the state. In the most dramatic example, respondents from New York City reported 80% more financial exploitation than in Region 4 (Capital Region, Mohawk Valley, North Country).
The high incidence of financial exploitation across regions argues for particular attention to this category of mistreatment in elder abuse service planning.

2. To estimate the number of elder abuse cases coming to the attention of all agencies and programs responsible for serving elder abuse victims in New York State in a one year period.

A second focus of the study was to determine the number of elder abuse cases referred for intervention in a one-year period, in this case, calendar year 2008. A total of 11,432 cases were identified among all the service systems charged with serving elder abuse victims. This number represents a rate of 3.24 elder abuse victims statewide per 1,000 older adult residents. Again there was significant variation in documented case rates among urban, suburban and rural counties as well as by region. At the extremes, urban counties reported documented case rates of 3.55 per 1,000 elders versus 2.16 for rural counties. Suburban counties reported a slightly lower rate than urban counties. Regional rates ranged from a high of 3.79 persons served per 1,000 in New York City to 2.30 in the Central New York/Southern Tier region.

While urban areas tend to have higher documented case rates than rural counties, there was little difference among urban, suburban and rural counties in types of abuse reported in the Documented Case Survey (for all regions, emotional abuse was the most common abuse category reported).

3. To compare rates of elder abuse in the two component studies, permitting a comparison of “known” to “hidden” cases, and thereby determining an estimate of the rate of elder abuse underreporting in New York State.

A third focus of the study was to determine, through the comparison of Self-Reported Study data with Documented Case Study data from service systems throughout the state, the difference, if any, between the rates of elder mistreatment reported by older adults, and the actual number of cases served by agencies and programs tasked with serving elder abuse victims.

The findings of the study point to a dramatic gap between the rate of elder abuse events reported by older New Yorkers and the number of cases served in the formal elder abuse service system.

Overall the study found an elder abuse incidence rate that was nearly 24 times greater than the number of cases referred to social service, law enforcement or legal authorities who have the capacity as well as the responsibility to assist older adult victims.

Caution must be used in interpreting the large gap between the extent of elder abuse reported directly by older adults and the number of cases served. Documentation systems may have played a role in the results. The inability of some service systems and individual programs to report on their involvement in elder abuse cases affected the final tally of documented cases. An undetermined number of cases are not accounted for from agencies and programs that could not access data about elder abuse victims served. The extent to which the gap between the number of cases reported through the Documented Case Study and the incidence rates found in the Self-Reported Study can be attributed to data collection issues among service systems has not been established. However, the study received comprehensive data from the largest programs serving elder abuse victims: Adult Protective Services, law enforcement and community-based elder abuse programs.
Consequently, the study results suggest a dramatic underreporting of elder abuse in all regions of the state and all three categories of counties.

The actual reasons for the level of underreporting of elder mistreatment apparent among respondent agencies and service systems are unclear but may be explained in two ways based on the analysis of survey data for the Documented Case part of the study. One is based on differences in available services and methods of documentation by service system and a second is based on differences among geographic regions.

The difference in rates suggests underreporting in rural areas. Referrals of elder abuse cases may be stimulated by the availability of services in urban areas such as New York City and other “service-rich” areas due to the expectation that victims will receive adequate help to stop the mistreatment. Region 1 (New York City) is relatively resource-rich with the only Area Agency on Aging that has a program funded by the Office of Victim Services and a network of specialized elder abuse service providers. Enhanced public education campaigns about elder abuse in high reporting areas may also be affecting identification and referral of cases.

Inconsistent documentation of elder abuse case activity may also be a factor. Adult Protective Services outside of New York City uses a common database that captures almost all the elements requested in the Documented Case survey. Since the completion of the Documented Case Study, New York City APS has updated its computer database and now captures data about elder abuse cases equivalent to the data elements recorded by other counties in the state. New York City Police Department also has a unique computer system that captures data at a level that not all counties in New York State can match.

Some service systems and some regions may lack the resources to integrate elder abuse elements in data collection systems or may simply not have an adequate elder abuse focus in their data collection. While each service system from which an elder abuse victim may need service has a different mission and mandate, there is a need for basic data for documentation of elder abuse events in the state for good service planning, clinical intervention and a coordinated response across systems.

Finally, population density and often greater visibility of older adults in the community in urban areas and, conversely, social isolation in rural areas may contribute to differences in reporting trends based on geography. Greater awareness by “sentinels,” that is, individuals, both lay and professional, who have contact with older adults and are alert to the signs and symptoms of elder abuse, may also explain higher referral rates in some areas.

The role of local Offices for the Aging (also known as Area Agencies on Aging (AAAs)) in elder abuse cases also merits further exploration. Of the 31 AAA agencies that responded to the Documented Case Study invitation to participate in the study, 23 reported serving elder abuse victims but only a third of that number (8) reported they were able to retrieve data about elder abuse victims served. AAAs are not required to track elder abuse and thus their data systems do not consistently include questions related to elder abuse. The AAA network plays a central role in providing, making available and funding aging services on a local level. The reasons behind the findings need to be explored further as AAAs can, and in some cases already do, play a critical role in service planning in elder abuse cases and can offer a range of supportive services for victims of elder abuse identified by APS, law enforcement, District Attorneys and community-based service systems.
It should be noted that all local Offices for the Aging are engaged in certain core functions, including systems development, service coordination and filling in service gaps. However, their specific roles and activities vary to some extent from county to county in New York State due to local needs and conditions. Their organizational structures vary as well. All provide some direct services, including programs for elder abuse victims; however, what services they provide directly and the extent to which they contract with community-based agencies to provide aging services can differ in each county.

One significant finding of the Self-Reported Study was the high rate of financial abuse reported by respondents as having occurred in the year preceding the survey. This stands in contrast to the Documented Case survey in which emotional abuse was the most common form of mistreatment reported by agencies providing data on elder abuse victims. Nonetheless, in two of the seven regions surveyed for documented cases, financial abuse emerged proportionally at a higher rate. However, few referrals come from financial institutions to any of the service systems surveyed (1.1% of all referrals).

Overall, the New York State Elder Abuse Prevalence Study uncovered a large number of older adults for whom elder abuse is a reality but who remain “under the radar” of the community response system set up to assist them.

The findings of the New York State Elder Abuse Prevalence Study suggest that attention should be paid to the following issues in elder abuse services:

- Consistency and adequacy in the collection of data regarding elder abuse cases across service systems. Complete data collected consistently can be used by a broad range of elder-serving organizations to reduce elder abuse.
- Emphasis on cross system collaboration to foster effective use of limited resources to identify and serve more elder abuse victims. This may include ongoing dialogue and written agreements concerning collaborative efforts and cross training within and among systems serving elder abuse victims and their families at the state and county levels.
- Greater focus on prevention and intervention in those forms of elder abuse reported to be most common, in particular, financial exploitation. There appears to be a need for further involvement of the financial industry in training and outreach and for general education of all sectors about identification of financial abuse.
- Promotion of public and professional awareness through education campaigns and training around the signs of elder abuse and around resources available to assist older adults who are being mistreated by trusted individuals.
LIMITATIONS OF STUDY

The New York State Elder Abuse Prevalence Study is one of the largest and most detailed studies of elder abuse subjects ever conducted; yet there are limitations inherent in the study design and study sample chosen. Although older adults were surveyed from every county in New York State, the size of the sample below the regional level does not allow for a statistically reliable profile of elder abuse cases on the county level in most cases. Other than populous counties with a large sample in the Self-Reported Study, individual counties must interpret the data in the context of the region in which they are located or in comparison to the overall classification of results into urban, suburban and rural county cohorts.

It should also be noted that in order to participate in the Self-Reported Survey, subjects needed to have the physical ability as well as the cognitive capability of using a telephone and answering the survey questions meaningfully. Excluded were older adults with frailties and cognitive impairments that prevented them from participating in the study. It is possible but cannot be determined with certainty that the rate of elder mistreatment would have been found to be even higher if this vulnerable group could have been included in the survey sample.

The research team believes that the Documented Case Study was successful in uncovering the vast majority of active elder abuse cases in New York State in a one-year period. Nevertheless, some agencies and organizations were unable to contribute to the study because they were unable to retrieve data about the elder abuse victims they served or, because they do not keep data on elder abuse victims, were unable to complete the study questionnaire.

IMPLICATIONS FOR FURTHER STUDY

For the first time, a scientifically rigorous estimate of the prevalence of elder abuse in New York State has been established. The study also provides an estimate of the number of cases that received intervention in a one-year period throughout the state. The study raises many questions about differences in rates of abuse in various regions and types of counties. The study also revealed many issues about how elder abuse data is recorded by service providers. Further exploration of these topics in future research studies is warranted.

The study also uncovered a range of case reporting rates across regions in New York. It would be useful to explore the factors that lead to higher referral rates to elder abuse agencies and programs in some areas than in others. Further examination of the data produced by the study may also lead to better understanding of vulnerability profiles of victims for specific types of abuse.

The findings also serve as a platform to make more informed decisions about policy, use of limited resources and models of service provision for the thousands of older New Yorkers whose safety, quality of life and dignity are compromised each year by elder mistreatment.
REFERENCES


APPENDIX A

SELF-REPORTED STUDY QUESTIONNAIRE

(English version. Spanish version available upon request.)

PREVALENCE OF ELDER ABUSE SURVEY
FINAL QUESTIONNAIRE

>lang<

Determine respondent language

<1> English
<2> Spanish

Introduction

>intro<

Hello, I’m [fill name] calling from Cornell University. The purpose of this study is to explore the relationships of older people with their families and other people that they live with or often come in contact with. We are interested in things like who lives with you, how your general health is, and who provides help for you if and when you need it. We are also interested in when family members disagree or don’t get along, and what happens in those situations.

In order to ensure that everyone we need to interview has the same chance of being included in this study, we would like to know how many adults age 60 years or older live in this household? Also, we need to make sure we reached a private residence (rather than a group home such as a nursing home).

<0> No adults 60+ in household ➔ Ineligible – End call
<1> 1 adult 60+ ➔ Ask to speak with that adult
<2> 2 adults 60+ ➔ Ask to speak with adult with most recent birthday
<3-9> 3-9 adults 60+ ➔ Ask to speak with adult with most recent birthday
<n> Nursing home ➔ Ineligible – End call
<d> Do not know ➔ Call back later to talk with someone else
<r> Refused ➔ End call – Eligibility unknown, but refused to go further
<m> Pre-interview letter requested ➔ Flag case to mail a letter and call back later (if requested)
<p> Post-interview letter requested ➔ Flag case to offer a letter after the interview (if requested)
>elig<
We would like to speak with the adult (who is at least 60 years of age) who has had the most recent birthday? Would that be you or someone else?
<1> Speaking with adult with most recent birthday
<2> Someone else is the adult with the most recent birthday
<d> Do not know ➔ Call back later to talk with someone else
<r> Refused ➔ Call back later to talk with someone else

>rname<
[If speaking with the identified respondent; elig=1]
May I please ask for your name in case we get cut off?

[If someone else had most recent birthday; elig=2]
May I please have his/her name? This would be the person who is at least 60 years of age and has had the most recent birthday.

Title: Mr., Mrs., Miss
Fname: ______________________
Lname: ______________________

[If intro↑m (Did not requested pre-interview letter) and elig=1 ? Go to confblurb; Begin interview]
[If intro↑m (Did not requested pre-interview letter) and elig≠1 ? Go to newintro]

>pre_letter<
First we need to get your name and address. Once we have your address, we’ll send the letter and set up a time to do the interview in a few days – after the mail arrives to you.

Address: ______________________
City: ______________________
State: ______________________
Zip code: ______________________

[Set callback for approximately 5 days (time for USPS to deliver a letter)]

>newintro<
May I please speak with [fill title] [fill Fname] [fill Lname]?
<1> [fill Fname] [fill Lname] comes to phone ➔ Go to confblurb; Begin interview
<2> Not home now ➔ Call back later
<3> Language problem ➔ Go to proxy
<4> Too ill or incapable of responding ➔ Go to proxy
<5> Refuses to get R on phone
I understand if [fill Fname] [fill Lname] is unable to participate. We are conducting a study to ask about the relationships of older adults with their families and other people that they live with or come in contact with. Since [fill Fname] [fill Lname] is unable to speak with us, would you be willing to answer some questions on his/her behalf? If not you, is there someone who I could speak with who has regular contact with [fill Fname] [fill Lname] who might be able to speak with me?

<1> No proxy available ➔ Ineligible – End call
<2> Proxy available ➔ Go to pname
<3> Proxy not available ➔ Call back later
<d> Do not know ➔ Call back later to talk with someone else
<r> Refused ➔ Go to prefuse

Okay, I understand that you and [fill Fname] [fill Lname] do not want to speak with us. Before I go, can you please tell me why? ____________________________________________________________________________

What is your/his/her name? This would be the name of whoever has regular contact with [fill Fname]
Title: Mr., Mrs., Miss
Fname: ________________
Lname: ________________

[if proxy=3 ➔ Call back later]

Before we begin, there are a few points I need to cover:
I want to assure you that all the information you give will be kept completely confidential and that none of it will be released in any way that would permit identification of you.

Your participation in this study is, of course, voluntary. Some of the questions might be upsetting to some people. If there is any question you would prefer not to answer, just tell me and we will go on to the next question. You can also stop participating at any time.

If this is a bad time to speak, I can either call you back at a time of your choosing, or I can give you a toll free 800 number to call back and we can complete the survey whenever you choose.

Would you like to participate? [If “No”, ask for another respondent and go to rname]
[If “Yes”, proceed to marital]
Some of the questions we ask depend on your marital status. Are you currently:

1. Married or partnered
2. Widowed
3. Separated
4. Single, never married
5. Single, divorced
6. Do not know
7. Refused

We're trying to reach people in a specific age range. Just to check, what is your date of birth?

Month: ________________
Day: ________________
Year: ________________

Do not know
Refused  ➜ Refused – Eligibility unconfirmed

Would you please tell me your age (just so I don’t have to do the math)?

Age: ____

Do not know
Refused  ➜ Refused – Eligibility unconfirmed

[if dob_age ↑ age or (dob=d and age=d and marital=d)  ➜ Ineligible – Cognitive incapacity]

[if age < 60  ➜ Go to intro; Ask for someone else ≥ 60 in household]
HH relations / Health

>HH_relations<
Would you please tell me who currently lives with you or has lived with you in the past year in this household?
[if marital="Married or partnered"] ➔ Go to 1
[otherwise ➔ Go to 2]

>health<
How would you rate your overall health at the present time? Would you say overall your health is:
<1> Excellent
<2> Very good
<3> Good
<4> Fair
<5> Poor
<6> Very poor
<d> Do not know
<r> Refused
<table>
<thead>
<tr>
<th>Question</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
<th>Option 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Default response options for questions below:</td>
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<td></td>
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<tr>
<td>&lt;0&gt; No</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;1&gt; Yes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;d&gt; Do not know</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;r&gt; Refused</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thinking about ONE person who helps you or does this for you, what is</td>
<td>Since you turned 60, has there</td>
<td>How many times has this happened</td>
<td>How serious a problem is it for</td>
<td></td>
</tr>
<tr>
<td>their relationship to you? (Select up to two: i, ii)</td>
<td>ever been a time when this</td>
<td>in the past year?</td>
<td>you that this person didn’t help</td>
<td></td>
</tr>
<tr>
<td>&lt;1&gt; Spouse/Partner</td>
<td>person hasn’t helped you when</td>
<td>&lt;0&gt; Never</td>
<td>you? Is it:</td>
<td></td>
</tr>
<tr>
<td>&lt;2&gt; Your adult child</td>
<td>you thought they should have</td>
<td>&lt;1&gt; Once</td>
<td>&lt;1&gt; Not serious at all</td>
<td></td>
</tr>
<tr>
<td>&lt;3&gt; Son/Daughter-in-law</td>
<td>helped you?</td>
<td>&lt;2&gt; 2 to 10 times</td>
<td>&lt;2&gt; Somewhat serious</td>
<td></td>
</tr>
<tr>
<td>&lt;4&gt; Grandchild</td>
<td>&lt;0&gt; No</td>
<td>&lt;3&gt; More than 10 times</td>
<td>&lt;3&gt; Very serious</td>
<td></td>
</tr>
<tr>
<td>&lt;5&gt; Other relative</td>
<td>&lt;1&gt; Yes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;6&gt; Neighbor</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;7&gt; Friend</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;8&gt; Other non-relative</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;9&gt; Paid home care aid (attendant)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1. Are you able to go shopping for groceries and clothes without any help at all from someone else?
   - 1.i.a.
   - 1.ii.a.
   - 1.i.b.
   - 1.ii.b.
   - 1.i.c.
   - 1.ii.c.
   - 1.i.d.
   - 1.ii.d.

2. Are you able to prepare your own meals without any help at all from someone else?
   - 2.i.a.
   - 2.ii.a.
   - 2.i.b.
   - 2.ii.b.
   - 2.i.c.
   - 2.ii.c.
   - 2.i.d.
   - 2.ii.d

3. Are you able to do the routine housework that needs to be done in your home without any help at all from someone else?
   - 3.i.a.
   - 3.ii.a.
   - 3.i.b.
   - 3.ii.b.
   - 3.i.c.
   - 3.ii.c.
   - 3.i.d.
   - 3.ii.d

4. Do you take any medicines on a regular basis? If No ➔ Go to Duke_ADL
   - 4.i. How many different medicines do you have to take regularly? ________
   - 4.ii.a.
   - 4.iii.a.
   - 4.ii.b.
   - 4.iii.b.
   - 4.ii.c.
   - 4.iii.c.
   - 4.ii.d.
   - 4.iii.d.
>IADLcheck<
[If DukeOARS_IADL.1, 2, 3, 4.ii. are all “Yes” assume ADL independence
 ➔ Go to financial_exploitation]

Duke ADL

> Duke_ADL<

<table>
<thead>
<tr>
<th>Default response options for questions below:</th>
<th>If No</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;0&gt; No</td>
<td>Thinking about ONE person who helps you or does this for you, what is their relationship to you? (Select up to two: i, ii)</td>
</tr>
<tr>
<td>&lt;1&gt; Yes</td>
<td>Since you turned 60, has there ever been a time when this person hasn’t helped you when you thought they should have helped you?</td>
</tr>
<tr>
<td>&lt;d&gt; Do not know</td>
<td>How many times has this happened in the past year?</td>
</tr>
<tr>
<td>&lt;r&gt; Refused</td>
<td>How serious a problem is it for you that this person didn’t help you? Is it:</td>
</tr>
<tr>
<td>&lt;1&gt; Spouse/Partner</td>
<td>&lt;0&gt; Never</td>
</tr>
<tr>
<td>&lt;2&gt; Your adult child</td>
<td>&lt;1&gt; Once</td>
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<tr>
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<tr>
<td>&lt;6&gt; Neighbor</td>
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</tr>
<tr>
<td>&lt;7&gt; Friend</td>
<td>&lt;3&gt; Very serious</td>
</tr>
<tr>
<td>&lt;8&gt; Other non-relative</td>
<td></td>
</tr>
<tr>
<td>&lt;9&gt; Paid home care aid (attendant)</td>
<td></td>
</tr>
<tr>
<td>If No</td>
<td></td>
</tr>
</tbody>
</table>

1. Are you able to cut and eat your food without any help at all from someone else?

1.i.a. 1.ii.a. 1.i.b. 1.ii.b. 1.i.c. 1.ii.c. 1.i.d. 1.ii.d.

2. Are you able to dress and undress yourself without any help at all from someone else?

2.i.a. 2.ii.a. 2.i.b. 2.ii.b. 2.i.c. 2.ii.c. 2.i.d. 2.ii.d.

3. Are you able to walk without any help at all from someone else?

3.i.a. 3.ii.a. 3.i.b. 3.ii.b. 3.i.c. 3.ii.c. 3.i.d. 3.ii.d.

3.iii. Do you use any type of assistive device to help you walk (such as a cane, crutches or a walker)?

4. Are you able to get in and out of bed without any help at all from someone else? If Yes ➔ Go to 5.
<table>
<thead>
<tr>
<th>If No</th>
<th>Thinking about ONE person who helps you or does this for you, what is their relationship to you? (Select up to two: i, ii)</th>
<th>Since you turned 60, has there ever been a time when this person hasn’t helped you when you thought they should have helped you?</th>
<th>How many times has this happened in the past year?</th>
<th>How serious a problem is it for you that this person didn’t help you? Is it:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0&gt; No</td>
<td>0&gt; No</td>
<td>0&gt; Never</td>
<td>1&gt; Not serious at all</td>
</tr>
<tr>
<td></td>
<td>1&gt; Yes</td>
<td>1&gt; Yes</td>
<td>1&gt; Once</td>
<td>2&gt; Somewhat serious</td>
</tr>
<tr>
<td></td>
<td>d&gt; Do not know</td>
<td>d&gt; Do not know</td>
<td>2&gt; 2 to 10 times</td>
<td>3&gt; Very serious</td>
</tr>
<tr>
<td></td>
<td>r&gt; Refused</td>
<td>r&gt; Refused</td>
<td>3&gt; More than 10 times</td>
<td></td>
</tr>
</tbody>
</table>

4.i. Can you get in and out of bed with some help, or are you totally dependent on someone else to lift you?  
1> With some help  
2> Totally dependent  
⇒ Go to 4.i.a.

4.i.a.  
4.i.b.  
4.i.c.  
4.i.d.

4.i.a.  
4.i.b.  
4.i.c.  
4.i.d.

4.ii.a.  
4.ii.b.  
4.ii.c.  
4.ii.d.

4.iii. Do you use any special device or equipment to help you get in and out of bed?  
⇒ Go to 4.iii.

5. Are you able to take a bath or shower without any help at all from someone else?  
If Yes ⇒ Go to 6.
<table>
<thead>
<tr>
<th>Default response options for questions below:</th>
<th>If Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;0&gt; No</td>
<td>Thinking about ONE person who helps you or does this for you, what is their relationship to you? (Select up to two: i, ii)</td>
</tr>
<tr>
<td>&lt;1&gt; Yes</td>
<td>Since you turned 60, has there ever been a time when this person hasn’t helped you when you thought they should have helped you?</td>
</tr>
<tr>
<td>&lt;d&gt; Do not know</td>
<td>How many times has this happened in the past year?</td>
</tr>
<tr>
<td>&lt;r&gt; Refused</td>
<td>How serious a problem is it for you that this person didn’t help you? Is it:</td>
</tr>
</tbody>
</table>

| 5.i. Can you take a bath or shower with some help, or are you totally dependent on someone else to bathe you? | 5.i.a. 5.ii.a. | 5.i.b. 5.ii.b. If No Go to 5.iii. | 5.i.c. 5.ii.c. | 5.i.d. 5.ii.d. |
| 5.iii. Do you use any special device or equipment to help you take a bath or shower? | |

| 6. How often do you have difficulty holding your urine until you can get to a toilet? | 6.i.a. 6.ii.a. | 6.i.b. 6.ii.b. If No Go to 7. | 6.i.c. 6.ii.c. | 6.i.d. 6.ii.d. |
| 7. Is there anything else someone helps you with? | 7.i.a. 7.ii.a. | 7.i.b. 7.ii.b. If No Go to financial_exploitation | 7.i.c. 7.ii.c. | 7.i.d. 7.ii.d. |

| If No ➜ Go to financial_exploitation | If Yes ➜ Specify and continue with 7.i.a. |
Since you turned 60 years old has someone you live with or spend a lot of time with ever done any of the following:

<table>
<thead>
<tr>
<th>Response options for questions below:</th>
<th>If Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;0&gt; No</td>
<td></td>
</tr>
<tr>
<td>&lt;1&gt; Yes</td>
<td></td>
</tr>
<tr>
<td>&lt;d&gt; Do not know</td>
<td></td>
</tr>
<tr>
<td>&lt;r&gt; Refused</td>
<td></td>
</tr>
</tbody>
</table>

What is this person’s relationship to you? (Select up to two: i, ii)
- <1> Spouse/Partner
- <2> Your adult child
- <3> Son/Daughter-in-law
- <4> Grandchild
- <5> Other relative
- <6> Neighbor
- <7> Friend
- <8> Other non-relative
- <9> Paid home care aid (attendant)

In just a sentence or two, could you tell me what this person did?

How many times has this happened in the past year?
- <0> Never
- <1> Once
- <2> 2 to 10 times
- <3> 11 or more times

How serious a problem is it for you that the person did this to you?
- <1> Not serious at all
- <2> Somewhat serious
- <3> Very serious

1. Stolen anything from you or used things that belonged to you but without your knowledge or permission? This could include money, bank ATM or credit cards, checks, personal property or documents.
   - 1.i.a.
   - 1.ii.a.
   - 1.i.b.
   - 1.ii.b.
   - 1.i.c.
   - 1.ii.c.
   - 1.i.d.
   - 1.ii.d.

2. Forced, convinced or misled you to give them something that belonged to you or to give them the legal rights to something that belonged to you? This could include money, a bank account, a credit card, a deed to a house, personal property, or documents such as a will (last will/testament) or power of attorney.
   - 2.i.a.
   - 2.ii.a.
   - 2.i.b.
   - 2.ii.b.
   - 2.i.c.
   - 2.ii.c.
   - 2.i.d.
   - 2.ii.d.

3. Pretended to be you to obtain goods or money?
   - 3.i.a.
   - 3.ii.a.
   - 3.i.b.
   - 3.ii.b.
   - 3.i.c.
   - 3.ii.c.
   - 3.i.d.
   - 3.ii.d.

4. Stopped contributing to household expenses such as rent or food where this arrangement had been previously agreed to, even if they were capable of still doing so?
   - 4.i.a.
   - 4.ii.a.
   - 4.i.b.
   - 4.ii.b.
   - 4.i.c.
   - 4.ii.c.
   - 4.i.d.
   - 4.ii.d.

5. Unwilling to contribute to household expenses to the extent that there was not enough money for food or other necessities?
   - 5.i.a.
   - 5.ii.a.
   - 5.i.b.
   - 5.ii.b.
   - 5.i.c.
   - 5.ii.c.
   - 5.i.d.
   - 5.ii.d.
Elder mistreatment

No matter how well people get along, there are times when family members or other people you live with, spend time with, or count on for help or support, disagree on major decisions, get annoyed about something another person does, or just have spats or fights because someone is in a bad mood or for some other reason. They also use many different ways of trying to settle their differences. I’m going to read a list of things that family members or people you spend time with might have said or done when there was a disagreement.

Since you turned 60 years old has someone you live with or spend a lot of time with:

<table>
<thead>
<tr>
<th>Response options for questions below:</th>
<th>If Yes</th>
<th>How many times has this happened in the past year?</th>
<th>How serious a problem is it that the person did this?</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;0&gt; No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;1&gt; Yes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;d&gt; Do not know</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&lt;r&gt; Refused</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| 1. Sulked or refused to talk about something? | 1.i.a. | 1.i.b. | 1.i.c. |
| 2. Done or said something to spite you?     | 2.i.a. | 2.i.b. | 2.i.c. |
| 3. Insulted or sworn at you?                | 3.i.a. | 3.i.b. | 3.i.c. |
| 4. Threatened to hit or throw something at you? | 4.i.a. | 4.i.b. | 4.i.c. |
| 5. Touched you or tried to touch you in a sexual way against your will? | 5.i.a. | 5.i.b. | 5.i.c. |
| 6. Thrown something at you?                | 6.i.a. | 6.i.b. | 6.i.c. |
| 7. Tried to slap or hit you?               | 7.i.a. | 7.i.b. | 7.i.c. |
| 8. Pushed, grabbed or shoved you?          | 8.i.a. | 8.i.b. | 8.i.c. |
| 9. Slapped you?                            | 9.i.a. | 9.i.b. | 9.i.c. |
| 10. Forced you to have sexual intercourse against your will? | 10.i.a. | 10.i.b. | 10.i.c. |
>elder_mistreatment_2<
Since you turned 60, has a family member or someone you spend a lot of time with ever been violent toward you in any way?
<0> No ➜ Go to demog_intro]
<1> Yes ➜ Continue to elder_mistreatment_3

>elder_mistreatment_3<
Since you turned 60, has a family member or someone you spend a lot of time with ever:

<table>
<thead>
<tr>
<th>Response options for questions below:</th>
<th>If Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;0&gt; No</td>
<td>What is this person’s relationship to you?</td>
</tr>
<tr>
<td>&lt;1&gt; Yes</td>
<td>(Select up to two: i, ii)</td>
</tr>
<tr>
<td>&lt;d&gt; Do not know</td>
<td>&lt;1&gt; Spouse/Partner</td>
</tr>
<tr>
<td>&lt;r&gt; Refused</td>
<td>&lt;2&gt; Your adult child</td>
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<tr>
<td></td>
<td>&lt;3&gt; Son/Daughter in-law</td>
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<tr>
<td></td>
<td>&lt;9&gt; Paid home care aid (attendant)</td>
</tr>
<tr>
<td></td>
<td>How many times has this happened in the past year?</td>
</tr>
<tr>
<td></td>
<td>&lt;0&gt; Never</td>
</tr>
<tr>
<td></td>
<td>&lt;1&gt; Once</td>
</tr>
<tr>
<td></td>
<td>&lt;2&gt; 2 to 10 times</td>
</tr>
<tr>
<td></td>
<td>&lt;3&gt; More than 10 times</td>
</tr>
<tr>
<td></td>
<td>How serious a problem is it that the person did this?</td>
</tr>
<tr>
<td></td>
<td>&lt;1&gt; Not serious at all</td>
</tr>
<tr>
<td></td>
<td>&lt;2&gt; Somewhat serious</td>
</tr>
<tr>
<td></td>
<td>&lt;3&gt; Very serious</td>
</tr>
</tbody>
</table>

11. Kicked, bit or hit you with a fist? 11.i.a. 11.i.a. 11.i.b. 11.i.c. 11.i.c.
12. Hit or tried to hit you with something? 12.i.a. 12.i.a. 12.i.b. 12.i.c. 12.i.c.
13. Locked you in your room? 13.i.a. 13.i.a. 13.i.b. 13.i.c. 13.i.c.
15. Threatened you with a knife or gun? 15.i.a. 15.i.a. 15.i.b. 15.i.c. 15.i.c.
16. Used a knife or gun? 16.i.a. 16.i.a. 16.i.b. 16.i.c. 16.i.c.

[If 11. through 16. are all “No” ➜ Go to elder_mistreatment_4]
[Else ➜ Go to catchall]
This study is about elder abuse and neglect. We have asked a number of questions about this topic, but I would like to ask one final question: have you ever experienced elder abuse or neglect?

<0> No
<1> Yes
<d> Do not know
<r> Refused

[If Yes]
Would you please describe the abuse or neglect you experienced?

---

<table>
<thead>
<tr>
<th>Response options for questions below:</th>
<th>If Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;0&gt; No</td>
<td>What is this person’s relationship to you? (Select up to two: i, ii)</td>
</tr>
<tr>
<td>&lt;1&gt; Yes</td>
<td>What was it that they did?</td>
</tr>
<tr>
<td>&lt;d&gt; Do not know</td>
<td>How many times has this happened in the past year?</td>
</tr>
<tr>
<td>&lt;r&gt; Refused</td>
<td>How serious a problem is it that the person did this?</td>
</tr>
</tbody>
</table>

17. Since you turned 60, has anyone done anything violent to you that you have not mentioned?

17.i.a.
17.ii.a.

17.i.b.
17.ii.b.

17.i.c.
17.ii.c.

17.i.d.
17.ii.d.
Demographics

>demog_intro<
We’d like to ask a few questions about your background, just to make sure we’re getting opinions from a wide variety of people.

>hispanic<
Are you of Hispanic origin or descent, such as Mexican, Puerto Rican, Cuban, or some other Spanish background?
<0> No
<1> Yes
<d> Do not know
<r> Refused

>ethnicity<
Would you say you are:
<1> African American or black
<2> Caucasian or white
<3> American Indian, Aleut, Eskimo
<4> Asian or Pacific Islander
<5> Something else (specify): ______________________
<d> Do not know
<r> Refused

>education<
<1> 8th grade or less
<2> Some high school (but did not graduate)
<3> High school diploma or GED
<4> Post-high school other than college
<5> Some college
<6> College degree
<7> Post graduate
<d> Do not know
<r> Refused

>homeown<
Do you [if marital=”Married or partnered”: and your spouse] own the place you are currently living in, do you pay rent, or do you live there rent free?
<1> Own home
<2> Rent
<3> Live rent free
<4> Other (specify): ______________________
<d> Do not know
<r> Refuses
I’m going to read you a list of income categories. Please tell me which of them best describes your total household income in 2008 before taxes from all sources.

1. Less than $10,000
2. 10 to under $20,000
3. 20 to under $30,000
4. 30 to under $40,000
5. 40 to under $50,000
6. 50 to under $75,000
7. 75 to under $100,000
8. 100 to under $150,000
9. $150,000 or more
<1> Do not know
<r> Refused

Recorded but not asked.

1. Male
2. Female

May we contact you again in the future?

1. No
2. Yes

[If Yes]
What is the best phone number to reach you?
Phone: (____) ______ - ________

May we have your mailing address so we can contact you by mail as well as by phone?
Address: ______________________
City: ____________________
State: __________________
Zip code: ______________________

How confident do you feel that you were able to correctly answer our questions? Would you say ...

1. Completely confident
2. Somewhat confident
3. Gave it your best guess
4. Not Confident at all
<1> Do not know
<r> Refused
As promised, we can send you a letter to confirm the legitimacy of the study you just participated in. Would you like us to send a letter?

<0> No
<1> Yes

[If Yes and contact=0 (No)]
Address: ______________________
City: ____________________
State: __________________
Zip code: ______________________

You have completed the survey. Thank you very much for your time. Before I go, I want to let you know that there is a toll-free hotline you can call if you are concerned about abuse that you or someone you are close to may have experienced. The number is 800.942.6906 (English) / 800.942.6908 (Spanish) and will connect you with a counselor experienced in handling issues of domestic abuse and violence.

Post interview: How confident do you feel that the respondent was able to correctly answer the questions?

<1> Completely confident
<2> Somewhat confident
<3> Gave it your best guess
<4> Not Confident at all
<d> Do not know
<r> Refused

Post-interview: Do you believe the respondent was in any kind of danger?

<0> No
<1> Yes

[If Yes]
Please describe the nature of the danger and bring this case to a supervisor’s attention.

_____________________________________________________________________________________________________________
_____________________________________________________________________________________________________________
_____________________________________________________________________________________________________________
_____________________________________________________________________________________________________________
APPENDIX B

DOCUMENTED CASE STUDY SURVEY

1. Introduction

Greetings:

You are being asked to participate in a research study with Cornell University, the New York City Department for the Aging, and Lifespan of Greater Rochester. The information collected from the questionnaire will help us to better quantify the documented cases of elder abuse in New York State.

Your participation is of critical importance as this is the first in-depth statewide study of elder abuse in the nation. Key stakeholders from a range of service systems are being asked to complete this questionnaire on aggregated cases of elder mistreatment.

By completing this questionnaire you are agreeing to participate in this extremely important study. All information will be kept confidential and information will be reported in aggregate.

This project is being funded, in part, through the New York State Children and Family Trust Fund, a program administered under the NYS Office of Children and Family Services. Also, this project has received approval for the Protocol for Human Subject Research through the Institutional Review Board (IRB) of Fordham University.

If you have any questions/concerns or need technical assistance, please contact either Dr. Patricia Brownell at Brownell@fordham.edu or Art Mason at amason@lifespan-roch.org.

Your help in this endeavor is greatly appreciated. Please note the questionnaire has 28 questions and we are asking that you complete this questionnaire within 4 weeks.

IF YOU SERVE MORE THAN ONE COUNTY, PLEASE FILL OUT A SURVEY FOR EACH COUNTY THAT YOU SERVE.

Before completing this form WE RECOMMEND THAT YOU REVIEW THE PDF VERSION of the questionnaire that you were sent previously to ensure that you have all necessary data readily available.

* 1. I wish to participate in this survey. Completion and submission of this survey indicate consent to participate in this study.

  ○ Yes

  ○ No
2. Elder Abuse Definitions

Although elder abuse is defined differently by individual service systems, for the purposes of this survey we are defining elder abuse in the following way:

Seniors (60+) who have experienced mistreatment (excluding self neglect) by a person that the senior has a trusting relationship with (excluding stranger crime).

EMOTIONAL ABUSE:
Willful infliction of mental or emotional anguish by threat, humiliation, intimidation or other abusive conduct, including but not limited to, frightening or isolating an adult.

FINANCIAL EXPLOITATION:
Improper use or wrongful taking of an adult’s funds, property or resources by another individual, including but not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.

NEGLECT - ACTIVE or PASSIVE:
*Active neglect is the willful failure by the caregiver to fulfill care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment, willful deprivation of food, water, heat, clean clothing and bedding, eyeglasses or dentures, medicine or other health related services.
*Passive neglect is the non-willful failure of a caregiver to fulfill care-taking functions and responsibilities assumed by the caregiver, including but not limited to, abandonment or denial of food or health related services because of inadequate caregiver knowledge, infirmity, or disputing the value of prescribed services.

PHYSICAL ABUSE:
Non-accidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained.

SEXUAL ABUSE:
Non-consensual sexual contact of any kind, including but not limited to, forcing sexual contact or forcing sex with a third party.
3. Introductory Questions

* 2. Name of organization

* 3. Type of organization (check all that apply):

- Adult Protective Services
- Aging service provider
- Crime Victim's Board Funded Program - Elder abuse
- Crime Victim's Board Funded Program - Domestic violence
- Crime Victim's Board Funded Program - Tribal organization
- Crime Victim's Board Funded Program - Law enforcement
- Crime Victim's Board Funded Program - District attorney
- Crime Victim's Board Funded Program - Other (please specify in text box below)
- District Attorney
- Domestic Violence Provider (non-residential)
- Domestic Violence Provider (residential)
- Elder Abuse Provider
- Government
- Health Care (hospitals)
- Law Enforcement (police, sheriff, etc.)
- Not for profit
- Office for the Aging (Area Agency on Aging)
- Public housing
- Tribal organization
- Other

If you checked 'other,' please specify

* 4. Organization serves the following geographic areas (select one only):

- Entire State
- Specific Regions
**4. Geographic area**

**5. Which counties does your organization serve? (Please select all that apply):**

- Albany
- Allegany
- Broome
- Cattaraugus
- Cayuga
- Chautauqua
- Chemung
- Chenango
- Clinton
- Columbia
- Cortland
- Delaware
- Dutchess
- Erie
- Essex
- Franklin
- Fulton
- Genesee
- Greene
- Hamilton
- Herkimer
- Jefferson
- Lewis
- Livingston
- Madison
- Monroe
- Montgomery
- Nassau
- Niagara
- Oneida
- Onondaga
- Ontario
- Orange
- Orleans
- Oswego
- Otsego
- Putnam
- Rensselaer
- Rockland
- Saratoga
- Schenectady
- Schoharie
- Schuyler
- Senator
- St Lawrence
- Steuben
- Suffolk
- Sullivan
- Tioga
- Tompkins
- Ulster
- Warren
- Washington
- Wayne
- Westchester
- Wyoming
- Yates
- New York City - Bronx
- New York City - Kings (Brooklyn)
- New York City - New York (Manhattan)
- New York City - Queens
- New York City - Richmond (Staten Island)

**6. How would you generally describe the area(s) your organization serves? (check all that apply):**

- Rural
- Suburban
- Urban
- Tribal Community
7. For purposes of this study we ask that you complete a separate questionnaire for each county that you serve.

The following questionnaire represents information from which county?

- Albany
- Allegany
- Broome
- Cattaraugus
- Cayuga
- Chautauqua
- Chemung
- Chenango
- Clinton
- Columbia
- Cortland
- Delaware
- Dutchess
- Erie
- Essex
- Franklin
- Fulton
- Genesee
- Greene
- Hamilton
- Herkimer
- Jefferson
- Lewis
- Livingston
- Madison
- Monroe
- Montgomery
- Nassau
- Niagara
- Oneida
- Onondaga
- Ontario
- Orange
- Orleans
- Oswego
- Otsego
- Putnam
- Rensselaer
- Rockland
- Saratoga
- Schenectady
- Schoharie
- Schuyler
- Seneca
- St Lawrence
- Steuben
- Suffolk
- Sullivan
- Tioga
- Tompkins
- Ulster
- Warren
- Washington
- Wayne
- Westchester
- Wyoming
- Yates
- New York City - Bronx
- New York City - Kings (Brooklyn)
- New York City - New York (Manhattan)
- New York City - Queens
- New York City - Richmond (Staten Island)

8. Does your organization have a formal protocol in place to document elder abuse information?

- Yes
- No
5. Unduplicated cases

*9. Are you able to give us information based on unduplicated cases of elder abuse?

An unduplicated case = a person who has returned to your organization multiple times for assistance in one year but is only counted once.

☐ Yes
☐ No
☐ Partial

If partial please explain which fields are based on unduplicated cases.
10. What % of your cases would be considered unduplicated?

If you don't know - please write 99999 in the box.
7. Year of data

We are interested in gathering data based on UNDuplicated cases during a calendar year (January 2008 to December 2008).

If you have LESS THAN 6 months of data for 2008 please respond based on ONLY 2007 data (January 2007 to December 2007).

If you DO NOT TRACK unduplicated cases, then record the number of duplicated cases.

11. Which calendar year are you basing your data?

- [ ] '08
- [ ] '07
- [ ] Can't complete data for either year (Please note technical assistance will contact you.)
8. Total and type of cases

Please answer the following questions, as best as possible, based on all UNDuplicated cases served during the calendar year.

If you do not capture specific demographic information for a particular category, please DO NOT put in your best estimate - indicate "don't know"

If you do not track unduplicated cases, then record the number of duplicated cases.

Please note: IF YOU SERVE MORE THAN ONE COUNTY PLEASE COMPLETE A SEPARATE QUESTIONNAIRE FOR EACH COUNTY THAT YOU SERVE. IF YOU ARE UNABLE TO DO THIS, PLEASE CONTACT EITHER DR. PAT BROWNELL AT Brownell@fordham.edu OR ART MASON AT amason@lifespan-roch.org.

* 12. How many total elder abuse and neglect (excluding self neglect) victims did you assist in the calendar year?

If you don't know - please write 999999 in the box.

Number

* 13. What types of mistreatment do you have in your caseload (please check all that apply)?

- [ ] Emotional abuse
- [ ] Financial exploitation
- [ ] Neglect (excluding self neglect)
- [ ] Physical abuse
- [ ] Sexual abuse

* 14. How many of these were victims of: (A victim may suffer from multiple types of mistreatment, please count all that apply)

If you don't know - please write 999999 in the box.

Emotional abuse
Financial exploitation
Neglect (excluding self neglect)
Physical abuse
Sexual abuse
9. Profile of Elder AbuseVictims

Please answer the following questions, as best as possible, based on all UNDuplicated cases served during the calendar year.

If you do not capture specific demographic information for a particular category, please DO NOT put in your best estimate - indicate "don't know"

If you do not track unduplicated cases, then record the number of duplicated cases.

* 15. Major age categories of victims:

If you don't know - please write 99999 in the box.
60+
65+
85+

* 16. Detailed age information of victims:

If you don't know - please write 99999 in the box.
60-64
65-74
75-84
85+

* 17. How many victims are:

If you don't know - please write 99999 in the box.
Male
Female

* 18. How many victims are:

If you don't know - please write 99999 in the box.
African-American/Black
Asian
Hispanic/Latino
Native American
White/Caucasian
Other
19. How many victims:

If you don't know - please write 99999 in the box.

- Live alone
- Live with spouse/partner
- Live with own children
- Live with sons-in-law or daughters-in-law
- Live with grandchildren
- Live with other relatives
- Live with other non-relatives

20. If you indicated "other relatives" or "other non-relatives" please give examples of other relatives and other non-relatives.

21. How many victims live with their abuser

If you don't know - please write 99999 in the box.

- Lives with abuser

22. How many victims live below the poverty line:

If you don't know - please write 99999 in the box.

- Live below the Poverty Line
### 10. Profile of Perpetrators of Elder Abuse

Please answer the following questions, as best as possible, based on all UNDuplicated cases served during the calendar year.

If you do not capture specific demographic information for a particular category, please DO NOT put in your best estimate - indicate "don’t know."

If you do not track unduplicated cases, then record the number of duplicated cases.

**23. How many perpetrators of elder abuse are:**

* If you don't know - please write 99999 in the box.

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>&lt;18</td>
<td></td>
</tr>
<tr>
<td>18-45</td>
<td></td>
</tr>
<tr>
<td>46-59</td>
<td></td>
</tr>
<tr>
<td>60+</td>
<td></td>
</tr>
</tbody>
</table>

**24. How many perpetrators of elder abuse are:**

* If you don't know - please write 99999 in the box.

<table>
<thead>
<tr>
<th>Gender</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td></td>
</tr>
</tbody>
</table>

**25. How many perpetrators of elder abuse are:**

* If you don't know - please write 99999 in the box.

<table>
<thead>
<tr>
<th>Relationship</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouse/partner</td>
<td></td>
</tr>
<tr>
<td>Own adult children</td>
<td></td>
</tr>
<tr>
<td>Son-in-law/Daughter-in-law</td>
<td></td>
</tr>
<tr>
<td>Grandchild</td>
<td></td>
</tr>
<tr>
<td>Friends/neighbors</td>
<td></td>
</tr>
<tr>
<td>Paid home care aide/attendant</td>
<td></td>
</tr>
<tr>
<td>Other relatives</td>
<td></td>
</tr>
<tr>
<td>Other non-relatives</td>
<td></td>
</tr>
</tbody>
</table>

**26. If you provided a number for 'other relatives' or 'other non-relatives', please give examples of the relationships of the perpetrators to the victim.**

---

88 | Under the Radar: New York State Elder Abuse Prevalence Study
27. Please indicate how many perpetrators are adult grandchildren and how many are minor grandchildren.

If you don’t know - please write 99999 in the box.

Grandchild (adult)  

Grandchild (minor, <18)
11. Referrals

Please answer the following questions, as best as possible, based on all UNDuplicated cases served during the calendar year.

If you do not capture specific demographic information for a particular category, please DO NOT put in your best estimate - indicate "don't know"

If you do not track unduplicated cases, then record the number of duplicated cases.

**28. Where do you receive your referrals from (Provide the number of victims referred from the following referral sources):**

If you don't know - please write 99999 in the box.

<table>
<thead>
<tr>
<th>Referral Source</th>
<th>Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult Protective Services</td>
<td></td>
</tr>
<tr>
<td>DA's office</td>
<td></td>
</tr>
<tr>
<td>Domestic Violence program</td>
<td></td>
</tr>
<tr>
<td>Elder abuse program</td>
<td></td>
</tr>
<tr>
<td>Law Enforcement (police, sheriff, etc.)</td>
<td></td>
</tr>
<tr>
<td>Community agency</td>
<td></td>
</tr>
<tr>
<td>Financial institution</td>
<td></td>
</tr>
<tr>
<td>Health care provider</td>
<td></td>
</tr>
<tr>
<td>Homecare</td>
<td></td>
</tr>
<tr>
<td>Office for the Aging</td>
<td></td>
</tr>
<tr>
<td>The victim</td>
<td></td>
</tr>
<tr>
<td>The perpetrator</td>
<td></td>
</tr>
<tr>
<td>Family member</td>
<td></td>
</tr>
<tr>
<td>Friend/Neighbor</td>
<td></td>
</tr>
<tr>
<td>Concerned citizen</td>
<td></td>
</tr>
<tr>
<td>Anonymous</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
</tr>
</tbody>
</table>

29. If you provided a number for 'other,' please specify who your other referrals come from.
*30. Where do you refer to (Provide the number of victims referred to the following referral sources):

If you don’t know - please write 99999 in the box.

- Adult Protective Services
- Community Agency
- DA’s office
- Domestic violence programs
- Elder abuse programs
- Family Court
- Health care providers
- Law Enforcement (police, sheriff, etc.)
- Office for the Aging
- Other

*31. If you provided a number for 'other,' please give some examples of other places you refer cases.

- 

*32. In how many cases was a Domestic Incident Report (DIR) completed?

If you don’t know - please write 99999 in the box.

- Number of DIRs completed
12. More information

* 33. If follow-up is needed, whom can we contact?
   
   Name: ____________________________
   Title: ____________________________
   Email Address: __________________
   Phone Number: ___________________
13. Thank you!

Thank you! Your time is appreciated.
### APPENDIX C

**DOCUMENTED CASE STUDY**

**AGGREGATE CASE DATA BY REGION**

<table>
<thead>
<tr>
<th>ELDER ABUSE AGGREGATE REGIONAL DATA</th>
<th>New York City</th>
<th>Long Island</th>
<th>Mid-Hudson Region</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SERVICE SYSTEM INFORMATION</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Type of Abuse</td>
<td>Total Number of Agencies = 50</td>
<td>Total Number of Agencies = 10</td>
<td>Total Number of Agencies = 30</td>
</tr>
<tr>
<td>Emotional Abuse</td>
<td>76.00%</td>
<td>90.00%</td>
<td>90.00%</td>
</tr>
<tr>
<td>Financial Abuse</td>
<td>80.00%</td>
<td>90.00%</td>
<td>83.33%</td>
</tr>
<tr>
<td>Neglect</td>
<td>64.00%</td>
<td>50.00%</td>
<td>50.00%</td>
</tr>
<tr>
<td>Physical</td>
<td>82.00%</td>
<td>90.00%</td>
<td>83.33%</td>
</tr>
<tr>
<td>Sexual</td>
<td>46.00%</td>
<td>60.00%</td>
<td>16.67%</td>
</tr>
<tr>
<td><strong>VICTIM INFORMATION</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Number of Victims = 6780</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Number of Agencies = 47</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Emotional Abuse</td>
<td>48.13%</td>
<td>63.66%</td>
<td>40.19%</td>
</tr>
<tr>
<td>Financial Abuse</td>
<td>34.72%</td>
<td>15.91%</td>
<td>28.36%</td>
</tr>
<tr>
<td>Neglect</td>
<td>10.94%</td>
<td>9.66%</td>
<td>11.51%</td>
</tr>
<tr>
<td>Physical</td>
<td>44.15%</td>
<td>26.68%</td>
<td>34.36%</td>
</tr>
<tr>
<td>Sexual</td>
<td>0.71%</td>
<td>1.66%</td>
<td>0.32%</td>
</tr>
<tr>
<td>Age Groups</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>60-64</td>
<td>24.85%</td>
<td>5.61%</td>
<td>2.85%</td>
</tr>
<tr>
<td>65-74</td>
<td>35.12%</td>
<td>53.08%</td>
<td>48.26%</td>
</tr>
<tr>
<td>75-84</td>
<td>26.37%</td>
<td>30.09%</td>
<td>31.14%</td>
</tr>
<tr>
<td>85+</td>
<td>13.67%</td>
<td>11.21%</td>
<td>17.74%</td>
</tr>
<tr>
<td>Total*</td>
<td>89.34%</td>
<td>79.42%</td>
<td>69.18%</td>
</tr>
<tr>
<td>Age Cumulative</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>60+</td>
<td>100.00%</td>
<td>100.00%</td>
<td>100.00%</td>
</tr>
<tr>
<td>65+</td>
<td>67.12%</td>
<td>74.96%</td>
<td>67.21%</td>
</tr>
<tr>
<td>85+</td>
<td>12.21%</td>
<td>8.91%</td>
<td>12.27%</td>
</tr>
<tr>
<td>Gender</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>33.84%</td>
<td>27.19%</td>
<td>30.91%</td>
</tr>
<tr>
<td>Female</td>
<td>66.16%</td>
<td>72.81%</td>
<td>69.09%</td>
</tr>
<tr>
<td>Total*</td>
<td>90.27%</td>
<td>78.97%</td>
<td>78.03%</td>
</tr>
<tr>
<td>Race/Ethnicity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>33.12%</td>
<td>18.29%</td>
<td>17.50%</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
<td>4.93%</td>
<td>0.78%</td>
<td>0.56%</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
<td>25.92%</td>
<td>3.32%</td>
<td>6.80%</td>
</tr>
<tr>
<td>Native American/Aleut Eskimo</td>
<td>0.31%</td>
<td>0.26%</td>
<td>0.00%</td>
</tr>
<tr>
<td>Caucasian</td>
<td>33.40%</td>
<td>68.82%</td>
<td>65.89%</td>
</tr>
<tr>
<td>Race Other</td>
<td>2.32%</td>
<td>8.53%</td>
<td>9.25%</td>
</tr>
<tr>
<td>Total*</td>
<td>52.68%</td>
<td>76.00%</td>
<td>77.00%</td>
</tr>
</tbody>
</table>

*Total = percentage of cases reporting data in the category
<table>
<thead>
<tr>
<th>Capital Region, Mohawk Valley, North Country</th>
<th>Central New York, Southern Tier</th>
<th>Finger Lakes</th>
<th>Western New York</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SERVICE SYSTEM INFORMATION</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Number of Agencies = 66</td>
<td>Total Number of Agencies = 39</td>
<td>Total Number of Agencies = 33</td>
<td>Total Number of Agencies = 21</td>
</tr>
<tr>
<td>74.24%</td>
<td>82.05%</td>
<td>75.76%</td>
<td>76.47%</td>
</tr>
<tr>
<td>74.24%</td>
<td>69.23%</td>
<td>81.82%</td>
<td>70.59%</td>
</tr>
<tr>
<td>43.94%</td>
<td>33.33%</td>
<td>39.39%</td>
<td>52.94%</td>
</tr>
<tr>
<td>77.27%</td>
<td>87.18%</td>
<td>69.70%</td>
<td>76.47%</td>
</tr>
<tr>
<td>19.70%</td>
<td>20.51%</td>
<td>21.21%</td>
<td>29.41%</td>
</tr>
<tr>
<td><strong>VICTIM INFORMATION</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Number of Victims = 1083</td>
<td>Total Number of Victims = 700</td>
<td>Total Number of Victims = 923</td>
<td>Total Number of Victims = 676</td>
</tr>
<tr>
<td>Total Number of Agencies = 62</td>
<td>Total Number of Agencies = 36</td>
<td>Total Number of Agencies = 31</td>
<td>Total Number of Agencies = 19</td>
</tr>
<tr>
<td>43.47%</td>
<td>50.00%</td>
<td>28.26%</td>
<td>29.91%</td>
</tr>
<tr>
<td>31.09%</td>
<td>36.60%</td>
<td>43.35%</td>
<td>39.29%</td>
</tr>
<tr>
<td>8.61%</td>
<td>15.85%</td>
<td>10.36%</td>
<td>10.94%</td>
</tr>
<tr>
<td>36.07%</td>
<td>39.81%</td>
<td>24.94%</td>
<td>31.25%</td>
</tr>
<tr>
<td>1.48%</td>
<td>3.02%</td>
<td>0.38%</td>
<td>1.56%</td>
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<tr>
<td>12.77%</td>
<td>11.76%</td>
<td>9.22%</td>
<td>6.70%</td>
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<td>53.80%</td>
<td>51.39%</td>
<td>39.76%</td>
<td>46.17%</td>
</tr>
<tr>
<td>25.63%</td>
<td>25.70%</td>
<td>35.93%</td>
<td>33.97%</td>
</tr>
<tr>
<td>7.80%</td>
<td>11.15%</td>
<td>15.09%</td>
<td>13.16%</td>
</tr>
<tr>
<td><strong>91.14%</strong></td>
<td><strong>92.29%</strong></td>
<td><strong>90.47%</strong></td>
<td><strong>61.83%</strong></td>
</tr>
<tr>
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<tr>
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<td>81.26%</td>
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<td>68.34%</td>
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**AGGREGATE CASE DATA BY REGION** (continued)

<table>
<thead>
<tr>
<th>ELDER ABUSE AGGREGATE REGIONAL DATA</th>
<th>New York City</th>
<th>Long Island</th>
<th>Mid-Hudson Region</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Living Arrangement</strong></td>
<td></td>
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<tr>
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<tr>
<td>Spouse/Partner</td>
<td>12.70%</td>
<td>23.69%</td>
<td>17.74%</td>
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<tr>
<td>Children</td>
<td>11.94%</td>
<td>37.75%</td>
<td>18.04%</td>
</tr>
<tr>
<td>Son/Daughter In Law</td>
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<td>0.92%</td>
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<td>Grandchild</td>
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<td>3.36%</td>
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<tr>
<td>Other Non Relative</td>
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<td>9.48%</td>
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<tr>
<td><strong>Lives with Abuser</strong></td>
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<td></td>
</tr>
<tr>
<td>Lives With Abuser</td>
<td>27.96%</td>
<td>35.46%</td>
<td>66.67%</td>
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<tr>
<td><strong>Poverty</strong></td>
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<td>Below Poverty</td>
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**ABUSER INFORMATION**

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<thead>
<tr>
<th>Total Number of Abusers = 5778</th>
<th>Total Number of Abusers = 1521</th>
<th>Total Number of Abusers = 668</th>
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<tbody>
<tr>
<td>Total Number of Agencies = 38</td>
<td>Total Number of Agencies = 8</td>
<td>Total Number of Agencies = 19</td>
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</table>

| **Age Groups**                  |               |             |                   |
| 18 or younger                   | 2.63%         | 8.19%       | 7.68%             |
| 18-45                           | 50.08%        | 43.65%      | 44.57%            |
| 46-59                           | 27.70%        | 25.96%      | 25.09%            |
| 60 and older                    | 19.58%        | 22.19%      | 22.66%            |
| Total*                          | 31.55%        | 90.66%      | 79.94%            |

| **Gender**                      |               |             |                   |
| Male                            | 68.90%        | 65.14%      | 66.87%            |
| Female                          | 31.10%        | 34.86%      | 33.13%            |
| Total Gender*                   | 68.40%        | 97.50%      | 98.95%            |

| **Relationship**                |               |             |                   |
| Spouse/Partner                  | 29.07%        | 24.03%      | 23.02%            |
| Own Adult Children              | 36.24%        | 47.99%      | 43.14%            |
| Son-in-law/Daughter-in-law      | 3.57%         | 0.27%       | 0.15%             |
| Grandchild                      | 8.71%         | 9.15%       | 10.37%            |
| Friends/Neighbors               | 4.68%         | 1.02%       | 1.37%             |
| Paid Home Attendant             | 1.19%         | 0.00%       | 0.46%             |
| Other Relatives                 | 9.12%         | 16.66%      | 17.07%            |
| Other non-relatives             | 7.42%         | 0.89%       | 4.42%             |
| Total relationship*             | 63.95%        | 96.32%      | 98.20%            |

*Total = percentage of cases reporting data in the category
<table>
<thead>
<tr>
<th>Capital Region, Mohawk Valley, North Country</th>
<th>Central New York, Southern Tier</th>
<th>Finger Lakes</th>
<th>Western New York</th>
</tr>
</thead>
<tbody>
<tr>
<td>43.47%</td>
<td>33.22%</td>
<td>49.67%</td>
<td>61.93%</td>
</tr>
<tr>
<td>31.09%</td>
<td>22.03%</td>
<td>24.18%</td>
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<tr>
<td>8.61%</td>
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<tr>
<td>48.21%</td>
<td>58.18%</td>
<td>58.96%</td>
<td>57.89%</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Total Number of Abusers = 855</th>
<th>Total Number of Abusers = 523</th>
<th>Total Number of Abusers = 777</th>
<th>Total Number of Abusers = 408</th>
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<td>Total Number of Agencies = 26</td>
<td>Total Number of Agencies = 11</td>
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<table>
<thead>
<tr>
<th>12.76%</th>
<th>16.30%</th>
<th>8.92%</th>
<th>11.39%</th>
</tr>
</thead>
<tbody>
<tr>
<td>41.51%</td>
<td>39.51%</td>
<td>38.17%</td>
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</tr>
<tr>
<td>21.46%</td>
<td>20.99%</td>
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<td><strong>77.44%</strong></td>
<td><strong>62.03%</strong></td>
<td><strong>58.09%</strong></td>
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</table>

<table>
<thead>
<tr>
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<tr>
<td>34.75%</td>
<td>34.05%</td>
<td>43.39%</td>
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</tr>
<tr>
<td><strong>99.30%</strong></td>
<td><strong>98.28%</strong></td>
<td><strong>97.30%</strong></td>
<td><strong>95.83%</strong></td>
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</table>

<table>
<thead>
<tr>
<th>24.63%</th>
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</thead>
<tbody>
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<td>37.87%</td>
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<td>43.78%</td>
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<tr>
<td>1.23%</td>
<td>2.68%</td>
<td>0.31%</td>
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<tr>
<td>12.01%</td>
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</tr>
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<td>1.59%</td>
<td>3.44%</td>
<td>6.14%</td>
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</tr>
<tr>
<td>0.25%</td>
<td>0.57%</td>
<td>0.15%</td>
<td>0.25%</td>
</tr>
<tr>
<td>18.87%</td>
<td>16.25%</td>
<td>11.67%</td>
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<td>6.31%</td>
<td>7.53%</td>
<td>8.52%</td>
</tr>
<tr>
<td><strong>95.44%</strong></td>
<td><strong>100.00%</strong></td>
<td><strong>83.78%</strong></td>
<td><strong>97.79%</strong></td>
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</tbody>
</table>
**AGGREGATE CASE DATA BY REGION**

<table>
<thead>
<tr>
<th>ELDER ABUSE AGGREGATE REGIONAL DATA</th>
<th>New York City</th>
<th>Long Island</th>
<th>Mid-Hudson Region</th>
</tr>
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<tbody>
<tr>
<td><strong>REFERRAL INFORMATION</strong></td>
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<tr>
<td>Referral From</td>
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<td></td>
</tr>
<tr>
<td>Adult Protective Services</td>
<td>0.40%</td>
<td>1.83%</td>
<td>3.36%</td>
</tr>
<tr>
<td>Community Agency</td>
<td>9.76%</td>
<td>2.90%</td>
<td>4.62%</td>
</tr>
<tr>
<td>District Attorney</td>
<td>5.90%</td>
<td>0.00%</td>
<td>6.30%</td>
</tr>
<tr>
<td>Domestic Violence Programs</td>
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<td>0.00%</td>
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<td>0.84%</td>
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<tr>
<td>Health Care Provider</td>
<td>8.19%</td>
<td>5.80%</td>
<td>16.39%</td>
</tr>
<tr>
<td>Homecare</td>
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<td>4.89%</td>
<td>6.72%</td>
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<tr>
<td>Law Enforcement</td>
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<td>2.75%</td>
<td>9.24%</td>
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<tr>
<td>Office for the Aging</td>
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<tr>
<td>Anonymous</td>
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<tr>
<td>Concerned Citizen</td>
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</tr>
<tr>
<td>Family Member</td>
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<td>13.45%</td>
</tr>
<tr>
<td>Friends/Neighbors</td>
<td>4.29%</td>
<td>2.14%</td>
<td>3.78%</td>
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<tr>
<td>Perpetrator</td>
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<tr>
<td>Victim</td>
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<tr>
<td>Other total</td>
<td>3.38%</td>
<td>5.04%</td>
<td>20.17%</td>
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<td><strong>Referral To</strong></td>
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<tr>
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<td>4.71%</td>
<td>27.97%</td>
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<tr>
<td>Community Agency</td>
<td>21.60%</td>
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<td>11.02%</td>
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<tr>
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<tr>
<td>Elder Abuse Programs</td>
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<td>69.41%</td>
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<tr>
<td>Office for the Aging</td>
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<tr>
<td>Other</td>
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<tr>
<td><strong>Percentage of Victims NOT Referred to Other Agencies</strong></td>
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<tr>
<td><strong>Percentage of Agencies Reporting No Victim Referrals At All</strong></td>
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<tr>
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<td>Percentage of cases with completed DIRs</td>
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<tr>
<td>Capital Region, Mohawk Valley, North Country</td>
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</tr>
<tr>
<td>---------------------------------------------</td>
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<tr>
<td>92.70%</td>
<td>97.07%</td>
<td>46.79%</td>
<td>98.36%</td>
</tr>
</tbody>
</table>
Of those agencies/programs that reported serving elder abuse victims and could provide aggregate elder abuse case data, not all could provide aggregate elder abuse case data for every data element requested. Requested data elements included:

- Total number of elder abuse and neglect victims assisted in the calendar year
- Types of elder abuse on caseload
- Number of victims suffering from each type of abuse
- Age categories of victims and abusers
- Gender of victims and abusers
- Race/ethnicity of victims
- Relationship of abusers to victims
- Poverty status of victims
- From what sources responding agency/program received elder abuse case referrals
- To what programs/services responding agency/program made elder abuse case referrals

Documented case study data by region must be understood within the context of the total aggregate number of victims that were reported by respondent agencies in each region and whether those responding agencies/programs that reported serving elder abuse victims were able to provide responses to every requested data element. This appended regional report focuses on aggregate data elements for reported elder abuse victims served in calendar year 2008.

Respondents were asked to provide elder abuse case level data in the aggregate for each data element. The following discussion of findings by region for each data element reflects aggregate case data as reported by respondent agencies/programs. In each region, there are varying levels of missing data for each data element. Data elements by region are reported only if at least 50% of aggregate victim data was reported for that element in completed surveys.

Consistent reporting of data on poverty, Domestic Incident Reports (DIRs) and living arrangements of victims was not available for all regions.
REGION 1: NEW YORK CITY

Region 1 is comprised of five counties within the New York City area; in total, 5,303 victims of elder abuse were served throughout Region 1, yielding a rate of 3.8 per 1,000 older adults.

Type of Abuse

When types of abuse were reported, 48.1% of reported victims experienced emotional abuse; 34.7% experienced financial abuse; 10.9% experienced neglect; 44.2% experienced physical abuse and .71% experienced sexual abuse. Aggregate data reported included victims who experienced multiple forms of abuse. For example, elder abuse victims who were provided services for both physical and emotional abuse could be included in aggregate data reported in both categories.

Age Groups of Victims

When age groups of victims were reported, 24.9% were reported in the 60-64 age category; 35.1% were reported in the 65-74 age category; 26.4% were reported in the 75-84 age category and 13.7% were reported in the 85+ age category.

Gender of Victims

When gender of victims was reported, 33.8% were identified as male victims and 66.2% were identified as female victims.

Race/Ethnicity of Victims

When race/ethnicity of victims was reported, 33.1% were reported as African-American; 4.9% as Asian/Pacific Islander; 25.9% as Hispanic/Latino; 0.31% as Native American/Aleut Eskimo; 33.4% as Caucasian and 2.3% victims were reported as “other race.”

ABUSER INFORMATION

When aggregate abuser data were reported, a total of 5,778 abusers were identified in the five counties of Region 1 during calendar year 2008.

Age Groups of Abusers

When age category of abusers was reported, 2.6% of abusers were identified as 18 years of age or younger; 50.1% were in the 18-45 years of age category; 27.7% were in the 46-59 age category and 19.6% were in the age category of 60 years and older.

Abuser Gender

When gender of abusers was reported, 68.9% were male abusers and 31.1% female abusers.
Abuser Relationship with Victim

When aggregate data on victim and abuser relationships was reported, victims’ abusers included spouses or partners, 29.1%; own adult children, 36.2%; sons or daughters-in-law, 3.6%; grandchildren, 8.7%; friends or neighbors, 4.7%; paid home care workers, 1.2%; other relatives, 9.1% and other non-relatives, 7.4%.

INFORMATION ON SOURCES OF ELDER ABUSE REFERRALS RECEIVED BY RESPONSIDENT AGENCIES

Victim referrals were received from both formal and informal sources:

Formal service system referrals received by respondent agency/programs

Respondent agency/programs in Region 1 reported receiving elder abuse referrals from the following agencies: Adult Protective Services (0.40%), district attorneys (5.9%), domestic violence programs (0.64%), elder abuse programs (3.4%), law enforcement (25.6%), community-based agencies such as Office of Victim Services programs (9.8%), financial institutions (0.48%), healthcare programs (8.2%), homecare programs (3.6%), and Area Agencies on Aging (2.4%).

Informal system referrals

Respondent agency/programs in Region 1 also received referrals from elder abuse victims themselves (14.7%), perpetrators (0.05%), family members (15.4%), friends and neighbors (4.3%), concerned citizens (1.1%) and anonymous sources (6.1%).

A total of 3.4% of victims in Region 1 were referred from “other referral sources,” both formal and informal, including: colleague, attorney, government, hospital and media.

INFORMATION ON REFERRALS MADE BY RESPONSIDENT AGENCIES TO OTHER SERVICES AND PROGRAMS

Victims may be referred to multiple agencies and programs by respondent agencies. A total of 18.7% victims were referred to Adult Protective Services. Respondent agency/programs reported referring 21.6% of cases to community-based agencies such as Office of Victim Services programs, 3.2% to district attorneys’ offices, 5.3% to domestic violence programs, 23.8% to elder abuse programs, 2.5% to Family Court, 10.7% to healthcare services, 5.8% to law enforcement, 2% to Area Agencies on Aging and 26.5% of cases to “other.” Referrals to “other” in Region 1 included referrals for financial assistance, housing, immigration, lock replacement and legal services.
REGION 2: LONG ISLAND

Region 2 consists of two counties, Nassau and Suffolk, within the Long Island area; in total, 1,998 victims of elder abuse were served throughout Region 2, yielding a rate of 3.6 per 1,000 older adults.

Type of Abuse

When types of abuse were reported, 63.7% of reported victims experienced emotional abuse; 15.9% experienced financial abuse; 9.7% experienced neglect; 26.7% experienced physical abuse and 1.7% experienced sexual abuse.

Age Groups of Victims

When age categories of victims were reported, 5.6% victims were in the 60-64 age category, 53.1% were in the 65-74 age category, 30.1% were in the 75-84 age category, and 11.2% were in the 85+ age category.

Gender of Victims

When gender of victims was reported, 27.2% victims were reported as male victims and 72.8% were reported as female victims.

Race/Ethnicity of Victims

When victims’ race/ethnicity was reported, 18.3% victims were African-American; 0.78% were Asian/Pacific Islander; 3.3% were Hispanic/Latino; 0.26% were Native American/Aleut Eskimo; 68.8% were Caucasian; and 8.5% were identified as “other race.”

Lives with Abuser

When victims’ living arrangements with their abusers were reported, over one-third (35.5%) of identified victims were reported to be living with their abusers.

ABUSER INFORMATION

When aggregate data on abusers of elder abuse victims was reported in Region 2, a total of 1,521 abusers were identified in the two counties (Nassau and Suffolk) of Region 2 during calendar year 2008.

Age Groups of Abusers

When age categories of abusers were identified, 8.2% of abusers were reported to be younger than 18 years of age; 43.7% were in the 18-45 years of age category; 26% were in the 46-59 age category and 22.2% were in the age category of 60 years and older.
Abuser Gender

When gender of abusers was identified, 65.1% abusers were male and 34.9% abusers were female.

Abuser Relationship with Victim

When aggregate data on victim and abuser relationships was reported, 24% were spouses or partners; 48% were victims’ own adult children; 0.27% were victims’ sons or daughters-in-law; 9.2% were victims’ grandchildren; 1% were friends or neighbors; 16.7% were other relatives and 0.90% were other non-relatives. No respondent agency/program reported that paid home care workers were abusers.

INFORMATION ON SOURCES OF ELDER ABUSE REFERRALS RECEIVED BY RESPONDENT AGENCIES

Victim referrals were received from both formal and informal sources:

Formal service system referrals received by respondent agency/programs

Respondent agency/programs in Region 2 reported receiving elder abuse referrals from the following agencies: Adult Protective Services (1.8%); no referrals were received from district attorneys; domestic violence programs (0.31%); no referrals were received from elder abuse programs; law enforcement (2.8%); community-based agencies such as Office of Victim Services programs (2.9%); financial institutions (1.5%); healthcare programs (5.8%); homecare programs (4.9%) and Area Agencies on Aging (1.1%).

Informal system referrals

Respondent agency/programs in Region 2 also received referrals from elder abuse victims themselves (64.6%); no referrals were received from perpetrators; family members (6.3%); friends and neighbors (2.1%); concerned citizens (0.15%) and anonymous sources (1.8%).

A total of 5% of victims in Region 2 were referred from “other referral sources,” both formal and informal, including acquaintances, building manager, social worker, department of social services, housing authorities and private therapies (sic).

INFORMATION ON REFERRALS TO RESPONDENT AGENCIES

Victims may be referred to multiple agencies and programs by respondent agencies. A total of 4.7% of elder abuse victims were referred to Adult Protective Services, 69.6% to community-based agencies such as Office of Victim Services programs, 68.2% to district attorneys’ offices, 10.4% to domestic violence programs, none to
elder abuse programs, 69.4% to Family Court, 60.2% to healthcare services, 69.4% to law enforcement, none to Area Agencies on Aging and 4.4% to “other.”

Referrals to “other” in Region 2 included referrals to Veterans Affairs and therapeutic services.

**REGION 3: MID-HUDSON**

Region 3 consists of seven counties located within the Mid-Hudson area; in total, 1,031 victims of elder abuse were served throughout Region 3, yielding a rate of 2.5 per 1,000 older adults.

**Type of Abuse**

When types of abuse were reported, 40.2% of victims experienced emotional abuse; 28.4% experienced financial abuse; 11.5% experienced neglect; 34.4% experienced physical abuse and 0.32% experienced sexual abuse.

**Age Groups of Victims**

When victims’ age categories were reported, 2.9% victims were reported to be in the 60-64 age category; 48.3% were in the 65-74 age category; 31.1% were in the 75-84 age category and 17.7% were in the 85+ age category.

**Gender of Victims**

When victims’ gender was reported, 30.9% victims were male victims and 69.1% were female victims.

**Race/Ethnicity of Victims**

When victims’ race/ethnicity was reported, 17.5% of victims were reported as African-American; 0.56% were Asian/Pacific Islander; 6.8% were Hispanic/Latino; no victims of abuse were Native American/Aleut Eskimo; 65.9% were Caucasian and 9.3% were identified as “other race.”

**Lives with Abuser**

When victims’ living arrangements with their abusers were reported, over two-thirds (66.7%) of identified victims lived with their abusers.

**ABUSER INFORMATION**

A total of 19 respondent agencies/programs within Region 3 were able to provide some aggregate data on abusers of elder abuse victims, representing 668 abusers in the seven counties throughout Region 3 during calendar year 2008.

**Age Groups of Abusers**

When age categories of abusers were reported, 7.7% of abusers were identified as younger than 18 years of age; 44.6% were in the 18-45 age category; 25.1% were in the 46-59 age category and 22.7% were in the age category of 60 years and older.
Abuser Gender

When gender of abusers was identified, 66.9% of abusers were male and 33.1% were female.

Abuser Relationship with Victim

When aggregate data on victim and abuser relationships was reported, 23% were spouses or partners; 43.1% were victims’ own adult children; 0.15% were victims’ sons or daughters-in-law; 10.4% were victims’ grandchildren; 1.4% were friends or neighbors; 0.46% were paid home care workers; 17.1% were other relatives and 4.4% were other non-relatives.

INFORMATION ON SOURCES OF ELDER ABUSE REFERRALS RECEIVED BY RESPONDENT AGENCIES

Victims were referred to respondent agencies/programs from both formal and informal sources.

Formal service system referrals received by respondent agency/programs

Respondent agency/programs in Region 3 reported receiving elder abuse referrals from the following agencies: Adult Protective Services (3.4%), district attorneys (6.3%), law enforcement (9.2%), community-based agencies such as Office of Victim Services programs (4.6%), financial institutions (0.84%), healthcare programs (16.4%), homecare programs (6.7%) and Area Agencies on Aging (5.9%).

Informal system referrals

Respondent agency/programs in Region 3 also received referrals from elder abuse victims themselves (5.9%), perpetrators (0.42%), family members (13.5%), friends and neighbors (3.8%), concerned citizens (1.3%) and anonymous sources (2.1%).

A total of 20% of victims in Region 3 were also referred from “other referral sources,” both formal and informal, including: landlord, apartment manager, acquaintance, places of worship, attorneys, social services, courts and Medicaid unit.

INFORMATION ON REFERRALS TO RESPONDENT AGENCIES

Victims may be referred to multiple agencies and programs by respondent agencies. A total of 28% of victims were referred to Adult Protective Services, 11% to community-based agencies such as Office of Victim Services programs, 0.85% to district attorneys’ offices, 14.4% to domestic violence programs, 1.7% to elder abuse programs, 0.85% to Family Court, 15.3% to healthcare services, 2.5% to law enforcement, 0.85% to Area Agencies on Aging and 25.4% cases to “other.”

Referrals to “other” in Region 3 included referrals to department of social services, Veterans Affairs and legal services.
REGION 4: CAPITAL REGION, MOHAWK VALLEY, AND NORTH COUNTRY

Region 4 consists of twenty counties located within the Capital Region, Mohawk Valley, and North Country area; in total, 1,018 victims of elder abuse were served throughout Region 4, yielding a rate of 2.7 per 1,000 older adults.

Type of Abuse

When types of abuse were identified, 43.5% of victims were reported as experiencing emotional abuse; 31.1% financial abuse; 8.6% neglect; 36.1% physical abuse and 1.5% sexual abuse.

Age Groups of Victims

When age categories of victims were identified, 12.8% of victims were in the 60-64 years age category; 53.8% in the 65-74 years age category; 25.6% in the 75-84 years age category and 7.8% were in the 85 years and older age category.

Gender of Victims

When victims’ gender was reported, 34% victims were male and 66% were female.

Race/Ethnicity of Victims

When victims’ race/ethnicity was reported, 9.2% of victims were reported as African-American; 0.23% were Asian/Pacific Islander; 1.9% were Hispanic/Latino; 2.1% were Native American/Aleut Eskimo; 76.6% were Caucasian and 10% were “other race.”

ABUSER INFORMATION

A total of 49 respondent agencies/programs within Region 4 reported information on abusers of elder abuse victims, representing 855 abusers in the twenty counties throughout Region 4 during calendar year 2008.

Age Groups of Abusers

When age categories of abusers were reported, 12.8% abusers were younger than 18 years of age; 41.5% were in the 18-45 years of age category; 21.5% were in the 46-59 age category; and 24.3% were in the age category of 60 years and older.

Abuser Gender

When gender of abusers was reported, 65.3% of abusers were male and 34.8% female.
Abuser Relationship with Victim

When aggregate data on victim and abuser relationships was reported, 24.6% were reported as spouse/partners; 37.9% adult children; 1.2% sons-in-law /daughters-in-law; 12% grandchildren; 1.6% friends/neighbors; 0.25% home attendants; 18.9% other relatives and 3.6% non-relatives.

INFORMATION ON SOURCES OF ELDER ABUSE REFERRALS RECEIVED BY RESPONDENT AGENCIES

Victim referrals were received from both formal and informal sources.

Formal service system referrals received by respondent agency/programs

Respondent agency/programs in Region 4 reported receiving elder abuse referrals from the following agencies: Adult Protective Services (3.5%), district attorneys (1.9%), domestic violence programs (3.1%), elder abuse programs (none-0%), law enforcement (24.8%), community-based agencies such as Office of Victim Services programs (3.1%), financial institutions (1.3%), healthcare programs (9.8%), homecare programs (4.1%), and Area Agencies on Aging (5.4%).

Informal system referrals

Respondent agency/programs in Region 4 also received referrals from elder abuse victims themselves (9.8%), perpetrators (none - 0%), family members (8.8%), friends and neighbors (3.1%), concerned citizens (0.63%), anonymous sources (2.2%).

A total of 19.8% of victims in Region 4 were referred from “other referral sources,” both formal and informal, including: landlords, acquaintance, Family Court, social services, Veterans Affairs, Joint Council on Economic Opportunity, and heating and cooling company.

INFORMATION ON REFERRALS TO RESPONDENT AGENCIES

Victims may be referred to multiple agencies and programs by respondent agencies. A total of 20.4% of victims were referred to Adult Protective Services, 25.3% to community-based agencies such as Office of Victim Services programs, 8.1% to district attorneys’ offices, 24.9% to domestic violence programs, 2.3% to elder abuse programs, 12.7% to Family Court, 25.3% to healthcare services, 7.7% to law enforcement, 7.7% to Area Agencies on Aging and 17.2% to “other.”

Referrals to “other” in Region 4 included referrals to landlords and houses of worship and for housing, food and social services.
REGION 5: CENTRAL NEW YORK AND SOUTHERN TIER

Region 5 consists of thirteen counties located within the Central New York and Southern Tier area; in total, 641 victims of elder abuse were served throughout Region 5, yielding a rate of 2.3 per 1,000 older adults.

Type of Abuse

When types of abuse were reported, 50% of victims were reported as experiencing emotional abuse; 36.6% experienced financial abuse; 15.9% experienced neglect; 39.8% experienced physical abuse and 3% experienced sexual abuse.

Age Groups of Victims

When age categories of victims were reported, 11.8% of victims were in the 60-64 years age range; 51.4% in the 65-74 years age range; 25.7% in the 75-84 years age range and 11.2% in the 85 years and older age range.

Gender of Victims

When gender of victims was reported within Region 5, 33.9% were male and 66.1% were female.

Race/Ethnicity of Victims

When victims’ race/ethnicity was reported, 4.2% were African-American; 0.51% were Asian/Pacific Islander; 0.68% were Hispanic/Latino; 1% were Native American/Aleut Eskimo; 67.3% were Caucasian; and 26.3% were identified as “other race.”

ABUSER INFORMATION

A total of 34 respondent agencies/programs within Region 5 reported information on abusers of elder abuse victims, representing 523 abusers in the 13 counties throughout the Central New York and Southern Tier Region (Region 5) during calendar year 2008.

Age Groups of Abusers

When age categories of abusers were reported, 16.3% abusers were identified as younger than 18 years of age; 39.5% were in the 18-45 years of age category; 20.9% were in the 46-59 age category; and 23.2% were in the age category of 60 years and older.

Abuser Gender

When gender of abusers was reported, 65.9% were male and 34% were female.
Abuser Relationship with Victim

When aggregate data on victim and abuser relationships were reported, 24.28% were spouses or partners, 34.43% were victims’ own adult children, 2.68% were victims’ sons or daughters-in-law, 12.05% were victims’ grandchildren, 3.44% were friends or neighbors, 0.57% were paid home care workers, 16.25% were other relatives and 6.31% were other non-relatives.

INFORMATION ON SOURCES OF ELDER ABUSE REFERRALS RECEIVED BY RESPONDENT AGENCIES

Victim referrals were received from both formal and informal sources.

Formal service system referrals received by respondent agency/programs

Respondent agency/programs in Region 5 reported receiving elder abuse referrals from the following agencies: Adult Protective Services (33.2%), district attorneys (22%), domestic violence programs (25.9%), elder abuse programs (1.8%), law enforcement (9.4%), community-based agencies such as Office of Victim Services programs (7.7%), financial institutions (19.2%), healthcare providers (33.2%), homecare programs (22%) and Area Agencies on Aging (25.9%).

Informal system referrals

Respondent agency/programs in Region 5 also received referrals from elder abuse victims themselves (6%), perpetrators (none-0%), family members (13.4%), friends and neighbors (6%), concerned citizens (0.74%) and anonymous sources (4.5%).

A total of 11.9% of victims in Region 5 were referred from “other referral sources,” both formal and informal, including: acquaintance, guardianship hearing, courts, judges and department of social services.

INFORMATION ON REFERRALS TO RESPONDENT AGENCIES

Victims may be referred to multiple agencies and programs by respondent agencies. A total of 30.8% of victims were referred to Adult Protective Services; 24.8% to community-based agencies such as Office of Victim Services programs; 8.3% to district attorneys’ offices, 32.3% to domestic violence programs, 4.5% to elder abuse programs, 18.8% to Family Court, 42.9% to healthcare services, 34.6% to law enforcement; 27.8% to Area Agencies on Aging and 18.1% to “other.”

Referrals to “other” in Region 5 included referrals to animal control, support groups, attorneys and social services.
REGION 6: FINGER LAKES

Region 6 consists of ten counties located within the Finger Lakes area; in total, 770 victims of elder abuse were served throughout Region 6, yielding a rate of 3.4 per 1,000 older adults.

Type of Abuse

When types of abuse were reported, 28.3% of victims were reported as experiencing emotional abuse; 43.4% experienced financial abuse; 10.4% experienced neglect; 24.9% experienced physical abuse and 0.38% experienced sexual abuse.

Age Groups of Victims

When age categories of victims were reported, 9.2% were in the 60-64 age category; 39.8% were in the 65-74 age category; 35.9% were in the 75-84 age category and 15.1% were in the 85+ age category.

Gender of Victims

When victims' gender was reported, 36.6% victims were identified as male and 63.4% were identified as female.

Race/Ethnicity of Victims

When victims' race/ethnicity was reported, 13.2% of victims were reported as African-American; 0.22% were Asian/Pacific Islander; 2.2% were Hispanic/Latino; 1.9% were Native American/Aleut Eskimo; 74.6% were Caucasian and 8% were “other race.”

Lives with Abuser

When victims' living arrangements with their abusers were reported, over 59% of identified victims were reported to be living with their abusers.

ABUSER INFORMATION

A total of 26 respondent agencies/programs within Region 6 reported information on abusers of elder abuse victims, representing 777 abusers throughout the ten counties located within the Finger Lakes region during calendar year 2008.

Age Groups of Abusers

When age categories of abusers were reported, 8.9% abusers were identified as younger than 18 years of age; 38.2% were in the 18-45 years of age category; 26.8% were in the 46-59 years of age category and 26.1% were in the age category of 60 years and older.
Abuser Gender

When abusers’ gender was reported, 56.6% were male and 43.4% were female.

Abuser Relationship with Victim

When aggregate data on victim and abuser relationships was reported, 21.4% were spouses or partners; 43.8% were victims’ own adult children; 0.31% were victims’ sons-in-law or daughters-in-law; 9.1% were victims’ grandchildren; 6.1% were friends or neighbors; 0.15% were paid home care workers; 11.7% were other relatives and 7.5% were other non-relatives.

INFORMATION ON SOURCES OF ELDER ABUSE REFERRALS RECEIVED BY RESPONDENT AGENCIES

Victims were referred to respondent agencies by formal and informal sources.

Formal service system referrals received by respondent agency/programs

Respondent agency/programs in Region 6 reported receiving elder abuse referrals from the following agencies: Adult Protective Services (5%), district attorneys (0.79%), domestic violence programs (1.9%), elder abuse programs (0.31%), law enforcement (32.4%), community-based agencies such as Office of Victim Services programs (7.7%), financial institutions (1.9%), healthcare programs (9.3%), homecare programs (6.6%) and Area Agencies on Aging (0.79%).

Informal system referrals

Respondent agency/programs in Region 6 also received referrals from elder abuse victims themselves (3.9%), no referrals from perpetrators, family members (15.4%), friends and neighbors (1.1%), concerned citizens (0.31%) and anonymous sources (1.3%).

A total of 34.3% of victims in Region 6 were referred from “other referral sources,” both formal and informal, including: acquaintance, building managers, department of social services, courts and legal aid.

Information on Referrals to respondent agencies

Victims may be referred to multiple agencies and programs by respondent agencies. A total of 38.4% of cases were referred to Adult Protective Services. Respondent agency/programs also reported referring 27.3% of victims to community-based agencies such as Office of Victim Services programs, 4% to district attorneys’ offices, 24.2% to domestic violence programs, 5.1% to elder abuse programs, 5.1% to Family Court, 30.3% to healthcare services, 6.1% to law enforcement, 9.1% to Area Agencies on Aging and 12.1% of victims to “other.” Referrals to “other” in Region 6 included referrals to legal aid and Surrogate’s Court.
REGION 7: WESTERN NEW YORK

Region 7 consists of five counties located within the Western New York area; in total, 671 victims of elder abuse were served throughout Region 7, yielding a rate of 2.3 per 1,000 older adults.

Type of Abuse

When types of abuse were reported, 30% of victims experienced emotional abuse; 39.3% experienced financial abuse; 10.9% experienced neglect; 31.3% experienced physical abuse and 1.6% experienced sexual abuse.

Age Groups of Victims

When age categories of victims were reported, 6.7% were in the 60-64 age category; 46.2% were in the 65-74 age category; 34% were in the 75-84 age category and 13.2% were in the 85+ age category.

Gender of Victims

When victims’ gender was reported, 31.3% victims were identified as male and 68.7% were identified as female.

Race/Ethnicity of Victims

When victims’ race/ethnicity was reported, 9.7% victims were African-American; 2% were Hispanic/Latino; 0.22% were Native American/Aleut Eskimo; 64.1% were Caucasian and 24% were reported as “other race.” There were no reported Asian/Pacific islander victims.

ABUSER INFORMATION

When aggregate data on abusers of elder abuse victims was reported in Region 7, a total of 408 abusers were reported in the five counties throughout Western New York (Region 7) during calendar year 2008.

Age Groups of Abusers

When age categories of abusers were identified, 11.4% of abusers were identified as under 18 years of age; 42.6% were in the 18-45 years of age category; 26.2% were in the 46-59 age category and 19.8% were in the age category of 60 years and older.

Abuser Gender

When abusers’ gender was identified, 65.5% were male and 34.5% were female.
Abuser Relationship with Victim

When aggregate data on victim and abuser relationships was reported, 17.3% were spouses or partners; 39.4% were victims’ own adult children; 10.5% were victims’ grandchildren; 5.8% were friends or neighbors; 0.25% were paid home care workers; 18.3% were other relatives and 8.5% were other non-relatives. There were no reported son or daughter-in-law abusers in Region 7 for 2008.

INFORMATION ON SOURCES OF ELDER ABUSE REFERRALS RECEIVED BY RESPONDENT AGENCIES

Victim referrals were received from both formal and informal sources.

Formal service system referrals received by respondent agency/programs

Respondent agency/programs in Region 7 reported receiving elder abuse referrals from the following agencies: Adult Protective Services (1.8%), law enforcement (7.3%), community-based agencies such as Office of Victim Services programs (8.5%), financial institutions (7.9%), healthcare programs (14%), homecare programs (4.9%) and Area Agencies on Aging (2.4%). There were no reported referrals from district attorneys (0%), domestic violence programs (0%) or elder abuse programs (0%).

Informal system referrals

Respondent agency/programs in Region 7 also received referrals from elder abuse victims themselves (6.1%), family members (14%), friends and neighbors (4.3%), concerned citizens (1.2%) and anonymous sources (3.7%).

A total of 23.8% of victims in Region 7 were referred from “other referral sources,” both formal and informal, including: law enforcement, court, attorneys, hospital, clergy, home care, primary care physicians, landlords and consumer credit authority.

INFORMATION ON REFERRALS TO RESPONDENT AGENCIES

Victims may be referred to multiple agencies and programs by respondent agencies. A total of 20% of victims were referred to Adult Protective Services. Respondent agency/programs also reported referring 6% of victims to community-based agencies such as Office of Victim Services programs, 8% to district attorneys’ offices, 30% to domestic violence programs, 6% to elder abuse programs, 6% to Family Court, 26% to healthcare services, 10% to law enforcement, 6% to Area Agencies on Aging and 20% of cases to “other.”

Referrals to “other” in Region 7 included referrals to attorneys and Veterans Affairs.
APPENDIX E

DOCUMENTED CASE STUDY
AGGREGATE DATA BY SERVICE SYSTEM

<table>
<thead>
<tr>
<th>ELDER ABUSE AGGREGATE SERVICE SYSTEM DATA</th>
<th>Adult Protective Services</th>
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<th>District Attorney</th>
<th>Community-Based Organizations</th>
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<td>0.12%</td>
<td>0.86%</td>
<td>2.71%</td>
</tr>
<tr>
<td>Age Groups</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>60-64</td>
<td>9.65%</td>
<td>13.70%</td>
<td>30.55%</td>
<td>21.49%</td>
</tr>
<tr>
<td>65-74</td>
<td>26.41%</td>
<td>56.86%</td>
<td>35.09%</td>
<td>32.27%</td>
</tr>
<tr>
<td>75-84</td>
<td>36.69%</td>
<td>24.73%</td>
<td>22.73%</td>
<td>30.36%</td>
</tr>
<tr>
<td>85+</td>
<td>27.25%</td>
<td>4.71%</td>
<td>11.64%</td>
<td>15.87%</td>
</tr>
<tr>
<td>Gender</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>30.32%</td>
<td>34.21%</td>
<td>59.55%</td>
<td>24.08%</td>
</tr>
<tr>
<td>Female</td>
<td>69.68%</td>
<td>65.79%</td>
<td>40.45%</td>
<td>75.92%</td>
</tr>
<tr>
<td>Race/Ethnicity</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>20.46%</td>
<td>23.30%</td>
<td>24.73%</td>
<td>18.52%</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
<td>0.00%</td>
<td>2.52%</td>
<td>5.58%</td>
<td>3.49%</td>
</tr>
<tr>
<td>Caucasian</td>
<td>31.97%</td>
<td>61.48%</td>
<td>59.57%</td>
<td>54.92%</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
<td>12.78%</td>
<td>11.02%</td>
<td>9.57%</td>
<td>18.52%</td>
</tr>
<tr>
<td>Native American/Aleut Eskimo</td>
<td>1.38%</td>
<td>0.45%</td>
<td>0.00%</td>
<td>0.29%</td>
</tr>
<tr>
<td>Race Other</td>
<td>33.41%</td>
<td>1.23%</td>
<td>0.27%</td>
<td>4.25%</td>
</tr>
<tr>
<td>Living Arrangement</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alone</td>
<td>42.11%</td>
<td>0.00%</td>
<td>40.91%</td>
<td>51.94%</td>
</tr>
<tr>
<td>Spouse/Partner</td>
<td>12.74%</td>
<td>0.00%</td>
<td>31.82%</td>
<td>23.49%</td>
</tr>
<tr>
<td>Children</td>
<td>18.95%</td>
<td>0.00%</td>
<td>4.55%</td>
<td>14.72%</td>
</tr>
<tr>
<td>Son/Daughter-in-Law</td>
<td>11.02%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.45%</td>
</tr>
<tr>
<td>Grandchild</td>
<td>6.87%</td>
<td>0.00%</td>
<td>9.09%</td>
<td>5.42%</td>
</tr>
<tr>
<td>Other Relative</td>
<td>6.20%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>2.44%</td>
</tr>
<tr>
<td>Other Non Relative</td>
<td>12.41%</td>
<td>0.00%</td>
<td>13.64%</td>
<td>2.89%</td>
</tr>
<tr>
<td>Lives With Abuser</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lives With Abuser</td>
<td>0.00%</td>
<td>50.78%</td>
<td>29.73%</td>
<td>22.55%</td>
</tr>
<tr>
<td>Poverty</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Below Poverty</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>59.41%</td>
</tr>
</tbody>
</table>
### ELDER ABUSE AGGREGATE SERVICE SYSTEM DATA

<table>
<thead>
<tr>
<th>ABUSER INFORMATION</th>
<th>Adult Protective Services</th>
<th>Law Enforcement</th>
<th>District Attorney</th>
<th>Community-Based Organizations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Number of Abusers = 1338</td>
<td>Total Number of Abusers = 4889</td>
<td>Total Number of Abusers = 1133</td>
<td>Total Number of Abusers = 3170</td>
<td></td>
</tr>
<tr>
<td>Total Number of Agencies = 54</td>
<td>Total Number of Agencies = 59</td>
<td>Total Number of Agencies = 10</td>
<td>Total Number of Agencies = 64</td>
<td></td>
</tr>
</tbody>
</table>

#### Age Groups

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Total Number of Abusers</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 or younger</td>
<td>0.79%</td>
</tr>
<tr>
<td>18-45</td>
<td>40.58%</td>
</tr>
<tr>
<td>46-59</td>
<td>34.55%</td>
</tr>
<tr>
<td>60 and older</td>
<td>24.08%</td>
</tr>
</tbody>
</table>

#### Gender

<table>
<thead>
<tr>
<th>Gender</th>
<th>Total Number of Abusers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>52.69%</td>
</tr>
<tr>
<td>Female</td>
<td>47.31%</td>
</tr>
</tbody>
</table>

#### Relationship

<table>
<thead>
<tr>
<th>Relationship</th>
<th>Total Number of Abusers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouse/Partner</td>
<td>11.03%</td>
</tr>
<tr>
<td>Own Adult Children</td>
<td>43.02%</td>
</tr>
<tr>
<td>Son-in-law/Daughter-in-law</td>
<td>1.08%</td>
</tr>
<tr>
<td>Grandchild</td>
<td>7.56%</td>
</tr>
<tr>
<td>Friends/Neighbors</td>
<td>9.18%</td>
</tr>
<tr>
<td>Paid Home Attendant</td>
<td>1.00%</td>
</tr>
<tr>
<td>Other Relatives</td>
<td>9.48%</td>
</tr>
<tr>
<td>Other Non-Relatives</td>
<td>17.66%</td>
</tr>
</tbody>
</table>

### REFERRAL INFORMATION

#### Source of Referral – Formal Sources

<table>
<thead>
<tr>
<th>Source of Referral</th>
<th>Total Number of Abusers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult Protective Services</td>
<td>0.69%</td>
</tr>
<tr>
<td>Community Agency</td>
<td>11.26%</td>
</tr>
<tr>
<td>District Attorney</td>
<td>0.90%</td>
</tr>
<tr>
<td>Domestic Violence Program</td>
<td>0.32%</td>
</tr>
<tr>
<td>Elder Abuse Program</td>
<td>2.17%</td>
</tr>
<tr>
<td>Financial Institution</td>
<td>2.86%</td>
</tr>
<tr>
<td>Health Care Provider</td>
<td>21.63%</td>
</tr>
<tr>
<td>Homecare</td>
<td>12.64%</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>5.61%</td>
</tr>
<tr>
<td>Office for the Aging</td>
<td>4.76%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Source of Referral</th>
<th>Total Number of Abusers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office for the Aging</td>
<td>4.76%</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>5.61%</td>
</tr>
<tr>
<td>Homecare</td>
<td>12.64%</td>
</tr>
<tr>
<td>Health Care Provider</td>
<td>21.63%</td>
</tr>
<tr>
<td>Financial Institution</td>
<td>2.86%</td>
</tr>
<tr>
<td>Elder Abuse Program</td>
<td>2.17%</td>
</tr>
<tr>
<td>Domestic Violence Program</td>
<td>0.32%</td>
</tr>
<tr>
<td>District Attorney</td>
<td>0.90%</td>
</tr>
<tr>
<td>Community Agency</td>
<td>11.26%</td>
</tr>
<tr>
<td>Adult Protective Services</td>
<td>0.69%</td>
</tr>
</tbody>
</table>

---

Under the Radar: New York State Elder Abuse Prevalence Study
### AGGREGATE DATA BY SERVICE SYSTEM (continued)

<table>
<thead>
<tr>
<th>ELDER ABUSE AGGREGATE SERVICE SYSTEM DATA</th>
<th>Adult Protective Services</th>
<th>Law Enforcement</th>
<th>District Attorney</th>
<th>Community-Based Organizations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>REFERRAL INFORMATION (continued)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Source of Referral – Informal Sources</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anonymous</td>
<td>3.75%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>6.66%</td>
</tr>
<tr>
<td>Concerned Citizen</td>
<td>1.00%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>1.07%</td>
</tr>
<tr>
<td>Family Member</td>
<td>14.75%</td>
<td>0.00%</td>
<td>2.14%</td>
<td>16.99%</td>
</tr>
<tr>
<td>Friends/Neighbors</td>
<td>6.61%</td>
<td>0.00%</td>
<td>0.39%</td>
<td>3.20%</td>
</tr>
<tr>
<td>Perpetrator</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.08%</td>
</tr>
<tr>
<td>Victim</td>
<td>2.64%</td>
<td>0.00%</td>
<td>1.75%</td>
<td>30.02%</td>
</tr>
<tr>
<td>Other-Total</td>
<td>15.39%</td>
<td>0.00%</td>
<td>0.49%</td>
<td>7.83%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Referral To</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult Protective Services</td>
<td>0.95%</td>
<td>26.23%</td>
<td>0.00%</td>
<td>21.23%</td>
</tr>
<tr>
<td>Community Agency</td>
<td>20.50%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>36.39%</td>
</tr>
<tr>
<td>District Attorney</td>
<td>1.58%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>20.66%</td>
</tr>
<tr>
<td>Domestic Violence Program</td>
<td>1.89%</td>
<td>41.64%</td>
<td>0.00%</td>
<td>7.87%</td>
</tr>
<tr>
<td>Elder Abuse Program</td>
<td>2.84%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>21.48%</td>
</tr>
<tr>
<td>Family Court</td>
<td>0.00%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>21.68%</td>
</tr>
<tr>
<td>Health Care Provider</td>
<td>42.43%</td>
<td>10.49%</td>
<td>0.00%</td>
<td>19.02%</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>1.42%</td>
<td>4.92%</td>
<td>50.00%</td>
<td>24.22%</td>
</tr>
<tr>
<td>Office for the Aging</td>
<td>6.31%</td>
<td>0.00%</td>
<td>0.00%</td>
<td>2.87%</td>
</tr>
<tr>
<td>Other</td>
<td>22.08%</td>
<td>16.72%</td>
<td>50.00%</td>
<td>21.60%</td>
</tr>
</tbody>
</table>

| Number of Victims Not Referred to Other Services/Agencies (Cases in which Agencies Reported No Referrals) | 3.44% | 36.88% | 93.01% | 33.11% |

| Domestic Incident Reports                | 0.00% | 100.00% | 58.09% | 13.91% |
Elder abuse victims may receive help from a variety of service systems. The data provided by the service systems that were identified for this study are described in greater detail in this section. (Data discussed in this section is contained in the table reproduced in Appendix E.) The service systems surveyed include: Adult Protective Services (APS), law enforcement, district attorneys’ offices (DA), community-based agencies, some of which are funded by the Office of Victim Services for either elder abuse or domestic violence services. The table below outlines the number of surveys that were distributed by service system and the number of surveys that were returned with information on either the victim or the abuser. In some cases surveys were completed but organizations either had zero cases during calendar year 2008 or were unable to give any information other than just the total number of victims. The following table describes those surveys that were completed in which organizations were able to submit at minimum the number of victims served.

Law enforcement and APS had the highest rates of completed surveys with some information included (95.2% and 91.9%, respectively). A smaller percentage of completed questionnaires were returned from both community-based agencies and district attorneys’ offices (58.9% and 50%, respectively).

**Table A**

<table>
<thead>
<tr>
<th>ORGANIZATIONS</th>
<th>TOTAL NUMBER OF SURVEYS</th>
<th>NUMBER COMPLETED (Able to provide information)</th>
<th>% COMPLETED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community-Based Agencies</td>
<td>163</td>
<td>96</td>
<td>58.9%</td>
</tr>
<tr>
<td>Adult Protective Services</td>
<td>63</td>
<td>57</td>
<td>90.5%</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>62</td>
<td>59</td>
<td>95.2%</td>
</tr>
<tr>
<td>District Attorneys</td>
<td>36</td>
<td>18</td>
<td>50.0%</td>
</tr>
</tbody>
</table>

The following analysis examines the profile of victims and abusers by service system, starting with Community Based Agencies.
COMMUNITY-BASED AGENCIES

Data obtained from community-based agencies consisted of programs that were funded by the NYS Office of Victim Services (49 of which were unable to give us any information with the exception of total number of victims as generated from statewide reporting data), elder abuse programs and members of elder abuse coalitions that were not captured within other service systems. Of the 163 agencies, 53 reported having no cases in 2008 (32.5%); 14 agencies reported serving elder abuse victims but were unable to report on the number of victims (8.6%). In the final analysis, 96 agencies (58.9%) were able to report at a minimum the number of victims served.

Victim information by type of reported abuse experienced

Nearly one-quarter of the agencies were unable to report any information on the type of mistreatment (n = 25 or 26%). Among the agencies that did report this information, 51.1% of reported victims were emotional abuse victims, 33.4% were financial abuse victims, 12.2% were neglect victims, 29.6% were physical abuse victims and 2.7% were sexual abuse victims.

Age breakdown of reported victims

Nearly one-quarter of agencies were unable to report any information on age for victims (n = 21 or 21.9%). Of those victims with age range reported by respondent agencies/programs; 21.5% were in the 60-64 age category; 32.3% were in the 65-74 age category; 30.4% were in the 75-84 age category and 15.9% fell into the 85+ age category.

Gender breakdown of reported victims

Approximately one in five agencies was unable to report any information on gender for victims (n = 18 or 19%). The breakdown for those victims whose gender was reported by respondent agencies/programs was 24.1% male and 75.9% female.

Race/ethnicity breakdown for reported victims

Agencies tended to collect less racial and ethnic data on their victims than other demographics; a total of 30 or 31.3% of agencies were unable to report this information. As reported by those agencies that did have racial and ethnic information on the victim, 54.9% were Caucasians; 18.5% were African Americans, 3.5% were Asian/Pacific Islanders; 18.5% were Hispanic/Latino; 0.29% were Native American/Aleut Eskimos and 4.3% were “other” races.
Living arrangements of victim

Over one third of the agencies were unable to report information on living arrangements of the victims (n = 34 or 35.4%). Of victims for whom respondent agencies/programs reported on living arrangements, 51.9% lived alone; 23.5% lived with spouses or partners; 14.7% lived with adult children; 0.5% lived with sons-in-law or daughters-in-law; 5.4% lived with grandchildren; 2.4% lived with other relatives and 2.9% lived with other non-relatives.

Lives with abuser

Close to two out of five of all agencies were unable to report information on whether the victim and abuser lived together (n = 38 or 39.6%). Of those agencies that could give this information, 22.6% of the victims lived with their abusers.

Living in poverty

Over one-half of the agencies were unable to give information on whether elder abuse victims were living at or below the poverty threshold (n = 58 or 60.4%). However, of those that responded, 59.4% victims were identified as living at or below the poverty threshold.

ABUSER INFORMATION

A total of 64 agencies/programs reported information on abusers of elder abuse victims (66% of all agencies reporting cases during this period), representing 3,170 abusers in New York State during calendar year 2008.

Age Groups of Abusers

One-quarter of the agencies were unable to report age information for abusers (n = 16 or 25%). Of those agencies that could give this information, 2.5% of abusers were reported to be in the younger than age 18 category; 36.1% were in the 18-45 age category; 28.9% were in the age 46-59 age category and 32.6% were in the 60 years and older category.

Abuser Gender

A small number of agencies were unable to report gender for abusers (n = 2 or 3.1%). Respondent agencies/programs that identified gender of abuser reported 61.5% male abusers and 38.5% female abusers.

Abuser Relationship with Victim

A small number of agencies were unable to report the abuser’s relationship with victim (n = 4 or 6.3%). Respondent agencies/programs reported on the relationship between victim and abuser as: spouses or partners, 28.5%; own adult children, 44%; sons or daughters-in-law, 2.2%; grandchildren, 6.3%; friends or neighbors, 5.7%; paid home care workers, 1.4%; other relatives, 5.9% and other non-relatives, 6%.
Information on sources of elder abuse referrals received by respondent agencies

Over one quarter of all respondent agencies were missing all information in this category (n=26 or 27.1%). For those agencies that were able to report some information on sources of referrals, in 24.3% of the cases the source of referral was missing. Data is presented below for both formal and informal system referrals.

**FORMAL SERVICE SYSTEM REFERRALS RECEIVED BY RESPONDENT AGENCIES/PROGRAMS**

Respondent agencies/programs reported receiving elder abuse referrals from the following agencies: Adult Protective Services (2.1%), district attorneys (3.4%), domestic violence programs (1.2%), elder abuse programs (2.9%), law enforcement (13.9%), other community-based agencies (8.6%), financial services (0.51%), healthcare programs (5.1%), homecare programs (1.2%) and Area Agencies on Aging (1.8%).

**INFORMAL SYSTEM REFERRALS**

Respondent agencies/programs also received referrals from elder abuse victims themselves (30%), perpetrators (0.08%), family members (17%), friends and neighbors (3.2%), concerned citizens (1.1%), anonymous sources (6.7%) and “other information sources” (7.8%).

**Information on referrals to respondent agencies**

Over 40% of all respondent agencies were missing all information in this category (n=41 or 42.7%). Additionally, 33.1% of the victims were not referred to any outside organization. For those agencies that were able to report some information on where referrals were made, in 22.4% of the cases, referral information was still missing. Agencies reported referring a total of 21.2% of cases to Adult Protective Services. Respondent agencies/programs also reported referring 36.4% of cases to other community-based agencies; 20.7% of cases to district attorney’s offices; 7.9% of cases to domestic violence programs; 21.5% of cases to elder abuse programs; 21.7% of cases to Family Court; 19% of cases to healthcare services; 24.2% of cases to law enforcement; 2.9% of cases to Area Agencies on Aging and 21.6% of cases to “other.”

**Domestic Incident Reports (DIR)**

Over three-fifths (63.5%) of agency responders could not report information on DIRs submitted on behalf of reported victims. Of those respondent agencies/programs that did report information on DIRs, 13.9% of elder abuse victims had DIRs filed on their behalf.
Overall data availability

In general, the availability of data requested from the community-based agencies was limited with a significant number of agencies unable to provide any demographic information, and when they did, there was often a substantial amount of missing data. In looking at data availability alone for those community-based agencies that could provide at least some demographic information, based on the percentage of agencies able to report and on the availability of data for individual survey fields, it was found:

Data elements with the greatest availability
- Gender of abuser
- Relationship of abuser and victim
- Gender of victim

Data elements less frequently available
- Type of mistreatment
- Age of victim
- Race and ethnicity of victim
- Living arrangement of victim
- Age of abuser
- Source of referral
- Referrals

Data elements with the least availability or no availability
- Whether the victim and abuser live together
- Poverty
- DIR reports

ADULT PROTECTIVE SERVICES (APS)

Data was obtained from APS through two sources. The Office of Children and Family Services (OCFS) maintains a robust statewide data system and was able to complete the survey for all counties, with the exception of New York City. New York City APS uses its own data system and completed the survey for the five counties within New York City separately. Data was obtained for all 62 counties of New York State, with Franklin County completing an additional survey for the division that serves the tribal community. Of the 62 counties (plus the tribal community), six reported having no elder abuse cases in 2008 (9.5%). This left 57 counties that were able to report at a minimum the number of victims served. APS reported a total of 2,180 elder abuse victims in 2008.

Victim Information by type of reported abuse experienced

A small number of counties were unable to report type of mistreatment (n = 3 or 5.3%). Of the counties that did report this information, 8.8% were emotional abuse victims; 65.8% were financial abuse victims; 37.9% were neglect victims; 33.7% were physical abuse victims and 0.15% were sexual abuse victims.
Age breakdown of reported victims

A small number of counties were unable to report age for victims (n = 3 or 5.3%). Of those victims with age range reported by counties, 9.7% were in the 60-64 age category; 36.4% were in the 65-74 age category; 36.7% were in the 75-84 age category and 27.3% fell into the 85+ age category.

Gender breakdown of reported victims

A small number of counties were unable to report gender for victims (n = 3 or 5.3%). The breakdown for those victims whose gender was reported by counties was 30.3% male and 69.7% female.

Race/ethnicity breakdown for reported victims

A small number of counties were unable to report race/ethnicity for victims (n = 3 or 5.3%). As reported by those counties that did have racial and ethnic information on the victim, 32% were Caucasians; 20.5% were African Americans; 0% were Asian/Pacific Islanders; 12.8% were Hispanic/Latino; 1.4% were Native American/Aleut Eskimos and 33.4% were classified as “other” races.

Living arrangements of victim

A small number of counties were unable to report living arrangements of victims (n = 3 or 5.3%). Of victims for whom counties reported on living arrangements, 42.1% lived alone; 12.7% lived with spouses or partners; 19% lived with adult children; 11% lived with sons-in-law or daughters-in-law; 6.9% lived with grandchildren; 6.2% lived with other relatives and 12.4% lived with other non-relatives.

Lives with abuser

None of the counties was able to report whether the victim lives with the abuser.

Living in poverty

None of the counties was able to report whether elder abuse victims were living at or below the poverty threshold.

ABUSER INFORMATION

A total of 54 counties were able to report information on the abusers of elder abuse victims (94.7% of all counties reporting cases during this period), representing 1,338 abusers in New York State during calendar year 2008.

Age Groups of Abusers

Virtually all of the counties were unable to report any age information for abusers (n = 49 or 90.7%). Counties that could give this information reported that .79% of abusers were in the younger than age 18 years category;
40.6% were in the 18-45 age category; 34.6% were in the age 46-59 age category and 24.1% were in the 60 years and older category.

**Abuser Gender**

All counties (100%) were able to report information on the gender of the abuser. Counties identified the gender of abuser as 52.7% male abusers and 47.3% female abusers.

**Abuser Relationship with Victim**

All counties (100%) were able to report information on the relationship of the abuser to the victim. Counties reported the relationship between victim and abuser as: spouses or partners, 11%; own adult children, 43%; sons or daughters-in-law, 1.1%; grandchildren, 7.6%; friends or neighbors, 9.2%; paid home care workers, 1%; other relatives, 9.5% and other non-relatives, 17.7%.

**Information on sources of elder abuse referrals received by respondent agencies**

A small number of counties were unable to report information on the sources of referrals (n = 3 or 5.3%). For those counties that were able to report some information on sources of referrals, in 13.3% of the cases source of referral was missing. Data is presented below for both formal and informal system referrals.

**FORMAL SERVICE SYSTEM REFERRALS RECEIVED BY RESPONDENT AGENCIES/PROGRAMS**

Counties reported receiving elder abuse referrals from the following agencies: other Adult Protective Services units (.69%), district attorneys (.90%), domestic violence programs (.32%), elder abuse programs (2.2%), law enforcement (5.6%), community-based agencies (11.3%), financial services (2.9%), healthcare programs (21.6%), homecare programs (12.6%) and Area Agencies on Aging (4.8%).

**INFORMAL SYSTEM REFERRALS**

Counties also received referrals from elder abuse victims themselves (2.6%), family members (14.8%), friends and neighbors (6.6%), concerned citizens (1%), anonymous sources (3.8%) and “other information sources” (15.4%).

**Information on referrals to respondent agencies**

A greater number of counties were missing all information in this category (n=10 or 17.5%). A small percentage of victims were not referred to an outside organization for assistance (3.4%). For those counties that were able to report some information on where referrals were made, in 69.9% of cases, the referral information was missing. Counties reported referring .95% of cases to other Adult Protective Services units, 20.5% of cases to
community-based agencies, 1.6% of cases to district attorneys’ offices, 1.9% of cases to domestic violence programs, 2.8% of cases to elder abuse programs, 42.4% of cases to healthcare services, 1.4% of cases to law enforcement, 6.3% of cases to Area Agencies on Aging and 22.1% of cases to “other.”

**Domestic Incident Reports (DIR)**

None of the counties was able to report whether DIRs had been submitted on behalf of reported victims.

Based on the percentage of agencies able to report and on the availability of data for individual survey fields, it was found:

**Overall data availability**

In general, the data availability from APS was quite good. In looking at just the data availability for those APS units that could provide at least some demographic information, based on the percentage of agencies able to report and on the availability of data for individual survey fields, it was found:

**Data elements with the greatest availability**

- Relationship of abuser and victim
- Type of mistreatment
- Living arrangement of victim
- Source of referral

**Data elements less frequently available**

- Age of victim
- Gender of victim
- Race and ethnicity of victim
- Gender of abuser
- Referrals

**Data elements with the least availability or no availability**

- Whether the victim and abuser live together
- Poverty
- Referrals
- DIR reports
- Age of abuser

**LAW ENFORCEMENT**

Data was obtained from law enforcement through two sources. The Department of Criminal Justice Services (DCJS) made available their Domestic Incident Reports (DIR) by county for New York State (with the exception of New York City). DIR forms are completed by law enforcement agencies on crimes or offenses that occur
between family members or intimate partners. It will not include elder abuse that occurs when the abuser is a non-family member, such as a home attendant. Data was also obtained from the New York City Police Department (NYPD) on all cases regardless of whether the abuser was a family or non-family member. DIR and NYPD data was generated by penal code, which was then categorized by the researchers in terms of type of mistreatment. Data was obtained on all 62 counties of New York State. Of the 62 counties, three reported having no cases in 2008 (4.8%). This left 59 counties that were able to report at a minimum the number of victims served.

**Victim information by type of reported abuse experienced**

All counties (100%) were able to report information on the type of mistreatment. Counties reported mistreatment in terms of penal codes, which were then categorized as emotional abuse, financial abuse, neglect, physical abuse and sexual abuse. Overall, 55.4% were emotional abuse victims; 14.7% were financial abuse victims; .12% were neglect victims; 54.1% were physical abuse victims and .12% were sexual abuse victims.

**Age breakdown of reported victims**

All counties (100%) were able to report information on the age of the victim in at least some cases. Of those victims with age range reported by counties, 13.7% were in the 60-64 age category; 56.9% were in the 65-74 age category; 24.7% were in the 75-84 age category and 4.7% fell into the 85+ age category.

**Gender breakdown of reported victims**

All counties (100%) were able to report information on the gender of the victim in at least some cases. The breakdown for those victims whose gender was reported by counties was 34.2% male and 65.8% female.

**Race/ethnicity breakdown for reported victims**

All counties (100%) were able to report information on the race and ethnicity of the victim in at least some cases. Respondent counties reported that 61.5% of victims were Caucasians; 23.3%, African Americans; 2.5%, Asian/Pacific Islanders; 11%, Hispanic/Latino; .45%, Native American/Aleut Eskimos and 1.2% were classified as “other” races.

**Living arrangements of victim**

None of the counties was able to report on the living arrangement of the victim.

**Lives with abuser**

All counties (100%) were able to report information on whether the victim lives with the victim in at least some cases. In cases in which this information was available, 50.8% of the victims lived with their abusers.
Living in poverty

None of the counties was able to report whether elder abuse victims were living at or below the poverty threshold.

ABUSER INFORMATION

A total of 59 counties were able to report information on the abusers of elder abuse victims (100% of all counties reporting cases during this period), representing 4,889 abusers in New York State during calendar year 2008.

Age Groups of Abusers

All counties (100%) were able to report age information for abusers in at least some cases. Overall 11.5% reported abusers were in the younger than age 18 years category; 43.8% were in the 18-45 age category; 24.1% were in the age 46-59 age category and 20.6% were in the 60 years and older category.

Abuser Gender

All counties (100%) were able to report information on the gender of the abuser in at least some cases. Counties identified gender of abuser as 70.5% male abusers and 29.5% female abusers.

Abuser Relationship with Victim

All counties (100%) were able to report information on the relationship of the abuser to the victim in at least some cases. Counties reported the relationship between victim and abuser as spouses or partners, 30.2%; own adult children, 38.1%; sons or daughters-in-law, 2.2%; grandchildren, 11.3%; friends or neighbors, .73%; other relatives, 17.4% and other non-relatives, .04%.

Information on sources of elder abuse referrals received by respondent agencies

None of the counties was able to report on sources of the referral.

Information on referrals to respondent agencies

A small number of counties were missing all information in this category (n=5 or 8.5%). Over one-third of the victims were not referred to an outside organization for assistance (36.9%). For those counties that were able to report some information on where referrals were made, in 90.2% of the cases, referral information was still missing. Counties reported referring 26.2% of cases to Adult Protective Services, 41.6% of cases to domestic violence programs, 10.5% of cases to healthcare services, 4.9% of cases to other divisions of law enforcement and 16.7% of cases to “other.”
Domestic Incident Reports (DIR)

A small number of counties were missing all information in this category (n=5 or 8.5%). Of those counties that did report information on DIRs, 100% of elder abuse victims had DIRs filed on their behalf.

Overall data availability

In general, the data quality from law enforcement was quite good. In looking at just the data availability for those law enforcement units that could provide at least some demographic information, based on the percentage of units able to report and on the availability of data for individual survey fields, it was found:

Data elements with the greatest availability

- Type of mistreatment
- Age of victim
- Gender of victim
- Race and ethnicity of victim
- Whether the victim and abuser live together
- Gender of abuser
- Relationship of abuser
- DIR reports

Data elements less frequently available

- Age of abuser

Data elements with the least availability or no availability

- Living arrangement of victim
- Poverty
- Source of referral
- Referrals

DISTRICT ATTORNEYS’ OFFICES

District Attorneys’ (DA) offices across the state were also asked to participate in the study. Data was obtained from DAs that received specific funding from the New York State Office of Victim Services as well as from DAs that did not receive such funding. Of the 36 agencies that responded to the survey, 16 reported having no cases in 2008 (44.4%) and two agencies reported serving elder abuse victims but were unable to report on the number of victims (5.6%). This left 18 agencies that were able to report at a minimum the number of victims served.

Victim information by type of reported abuse experienced

Close to two-fifths of the agencies were unable to report any information on the type of mistreatment (n = 7 or 38.9%). Of the agencies that did report this information, 68.9% were emotional abuse victims; 38.1% were
financial abuse victims; 0.55% were neglect victims; 18.8% were physical abuse victims and 0.86% were sexual abuse victims.

**Age breakdown of reported victims**

Over half of the agencies were unable to report any information on age for victims (n = 10 or 55.6%). Of those victims with age range reported by respondent agencies/programs, 30.6% were in the 60-64 age category; 35.1% were in the 65-74 age category; 22.7% were in the 75-84 age category and 11.6% fell into the 85+ age category.

**Gender breakdown of reported victims**

Approximately half of the agencies were unable to report any information on gender for victims (n = 9 or 50%). The gender breakdown for those victims whose gender was reported by respondent agencies/programs was 59.6% male and 40.5% female.

**Race/ethnicity breakdown for reported victims**

Agencies tended to collect less racial and ethnic data on their victims than other demographics; a total of 11 or 61.1% of agencies were unable to report this information. As reported by those agencies that did have racial and ethnic information on the victim, 59.6% were Caucasians; 24.7%, African Americans; 5.9%, Asian/Pacific Islanders; 9.6%, Hispanic/Latino; 0%, Native American/Aleut Eskimos and 0.27% were classified as “other” races.

**Living arrangements of victim**

Approximately four out of five agencies were unable to report information on living arrangements of the victims (n = 15 or 83.3%). Of victims for whom respondent agencies/programs reported on living arrangements, 40.9% lived alone; 31.8% lived with spouses or partners; 4.6% lived with adult children; 9.1% lived with grandchildren and 13.6% lived with other non-relatives.

**Lives with abuser**

Over three-fourths of the agencies were unable to report information on whether the victim and abuser lived together (n = 14 or 77.8%). Of those agencies that could give this information, 29.7% of the victims lived with their abusers.

**Living in poverty**

Almost all of the agencies were unable to give information on whether elder abuse victims were living at or below the poverty threshold (n = 17 or 97.6%). Similarly, of those agencies that could give this information, 99.8% of the information was missing. As a result, 0% of victims were identified as living at or below the poverty threshold.
ABUSER INFORMATION

A total of ten agencies/programs reported information on abusers of elder abuse victims (55.6% of all agencies reporting cases during this period), representing 1,133 abusers in New York State during calendar year 2008.

Age Groups of Abusers

One-fifth of the agencies were unable to report age of abusers (n = 2 or 20%). Of those agencies that could give this information, 4.5% reported abusers were in the younger than age 18 years category; 64.5% were in the 18-45 age category; 21.9% were in the age 46-59 age category and 9.1% were in the 60 years and older category.

Abuser Gender

All agencies were able to report gender for abusers. Respondent agencies/programs that identified gender of abuser reported 71.6% male abusers and 28.4% female abusers

Abuser Relationship with Victim

Two out of every five agencies were unable to report the abuser’s relationship with the victim (n = 4 or 40%). Respondent agencies/programs reported on the relationship between victim and abuser as: spouses or partners, 5.3%; own adult children, 21.3%; sons or daughters-in-law, 1.1%; grandchildren, 5.7%; friends or neighbors, 11.4%; paid home care workers, 5.7%; other relatives, 4.9%, and other non-relatives, 44.5%.

Information on sources of elder abuse referrals received by respondent agencies

Half of all respondent agencies were missing all information in this category (n=5 or 50%). For those agencies that were able to report some information on sources of referrals, in 34.2% of the cases source of referral was missing. Data are presented below for both formal and informal system referrals.

FORMAL SERVICE SYSTEM REFERRALS RECEIVED BY RESPONDENT AGENCIES/PROGRAMS

Respondent agencies/programs reported receiving elder abuse referrals from the following agencies: Adult Protective Services (0.29%), other division within district attorneys’ offices (14.5%), law enforcement (80.6%), community-based agencies (0.68%), financial services (0.10%).

INFORMAL SYSTEM REFERRALS

Respondent agencies/programs also received referrals from elder abuse victims themselves (1.8%), family members (2.1%), friends and neighbors (0.4%), and “other information sources” (0.5%).
Information on referrals to respondent agencies

Over three-fourths of all respondent agencies were missing all information in this category (n=14 or 77.8%). The vast majority of victims were not referred to outside organizations for assistance (93%). For those agencies that were able to report some information on where referrals were made, in 98.1% of the cases, referral information was missing. The only categories of referrals listed were to law enforcement (50%) and to “other” (50%).

Domestic Incident Reports (DIR)

Over three-fourths of all agency responders could not report information on DIRs submitted on behalf of reported victims (n=14 or 77.8%). Of those respondent agencies/programs that did report information on DIRs, 58.1% of elder abuse victims had DIRs filed on their behalf.

Overall data availability

In general, the availability of data from the district attorney offices was fairly limited with either a significant number of offices unable to provide any demographic information and, when they did, there was still a substantial amount of missing data. In looking at data availability alone for those offices that could provide at least some demographic information, based on the percentage of offices able to report and on the availability of data for individual survey fields, it was found:

Data elements with the greatest availability

- Type of mistreatment
- Gender of abuser
- Age of abuser

Data elements less frequently available

- Gender of victim
- Age of victim
- Race and ethnicity of victim
- Source of referral

Data elements with the least availability or no availability

- Whether the victim and abuser live together
- Poverty
- Living arrangement of victim
- Relationship of abuser and victim
- Referrals
- DIR reports
**VICTIM AND ABUSER PROFILES BY SYSTEM**

Data availability across four service systems surveyed in the Documented Case Study (APS, community-based agencies, DAs, law enforcement) is robust enough to permit a comparison in some study data fields, in particular, types of mistreatment, gender of the victims, age of the victims and gender of the abuser. Several profiles of interest emerge related to the victims and abusers served in each system.

Victim Information by type of reported abuse experienced

APS serves a higher percentage of neglect cases (37.9%) than community-based agencies (12.2%); both systems serve higher percentages than law enforcement and DAs (0.12% and 0.55%, respectively). Similarly, APS sees more financial abuse (65.8% of all cases) and less emotional abuse (8.8%) than all other service systems. Law enforcement sees more physical abuse (54.1%) than the other service systems (18.8% for DAs; 29.6% for community-based agencies; 33.7% for APS).

Age breakdown of reported victims

APS serves a higher percentage of adults aged 75-84 (36.7%) and older than 85 (27.3%) compared to the other service systems. The higher percentage of older adults in APS is reflective of a service system designed to serve the most vulnerable adults in the community. DAs serve a larger percentage of adults aged 60-64 (30.6%); law enforcement serves a higher rate of adults aged 65-74 (56.9%).

Gender breakdown of reported victims

In three of the four service systems two-thirds (65.8%) to three-fourths (75.9%) of the victims are women. District Attorneys’ offices serve more men (59.6%).

Gender of abuser

While all four service systems reported that the abuser tended to be male, law enforcement and DAs had the most similar abuser profiles. Both systems reported that close to three-fourths of the abusers coming into their system were male (70.5% and 71.6%, respectively). Community-based agencies reported slightly over three-fifths of abusers were male (61.5%) and APS reported slightly more than half of abusers were male (52.3%).
# NEW YORK RULES OF PROFESSIONAL CONDUCT

Effective April 1, 2009  
As amended through January 1, 2017  
With Commentary as amended through January 1, 2017

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Rule</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.0</td>
<td>Terminology</td>
<td>6</td>
</tr>
<tr>
<td>1.1</td>
<td>Competence</td>
<td>11</td>
</tr>
<tr>
<td>1.2</td>
<td>Scope of Representation and Allocation of Authority Between Client and Lawyer</td>
<td>14</td>
</tr>
<tr>
<td>1.3</td>
<td>Diligence</td>
<td>19</td>
</tr>
<tr>
<td>1.4</td>
<td>Communication</td>
<td>21</td>
</tr>
<tr>
<td>1.5</td>
<td>Fees and Division of Fees</td>
<td>24</td>
</tr>
<tr>
<td>1.6</td>
<td>Confidentiality of Information</td>
<td>29</td>
</tr>
<tr>
<td>1.7</td>
<td>Conflict of Interest: Current Clients</td>
<td>38</td>
</tr>
<tr>
<td>1.8</td>
<td>Current Clients: Specific Conflict of Interest Rules</td>
<td>49</td>
</tr>
<tr>
<td>1.9</td>
<td>Duties to Former Clients</td>
<td>60</td>
</tr>
<tr>
<td>1.10</td>
<td>Imputation of Conflicts of Interest</td>
<td>63</td>
</tr>
<tr>
<td>1.11</td>
<td>Special Conflicts of Interest for Former and Current Government Officials and Employees</td>
<td>69</td>
</tr>
<tr>
<td>1.12</td>
<td>Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators, or Other Third-Party Neutrals</td>
<td>74</td>
</tr>
<tr>
<td>1.13</td>
<td>Organization as Client</td>
<td>77</td>
</tr>
<tr>
<td>1.14</td>
<td>Client with Diminished Capacity</td>
<td>82</td>
</tr>
<tr>
<td>1.15</td>
<td>Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records</td>
<td>85</td>
</tr>
<tr>
<td>1.16</td>
<td>Declining or Terminating Representation</td>
<td>90</td>
</tr>
<tr>
<td>1.17</td>
<td>Sale of Law Practice</td>
<td>94</td>
</tr>
<tr>
<td>1.18</td>
<td>Duties to Prospective Clients</td>
<td>99</td>
</tr>
<tr>
<td>2.1</td>
<td>Advisor</td>
<td>103</td>
</tr>
<tr>
<td>2.2</td>
<td>[Reserved]</td>
<td>105</td>
</tr>
<tr>
<td>2.3</td>
<td>Evaluation for Use by Third Persons</td>
<td>106</td>
</tr>
<tr>
<td>2.4</td>
<td>Lawyer Serving as Third-Party Neutral</td>
<td>108</td>
</tr>
<tr>
<td>3.1</td>
<td>Non-Meritorious Claims and Contentions</td>
<td>110</td>
</tr>
<tr>
<td>3.2</td>
<td>Delay of Litigation</td>
<td>111</td>
</tr>
</tbody>
</table>
RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.
(c) A lawyer make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(e), or 1.18(b).

Comment

Scope of the Professional Duty of Confidentiality

[1] This Rule governs the disclosure of information protected by the professional duty of confidentiality. Such information is described in these Rules as “confidential information” as defined in this Rule. Other rules also deal with confidential information. See Rules 1.8(b) and 1.9(c)(1) for the lawyer’s duties with respect to the use of such information to the disadvantage of clients and former clients; Rule 1.9(c)(2) for the lawyer’s duty not to reveal information relating to the lawyer’s prior representation of a former client; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer’s duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer’s duty of candor to a tribunal; and Rule 8.3(c) for information gained by a lawyer or judge while participating in an approved lawyer assistance program.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. See Rule 1.0(j) for the definition of informed consent. The lawyer’s duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Typically, clients come to lawyers to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is thereby upheld.

[3] The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order. The confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source. The confidentiality duty, for example, prohibits a lawyer from volunteering confidential information to a friend or to any other person except in compliance with the provisions of this Rule, including the Rule’s reference to other law that may compel disclosure. See Comments [12]-[13]; see also Scope.
Paragraph (a) prohibits a lawyer from knowingly revealing confidential information as defined by this Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation with persons not connected to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client.

Paragraph (a) protects all factual information "gained during or relating to the representation of a client." Information relates to the representation if it has any possible relevance to the representation or is received because of the representation. The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research. Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not "generally known" simply because it is in the public domain or available in a public file.

Use of Information Related to Representation

The duty of confidentiality also prohibits a lawyer from using confidential information to the advantage of the lawyer or a third person or to the disadvantage of a client or former client unless the client or former client has given informed consent. See Rule 1.0(j) for the definition of "informed consent." This part of paragraph (a) applies when information is used to benefit either the lawyer or a third person, such as another client, a former client or a business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not (absent the client's informed consent) use that information to buy a nearby parcel that is expected to appreciate in value due to the client's purchase, or to recommend that another client buy the nearby land, even if the lawyer does not reveal any confidential information. The duty also prohibits disadvantageous use of confidential information unless the client gives informed consent, except as permitted or required by these Rules. For example, a lawyer assisting a client in purchasing a parcel of land may not make a competing bid on the same land. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client, even to the disadvantage of the former client, after the client-lawyer relationship has terminated. See Rule 1.9(c)(1).

Authorized Disclosure

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. In addition, lawyers in a firm may, in the course of the firm's practice, disclose to each other
information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client’s interests. See Rules 1.14(b) and (c).

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions that prevent substantial harm to important interests, deter wrongdoing by clients, prevent violations of the law, and maintain the impartiality and integrity of judicial proceedings. Paragraph (b) permits, but does not require, a lawyer to disclose information relating to the representation to accomplish these specified purposes.

[6A] The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, see Rule 1.13(b).

[6B] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to
eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a remote possibility or small statistical likelihood that any particular unit of a mass-distributed product will cause death or substantial bodily harm to unspecified persons over a period of years does not satisfy the element of reasonably certain death or substantial bodily harm under the exception to the duty of confidentiality in paragraph (b)(1).

[6C] Paragraph (b)(2) recognizes that society has important interests in preventing a client's crime. Disclosure of the client's intention is permitted to the extent reasonably necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

[6D] Some crimes, such as criminal fraud, may be ongoing in the sense that the client's past material false representations are still deceiving new victims. The law treats such crimes as continuing crimes in which new violations are constantly occurring. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury.

[6E] Paragraph (b)(3) permits a lawyer to withdraw a legal opinion or to disaffirm a prior representation made to third parties when the lawyer reasonably believes that third persons are still relying on the lawyer's work and the work was based on "materially inaccurate information or is being used to further a crime or fraud." See Rule 1.16(b)(1), requiring the lawyer to withdraw when the lawyer knows or reasonably should know that the representation will result in a violation of law. Paragraph (b)(3) permits the lawyer to give only the limited notice that is implicit in withdrawing an opinion or representation, which may have the collateral effect of inferentially revealing confidential information. The lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, but paragraph (b)(3) does not permit explicit disclosure of the client's past acts unless such disclosure is permitted under paragraph (b)(2).

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about compliance with these Rules and other law by the lawyer, another lawyer in the lawyer's firm, or the law firm. In many situations, disclosing information to secure
such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with these Rules, court orders and other law.

[10] Where a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a claim can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone. The lawyer may respond directly to the person who has made an accusation that permits disclosure, provided that the lawyer's response complies with Rule 4.2 and Rule 4.3, and other Rules or applicable law. A lawyer may make the disclosures authorized by paragraph (b)(5) through counsel. The right to respond also applies to accusations of wrongful conduct concerning the lawyer's law firm, employees or associates.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Paragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 before making the disclosure, unless such consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A tribunal or governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) through (b)(6). Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose, particularly when accusations of wrongdoing in the representation of a client have been made by a third party rather than by the client. If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be
made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). A lawyer’s decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law. See Comments [12]-[13]. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). E.g., Rule 8.3(c)(1). Rule 3.3(c), on the other hand, requires disclosure in some circumstances whether or not disclosure is permitted or prohibited by this Rule.

Withdrawal

[15A] If the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw pursuant to Rule 1.16(b)(1). Withdrawal may also be required or permitted for other reasons under Rule 1.16. After withdrawal, the lawyer is required to refrain from disclosing or using information protected by Rule 1.6, except as this Rule permits such disclosure. Neither this Rule, nor Rule 1.9(c), nor Rule 1.16(c) prevents the lawyer from giving notice of the fact of withdrawal. For withdrawal or disaffirmance of an opinion or representation, see paragraph (b)(3) and Comment [6E]. Where the client is an organization, the lawyer may be in doubt whether the organization will actually carry out the contemplated conduct. Where necessary to guide conduct in connection with this Rule, the lawyer may, and sometimes must, make inquiry within the organization. See Rules 1.13(b) and (c).

Duty to Preserve Confidentiality

[16] Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer’s duties when sharing information with nonlawyers inside or outside the lawyer’s own firm, see Rule 5.3, Comment [2].
[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client’s information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked “Confidential” or “Confidential – Attorneys’ Eyes Only”; the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) may require a lawyer to take specific precautions with respect to a client’s or adversary’s medical records; and court rules may require a lawyer to block out a client’s Social Security number or a minor’s name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

**Lateral Moves, Law Firm Mergers, and Confidentiality**

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms though lateral hiring or merger, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational, and other practical issues. However, Rule 1.6(a) requires lawyers and law firms to protect their clients’ confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client’s informed consent or some other exception to Rule 1.6.

[18B] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as: (i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer’s total book of business; (v) the financial terms of each lawyer-client relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments). Such information is generally not “confidential information” within the meaning of Rule 1.6.

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily not permitted, however, if information is protected by Rule 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; information relating to sensitive client matters (e.g., an unannounced corporate takeover, an undisclosed possible divorce, or a criminal investigation into the client’s conduct).
[18D] When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with these fiduciary duties – see Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

[18E] For the unique confidentiality and notice provisions that apply to a lawyer or law firm seeking to sell all or part of its practice, see Rule 1.17 and Comment [7] to that Rule.

[18F] Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages; initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.
RULE 1.7:
CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

1. the representation will involve the lawyer in representing differing interests; or

2. there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

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

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

2. the representation is not prohibited by law;

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

4. each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "differing interests," "informed consent" and "confirmed in writing," see Rules 1.0(f), (j) and (e), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, i.e., whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the
representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include all of the clients who may have differing interests under paragraph (a)(1) and any clients whose representation might be adversely affected under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). See Rule 1.10(e), which requires every law firm to create, implement and maintain a conflict-checking system.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16(b)(1). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client. See Rule 1.9; see also Comments [5], [29A].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is acquired by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest

[6] The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client’s informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is adverse is likely to feel betrayed and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken may reasonably fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, that is, that the lawyer’s exercise of professional judgment on behalf of that client will be adversely affected by the lawyer’s interest in retaining the current client. Similarly, a conflict may arise when a lawyer is required to cross-examine a client appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.
[7] Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

**Lawyer's Responsibilities to Former Clients and Other Third Persons**

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be adversely affected by responsibilities to former clients under Rule 1.9, or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

**Personal-Interest Conflicts**

[10] The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients.

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with
another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j).

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer’s sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

**Interest of Person Paying for Lawyer’s Services**

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer’s exercise of professional judgment on behalf of a client will be adversely affected by the lawyer’s own interest in accommodating the person paying the lawyer’s fee or by the lawyer’s responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

**Prohibited Representations**

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. As paragraph (b) indicates, however, some conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client’s consent nor provide representation on the basis of the client’s consent. A client’s consent to a nonconsentable conflict is ineffective. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, a representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 regarding competence and Rule 1.3 regarding diligence.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client’s position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer’s multiple representation of adverse parties to mediation (because mediation is
not a proceeding before a “tribunal” as defined in Rule 1.0(w)), such representation may be precluded by paragraph (b)(1).

**Informed Consent**

[18] Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. See Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. See Comments [30] and [31] concerning the effect of common representation on confidentiality.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one client refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation is that each party obtains separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client’s interests. Where the fact, validity or propriety of client consent is called into question, the lawyer has the burden of establishing that the client’s consent was properly obtained in accordance with the Rule.

**Client Consent Confirmed in Writing**

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement by the client made on the record of any proceeding before a tribunal, whether before, during or after a trial or hearing. See Rule 1.0(e) for the definition of “confirmed in writing.” See also Rule 1.0(x) (“writing” includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent “informed” be in writing or in any particular form in all cases. See Rules 1.0(e) and (j). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to
avoid disputes or ambiguities that might later occur in the absence of a writing. See Comment [18].

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent "informed" and the waiver effective. See Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. See Rule 1.0(t) for the definition of "screening." The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client’s advance consent cannot be effective if the particular circumstances that have created an actual conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). See Comments [14]-[17] and [28] addressing nonconsentable conflicts.
Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(1). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal as well as civil cases. Some examples are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs or co-defendants in a personal injury case, an insured and insurer, or beneficiaries of the estate of a decedent. In a criminal case, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, multiple representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients' reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients' interests. If there is significant risk of an adverse effect on the lawyer's professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1). Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraph (a)(1) arise in contexts other than litigation. For a discussion of such conflicts in transactional matters, see Comment [7]. Regarding paragraph (a)(2), relevant factors in determining whether there is a significant risk that the lawyer's professional judgment will be adversely affected include: (i) the importance of the
matter to each client, (ii) the duration and intimacy of the lawyer’s relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). See Comments [8], [29] and [29A].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, the lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise each client that information will be shared (and regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. See Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. Examples include helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, and arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

**Special Considerations in Common Representation**

[29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client’s informed consent, confirmed in writing, to the common representation.
[29A] Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. See Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between or among commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, it is unlikely that the clients’ interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit. See Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client’s informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients. For example, the lawyer may reasonably conclude that failure to disclose one client’s trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer’s role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitation on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).
[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client’s affiliates, (ii) the lawyer’s obligations to either the organizational client or the new client are likely to adversely affect the lawyer’s exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer’s relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer’s work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client’s overall mode of doing business, may be so extensive that the entities would be viewed as “alter egos.” Under such circumstances, the lawyer may conclude that the affiliate is the lawyer’s client despite the lack of any formal agreement to represent the affiliate.

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer’s client.

[34B] Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer’s ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer’s corporate client.

Lawyer as Corporate Director

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the
directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer’s resignation from the board, and the possibility of the corporation’s obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer’s professional judgment, the lawyer should not serve as a director or should cease to act as the corporation’s lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer’s recusal as a director or might require the lawyer and the lawyer’s firm to decline representation of the corporation in a matter.
Elder Abuse & Crime

- Find Help
- Senior Centers
- Naturally Occurring Retirement Communities
- In-Home Services
- ThriveNYC at DFTA
- Health Insurance Assistance
- NY Connects
- Elder Abuse & Crime
- Senior Employment
- Bill Payer Program
- Transportation
- Legal Help
- Emergency Preparedness

Elder Abuse & Crime
If you are an older adult who has been abused, you don’t have to suffer in silence. Abuse committed by someone you know and trust is called "elder abuse." Elder abuse can be financial, physical, emotional, and include neglect (withholding food and medication, abandonment).
A study from the Department for the Aging (DFTA) and other organizations found that 76 in 1,000 older New York state residents were victims of elder abuse during a one-year period. A DFTA ad campaign that portrays elder abuse also raises awareness about the issue.

DFTA partners with a community-based program in each borough to provide elder abuse victims with crisis intervention and safety planning. The programs also help victims compile evidence, work with authorities, and seek compensation through the New York State Office of Victim Services.

Providing Options to Elderly Clients Together

One-third of elder abuse victims suffer from depression, anxiety or trauma, making it difficult for them to take steps to address the abuse. Providing Options to Elderly Clients Together (PROTECT) provides victims with mental health treatment through a partnership with Weill Cornell Institute of Geriatric Psychiatry.

Community-based elder abuse agencies connect victims with clinicians, who provide evidence-based mental health treatment at a safe meeting place in the community or a home.

PROTECT is an initiative launched with DFTA through the New York City Domestic Violence Task Force, co-led by the Mayor's Office to End Domestic and Gender-Based Violence and the Mayor's Office of Criminal Justice.

Elderly Crime Victims Resource Center

DFTA's Elderly Crime Victims Resource Center helps older victims of crimes committed by strangers. Crimes can be financial, physical, emotional, and include neglect - the same crimes that are committed in elder abuse cases.

Perpetrators who don't know their victims often target them for money through IRS, investment, home-improvement, charity, and other types of scams.

Never give personal information to unknown callers. When in doubt, hang up and call the official business. Always protect your bank account, Social Security number, and Medicare and Medicaid information.

If you are a victim, call 311 to be connected to services.
CLE MATERIALS FOR FOURTH SESSION

1:45 p.m. to 3:00 p.m. (1.5 Diversity, Inclusion and Elimination of Bias CLE Credits)

Implicit Bias: What It Is and How Lawyers Can Address It in Practice

Panelists:
Ann F. Thomas, Otto L. Walter Distinguished Professor of Tax Law; Director, Graduate Tax Program, New York Law School
Penelope Andrews, Distinguished Visiting Professor of Law; Co-Director, Racial Justice Project, New York Law School

Materials:

1. New York Rules of Professional Conduct - 1.1, 1.4, 8.4 (g)
2. ABA Diversity and Inclusion Toolkit
3. Is This How Discrimination Ends? article
4. Multicultural Lawyering and Cultural Competence (Chap. 7) - 207 -221
6. Five Habits for Cross-Cultural Lawyering
7. Dorothy Brown article - from Implicit Racial Bias Across the Law (Levinson and Smith)
# NEW YORK RULES OF PROFESSIONAL CONDUCT

Effective April 1, 2009
As amended through January 1, 2017
With Commentary as amended through January 1, 2017

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Rule</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.0</td>
<td>Terminology</td>
<td>6</td>
</tr>
<tr>
<td>1.1</td>
<td>Competence</td>
<td>11</td>
</tr>
<tr>
<td>1.2</td>
<td>Scope of Representation and Allocation of Authority Between Client and Lawyer</td>
<td>14</td>
</tr>
<tr>
<td>1.3</td>
<td>Diligence</td>
<td>19</td>
</tr>
<tr>
<td>1.4</td>
<td>Communication</td>
<td>21</td>
</tr>
<tr>
<td>1.5</td>
<td>Fees and Division of Fees</td>
<td>24</td>
</tr>
<tr>
<td>1.6</td>
<td>Confidentiality of Information</td>
<td>29</td>
</tr>
<tr>
<td>1.7</td>
<td>Conflict of Interest: Current Clients</td>
<td>38</td>
</tr>
<tr>
<td>1.8</td>
<td>Current Clients: Specific Conflict of Interest Rules</td>
<td>49</td>
</tr>
<tr>
<td>1.9</td>
<td>Duties to Former Clients</td>
<td>60</td>
</tr>
<tr>
<td>1.10</td>
<td>Imputation of Conflicts of Interest</td>
<td>63</td>
</tr>
<tr>
<td>1.11</td>
<td>Special Conflicts of Interest for Former and Current Government Officials and Employees</td>
<td>69</td>
</tr>
<tr>
<td>1.12</td>
<td>Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators, or Other Third-Party Neutrals</td>
<td>74</td>
</tr>
<tr>
<td>1.13</td>
<td>Organization as Client</td>
<td>77</td>
</tr>
<tr>
<td>1.14</td>
<td>Client with Diminished Capacity</td>
<td>82</td>
</tr>
<tr>
<td>1.15</td>
<td>Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records</td>
<td>85</td>
</tr>
<tr>
<td>1.16</td>
<td>Declining or Terminating Representation</td>
<td>90</td>
</tr>
<tr>
<td>1.17</td>
<td>Sale of Law Practice</td>
<td>94</td>
</tr>
<tr>
<td>1.18</td>
<td>Duties to Prospective Clients</td>
<td>99</td>
</tr>
<tr>
<td>2.1</td>
<td>Advisor</td>
<td>103</td>
</tr>
<tr>
<td>2.2</td>
<td>[Reserved]</td>
<td>105</td>
</tr>
<tr>
<td>2.3</td>
<td>Evaluation for Use by Third Persons</td>
<td>106</td>
</tr>
<tr>
<td>2.4</td>
<td>Lawyer Serving as Third-Party Neutral</td>
<td>108</td>
</tr>
<tr>
<td>3.1</td>
<td>Non-Meritorious Claims and Contentions</td>
<td>110</td>
</tr>
<tr>
<td>3.2</td>
<td>Delay of Litigation</td>
<td>111</td>
</tr>
</tbody>
</table>
3.3 Conduct Before a Tribunal ................................................................. 112
3.4 Fairness to Opposing Party and Counsel ....................................... 117
3.5 Maintaining and Preserving the Impartiality of Tribunals
    and Jurors ...................................................................................... 120
3.6 Trial Publicity .............................................................................. 123
3.7 Lawyer as Witness ....................................................................... 126
3.8 Special Responsibilities of Prosecutors and Other
    Government Lawyers .................................................................... 129
3.9 Advocate in Non-Adjudicative Matters ........................................... 132

4.1 Truthfulness in Statements to Others .............................................. 133
4.2 Communication with Persons Represented by Counsel ................. 134
4.3 Communicating with Unrepresented Persons .................................. 137
4.4 Respect for Rights of Third Persons .............................................. 138
4.5 Communication After Incidents involving Personal Injury
    or Wrongful Death ......................................................................... 140

5.1 Responsibilities of Law Firms, Partners, Managers, and
    Supervisory Lawyers ..................................................................... 141
5.2 Responsibilities of a Subordinate Lawyer ....................................... 144
5.3 Lawyer’s Responsibility for Conduct of Nonlawyers ...................... 145
5.4 Professional Independence of a Lawyer ....................................... 147
5.5 Unauthorized Practice of Law ...................................................... 149
5.6 Restrictions on Right to Practice .................................................... 150
5.7 Responsibilities Regarding Nonlegal Services ............................... 151
5.8 Contractual Relationship Between Lawyers and Nonlegal
    Professionals .................................................................................. 155

6.1 Voluntary Pro Bono Service .......................................................... 159
6.2 [Reserved] .................................................................................... 162
6.3 Membership in a Legal Services Organization ............................... 163
6.4 Law Reform Activities Affecting Client Interests .............................. 164
6.5 Participation in Limited Pro Bono Legal Service Programs ............. 165

7.1 Advertising .................................................................................... 167
7.2 Payment for Referrals .................................................................... 175
7.3 Solicitation and Recommendation of Professional Employment ....... 179
7.4 Identification of Practice and Specialty ......................................... 184
7.5 Professional Notices, Letterheads, and Signs .................................. 186

8.1 Candor in the Bar Admission Process ............................................ 190
8.2 Judicial Officers and Candidates ..................................................... 191
8.3 Reporting Professional Misconduct ............................................... 192
8.4 Misconduct .................................................................................... 194
8.5 Disciplinary Authority and Choice of Law ..................................... 196
RULE 1.1: COMPETENCE

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [Reserved.]
A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

**Thoroughness and Preparation**

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

**Retaining or Contracting with Lawyers Outside the Firm**

Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the needs of the client; the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

Client consent to contract with a lawyer outside the lawyer’s own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client’s prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client’s prior informed consent.

When lawyer from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. *See* Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (e.g., under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.
[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, if a lawyer retains an outside lawyer or law firm to work under the lawyer’s close direction and supervision, and the retaining lawyer closely reviews the outside lawyer’s work, the retaining lawyer usually will not need to consult with the client about the outside lawyer’s role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client’s confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer’s practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.
RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client’s reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Communicating with Client

[2] In instances where these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with the client and secure the client’s consent prior to taking action, unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, paragraph (a)(1)(iii) requires that a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously made clear that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).
[3] Paragraph (a)(2) requires that the lawyer reasonably consult with the client about the means to be used to accomplish the client’s objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client’s behalf. Likewise, for routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer’s staff acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

**Explaining Matters**

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interest and the client’s overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(j).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to those who the lawyer reasonably believes to be appropriate persons within the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.
Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer’s own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.
RULE 8.4:
MISCONDUCT

A lawyer or law firm shall not:

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or
ABA Diversity and Inclusion 360 Commission
Toolkit Introduction

Dear User,

The information provided in this Toolkit is designed to help you recognize some of the biases that we all have, including, specifically, the implicit biases of judges, prosecutors, and public defenders. The goals of this toolkit are to:

1. Explain the social science term implicit bias;

2. Provide some examples of where implicit biases live and thrive;

3. Explain how they exist;

4. Raise consciousness about the power of these unknown “mind bugs,” as some have called them, and their ability to negatively impact decision-making;

5. Help you identify some of your own implicit biases;

6. Examine how implicit biases might show up in the performance of your job;

7. Provide some tools to help you catch and correct snap decision-making that may be linked to harmful implicit biases; and

8. Provide you with the knowledge that will allow you to help others catch decision-making that might be based on implicit biases.

We all have biases. Every one of us. This is not a finger-pointing expedition. Rather, we are sharing with you the evidence of this science, offering strategies for you to find the implicit biases hidden within you to help you reduce their harmful effects. As you learn more about how these biases work in society and in your life, you will not only become more mindful and deliberate in your decision-making but also be able to help others in the profession with whom you interact regularly: court personnel, including law clerks, officers of the court, other lawyers, parties to litigation, witnesses, and jurors.

Implicit biases are unwitting and unconscious cognitions that include stereotypes, beliefs, attitudes, intuitions, gut feelings, and related intangibles that we categorize in our brains—without conscious effort—every fraction of a second.1 For instance, if we think that a particular category of human beings is frail—the IAT (Implicit Association Test) indicates that many of us categorize the elderly in this way2—we will not raise our guard around them. That is a stereotype in action. If we identify someone as having graduated from our beloved alma mater, we will feel more at ease—that is an attitude in action.

Your ever-efficient brain automatically organizes all of the information it receives and places the information into cognitive boxes, shorthand, or schemas, if you will. A more colloquial way to think of a schema is the aforementioned “stereotype,” though the two terms are not entirely interchangeable. Consider some of the data collected about what many people think when they see an Asian male. The data shows that many people believe Asians and Asian-Americans are extremely smart, excellent students, excellent in mathematics, and pretty good at some martial art; play, really well, some musical instrument; and are also really polite, kind, and shy—in other words, the model minority.3 These labels have


2.) You will learn much, if you have not already, by taking an “implicit association test,” or “IAT” as it is commonly known. The IAT is explained in other parts of your Toolkit. One of the IAT’s deals with how people implicitly view the elderly. The fragile and the elderly are always paired together. For more about this result in particular or the IAT generally, visit https://implicit.harvard.edu/implicit/

implicit origins. Based on information that we are fed in society through television, movies, the media, work, and social exposures, our mind quickly creates schemas and puts these associations into one box. These social schemas form based on everything that we’ve ever consciously and unconsciously seen and heard. So when we see an Asian male, we immediately think of many of the characteristics and adjectives referenced above even though we do not know that individual. These judgments, assumptions, and attitudes require no contemplative, deliberate thought. It just happens.

Social scientists categorize our dual ways of thinking into two systems: System 1 and System 2. System 1 is the unconscious mode, which helps us make snap judgments and is where our schemas live. System 2 is our deliberative mind, i.e., the conscious mode that is active in explicit biases. The focus of this Toolkit is to get you more conscious of System 1, that place where, as it turns out, 90 percent of your mind operates.

In a similar vein, we also must think about coded language and microaggressions. Take coded language, for example. It is not uncommon for women to be referred to as aggressive or bossy, characteristics viewed positively with male employees but considered negatively with female employees. Is the woman “opinionated” or “sassy”? Why? And why are men not ever similarly categorized? Consider some race-related terms and words. Inner city and urban education are terms most quickly associated with predominantly black, brown, and poor areas. Thugs is a word almost exclusively used in connection with black men.

Microaggression is another type of behavior the ABA is hopeful that this Toolkit will help reduce and ideally eliminate. Microaggressions are “commonplace daily indignities, whether intentional or unintentional, that communicate racial slights and insults towards [minorities].” Studies have shown that the recipients of microaggressions experience greater degrees of loneliness, anger, depression, and anxiety. There are many examples of microaggressions in daily life, some of which include assuming that a black student in an elite school is there because of affirmative action, confusing black attorneys for court staff, telling an LGBT person that s/he does not “look like” an LGBT person, telling a black person that s/he is “articulate,” touching someone else’s hair without permission, asking people of color where they are from, and assuming that all Asian-Americans are Chinese and/or speak an Asian language. An attempt to be aware of microaggressions and taking a thoughtful approach to language when speaking with minority groups are part of this process of consciousness raising, education, and correction.

This program is designed to help with all of these areas. It includes a PowerPoint presentation that focuses on the aforementioned goals. It includes a video, too—just a short 10 to 12 minutes, designed to allow you to hear from experts and others who perform the very same role that you do in the judicial system. Implicit biases are analyzed in the video; and others, whether judge, prosecutor, or public defender, share their own implicit biases and strategies for how they work to be continually mindful of them in order to interrupt them. Finally, this Toolkit contains a comprehensive bibliography and resource list, including a large category of books, articles, and websites that focus on implicit bias generally for those who want to learn more about this fascinating social science; material specifically addressed to judges; material specifically addressed to prosecutors; and material specifically addressed to defenders.

Whether you are a judge, a prosecutor, or a defender, we hope that you find this Toolkit useful. This is fascinating yet challenging work. It is not rocket science, but because biases are in our DNA, it will require great determination and conscious effort to catch assumptions that are made and applied automatically. The Toolkit will reveal the benefits of deliberation, i.e., slowing down to take a few extra moments to focus on the person in front of you before making decisions that will or might affect that person.

We are confident that you will not only learn about that stranger that lives within you but also actually enjoy the materials contained herein and this journey.

Thank you.

7) Id.
9) Id.
ABA Diversity and Inclusion 360 Commission
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B.) BOOKS
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C.) UCLA LAW PROFESSOR JERRY KANG’S WEBSITE
Professor Kang has worked with courts to create implicit bias primers for the court system; has written many law review articles on the subject; and conducts CLEs, etc. See http://jerrykang.net. In particular, see Jerry Kang, Nat’l Ctr. for State Courts, Implicit Bias: A Primer for Courts (Aug. 2009), available at http://jerrykang.net/research/2009-implicit-bias-primer-for-courts/. See also his TED talk and other relevant videos of his work in this area:
https://www.bing.com/videos/search?q=jerry+kang+ted+talk&view=detail&mid=C199BFAA2157E6F0C7FBC199BFAA2157E6F0C7F&BFORM=VIRE.
http://uwtv.org/watch/PlUf2WiuqYE/.
http://uwtv.org/watch/dM_vc1n599w/.
D.) **THE NATIONAL CENTER FOR STATE COURTS WEBSITE**


E.) **MATERIALS SPECIFIC TO JUDGES, PROSECUTORS, AND DEFENSE COUNSEL**

**Judges:**
Videos produced by the ABA Diversity and Inclusion 360 Commission: Video for Judges; Video for Prosecutors; Videos for Public Defenders. Please visit www.ambar.org/360commission to access the videos.

**Prosecutors:**
Prosecutor TED Talk: http://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system?language=en#t-421101.

**Defense Counsel:**

F.) **COGNITIVE REFLECTION TEST (CRT) WEBSITE**

The CRT is designed to assess an individual’s ability to suppress an intuitive and spontaneous wrong answer in favor of a reflective and deliberative answer. The test is available at http://www.sjdm.org/dmidi/Cognitive_Reflection_Test.html#

G.) **PERCEPTION INSTITUTE WEBSITE**

http://perception.org/.

H.) **KIRWAN INSTITUTE WEBSITE**

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Kerala T. Cowart, On Responsible Prosecutorial Discretion, 44 HARV. C.R.-C.L. L. REV. 597 (Summer 2009).


DEFE NCE COUNSEL


Jonathan Rapping et al., The Role of the Defender in a Racially Disparate System, 37 CHAMPION 50 (July 2013).


Andrew E. Taslitz, Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?, 45 TEX. TECH L. REV. 315 (Fall 2012).


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Anna Roberts, (Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias, 44 CONN. L. REV. 827 (Feb. 2012).


Karl L. Wuensch et al., Racial Bias in Decisions Made by Mock Jurors Evaluating a Case of Sexual Harassment, 142 J. SOC. PSYCHOL. 587 (2002).
Is This How Discrimination Ends?

Trainings and workshops geared toward eliminating people's hidden prejudices are all the rage—but many don’t work. Now the psychologist who made the case for "implicit bias" wants to cure it.

N A CLOUDY day in February, Will Cox pointed to a pair of news photos that prompted a room of University of Wisconsin, Madison, graduate students to shift in their seats. In one image, a young African American man clutches a carton of soda under his arm. Dark water swirls around his torso; his yellow shirt is soaked. In the other, a white couple is in water up to their elbows. The woman is tattooed and frowning, gripping a bag of bread.
Cox read aloud the captions that were published alongside these images of a post-Katrina New Orleans. For the black man: “A young man walks through chest-deep water after looting a grocery store.” For the white couple: “Two residents wade through chest-deep water after finding bread and soda.”

**Looting. Finding.** A murmur spread through the rows of students watching.

Cox, a social psychologist in the university’s Prejudice and Intergroup Relations Lab, turned to his co-presenter, a compact, 50-something woman standing next to him. As she strode down the rows of students, her voice was ardent, her movements deliberate. She could have been under a spotlight on the stage at a tech summit, not at the head of a narrow classroom in the university’s education building.

*Listen to the audio version of this article:*

[Listen to the audio](https://www.theatlantic.com/science/archive/2017/05/unconscious-bias-training/525405/)

*Feature stories, read aloud: download the Audm app for your iPhone.*

“There are a lot of people who are very sincere in their renunciation of prejudice,” she said. “Yet they are vulnerable to habits of mind. Intentions aren’t good enough.”

The woman, Patricia Devine, is a psychology professor and director of the Prejudice Lab. Thirty years ago, as a graduate student, she conducted a series of experiments that laid out the psychological case for implicit racial bias—the idea, broadly, is that it’s possible to act in prejudicial ways while sincerely rejecting prejudiced ideas. She demonstrated that even if people don’t believe racist stereotypes are true, those stereotypes, once absorbed, can influence people’s behavior without their awareness or intent.
Now, decades after unraveling this phenomenon, Devine wants to find a way to end it. She’s not alone. Since the mid-1990s, researchers have been trying to wipe out implicit bias. Over the last several years, “unconscious-bias trainings” have seized Silicon Valley; they are now de rigueur at organizations across the tech world.

But whether these efforts have had any meaningful effect is still largely undetermined.

Until, perhaps, now. I traveled to southern Wisconsin, because Devine and a small group of scientists have developed an approach to bias that actually seems to be working—a two-hour, semi-interactive presentation they’ve been testing and refining for years. They’ve created versions focused on race and versions focused on gender. They’ve tried it with students and faculty. Next, they’ll test it with police.

Their goal is to make people act less biased. So far, it’s working.

On July 17, 2014, a 43-year-old former horticulturist on Staten Island named Eric Garner was approached by police officers who suspected him of selling untaxed cigarettes. One of them put him in a chokehold, a maneuver the New York City Police Department prohibits. Garner died an hour later—a homicide, according to the medical examiner. Since Garner’s death, and then Michael Brown’s, and Tamir Rice’s, and many, many others’, voices condemning discrimination in policing have grown to a thunder. While police in many cases maintain that they used appropriate measures to protect lives and their own personal safety, the concept of implicit bias suggests that in these crucial moments, the officers saw these people not as individuals—a gentle father, an unarmed teenager, a 12-year-old child—but as members of a group they had learned to associate with fear.

In Silicon Valley, a similar narrative of pervasive bias has unfolded over the last several years. In 2012, venture capitalist Ellen Pao filed a gender-discrimination lawsuit against her employer, the venture-capital firm Kleiner Perkins Caufield & Byers, maintaining, for instance, that she was penalized for the same behaviors her
male colleagues were praised for. Her experience wasn't unique: A 2016 survey of hundreds of women in technology, titled Elephant in the Valley, revealed that the vast majority experienced both subtle and overt bias in their careers.

In addition to urgent conversations about race and criminal justice, and employment and gender, discussions about implicit bias have spread to Hollywood, the sciences, and the presidential election. What’s more, though solutions are hard to come by, there’s plenty of hard data to validate a very real problem.

In fact, studies demonstrate bias across nearly every field and for nearly every group of people. If you’re Latino, you’ll get less pain medication than a white patient. If you’re an elderly woman, you’ll receive fewer life-saving interventions than an elderly man. If you are a man being evaluated for a job as a lab manager, you will be given more mentorship, judged as more capable, and offered a higher starting salary than if you were a woman. If you are an obese child, your teacher is more likely to assume you’re less intelligent than if you were slim. If you are a black
student, you are more likely to be punished than a white student behaving the same way.

There are thousands of these studies. And they show that at this moment in time, if person A is white and person B is black, if person X is a woman and person Y is a man, they will be treated differently in American society for no other reason than that their identities have a cultural meaning. And that meaning clings to each person like a film that cannot be peeled away.

Findings like these can feel radioactive. Ben Barres, a Stanford neurobiologist I spoke with, once wondered aloud whether it was wise to even share with women entering science what they are up against; as James Baldwin wrote, it takes a rare person “to risk madness and heartbreak in an attempt to achieve the impossible.” For people struggling to grapple with bias, these realities can elicit feelings of rage and sadness, grief and guilt. Last summer, a man from North Carolina called in to C-SPAN because he wanted to know, quite simply, how he could become less racially biased. “What can I do to change?” he asked. “You know, to be a better American?” The video has been watched online more than 8 million times.

What if the photographers really did see one person looting and not the other?

At the same time, there are many people who reject the concept of implicit bias outright. Some misinterpret it as a charge of plain, old-fashioned bigotry; others just don’t perceive its existence, or they believe its role in determining outcomes is overstated. Mike Pence, for instance, bristled during the 2016 vice-presidential debate: “Enough of this seeking every opportunity to demean law enforcement broadly by making the accusation of implicit bias whenever tragedy occurs.” And two days after the first presidential debate, in which Hillary Clinton proclaimed the need to address implicit bias, Donald Trump asserted that she was “essentially suggesting that everyone, including our police, are basically racist and prejudiced.”
Still other people, particularly those who have been the victims of police violence, also reject implicit bias—on the grounds that there’s nothing implicit about it at all.

One challenge to bridging these perspectives is that real life rarely provides lab-perfect conditions in which proof of implicit bias can be established. Take Cox’s Hurricane Katrina photos. After they were published, people began to ask: What if the photographers really did see one person looting and not the other? When the photographers were asked what they’d seen, the photographer of the “looting” photo said that he did see that person loot. The other photographer said that he did not see how his subjects acquired their groceries. There was a plausible explanation other than bias. In debates and jury trials, doubts like this scatter like seeds.

But there may be an even more fundamental reason for this gulf between people’s perspectives on the subject of bias. This has to do with the fact that a person’s very circumstances and position in the world influence what they do and don’t perceive. As Evelyn Carter, a social psychologist at the University of California, Los Angeles, told me, people in the majority and the minority often see two different realities. While people in the majority may only see intentional acts of discrimination, people in the minority may register both those acts and unintended ones. White people, for instance, might only hear a racist remark, while people of color might register subtler actions, like someone scooting away slightly on a bus—behaviors the majority may not even be aware they’re doing.

Bias is woven through culture like a silver cord woven through cloth. In some lights, it’s brightly visible. In others, it’s hard to distinguish. And your position relative to that glinting thread determines whether you see it at all.

One attempt to get a handle on all this and pin down implicit bias has come by way of a tool known as the Implicit Association Test. There are many techniques to measure implicit associations, but the IAT, a reaction-time test that gauges how strongly certain concepts are linked in a person’s mind, has become the most well-known and widely used.
In an IAT designed to assess anti-gay bias, for instance, you are presented with a list of words (like “smiling” or “rotten” or “homosexual”) and asked to sort each into a combined category: “gay or bad” or “straight or good.” Then, you see another list and are asked to sort each word again, this time with the combinations flipped: “gay or good” or “straight or bad.” If your responses are faster when “gay” is paired with “bad” than with “good,” this is supposed to demonstrate that the gay/bad association in your mind is stronger. In a review of more than 2.5 million of these tests, most people showed a preference for straight people over gay, white people over black, and young people over old.

Ideally, the IAT would provide not only a way to quantify bias, but a clear target in the quest to end it. If the implicit associations the IAT measures are the cause of biased behavior, then untethering these negative associations could eliminate it.

But an increasingly vocal group of critics now questions all these assumptions. One issue, according to detractors, is that people’s IAT scores are not stable. In scientific parlance, the IAT has low “test-retest reliability”; the same person might end up with different scores at different times. (If a bathroom scale says you weigh 210 pounds today and 160 tomorrow, you might feel skeptical about the scale.) More importantly, according to meta-analyses (a synthesis of all available studies on a topic), there’s a weak relationship between a person’s IAT score and their actual behavior. In other words, people may be acting in biased ways, but it’s not clear this is due to the mental construct measured by the IAT.

The term implicit bias “has become so broad that it almost has no meaning.”

While this debate could threaten decades of IAT-based work on implicit bias, a third point of view has also quietly emerged. Yes, the IAT has flaws, this perspective holds. But the meta-analyses criticizing it also have flaws. Furthermore, the IAT is only one of many tools for measuring implicit associations, and all these different tools tend to turn up the same results—the same preferences for certain social
groups over others. There is something truly consistent and real there, these results suggest.

Perhaps, this third view holds, what’s really going on is that implicit bias is more complex than these tools can fully handle. Implicit associations may not be the stable entities scientists and others have been imagining them to be. In fact, studies show that the specific associations that arise depend on a person’s context and state of mind. People in one experiment, for instance, automatically associated rich foods with positive things when they were prompted to focus on taste, and negative things when they were prompted to focus on health. In this case, the test-retest reliability criticism would be irrelevant; something that’s fluid and changeable shouldn’t be consistent. The fact that there’s any correlation at all between IAT scores and behavior would be remarkable.

All of which is to say that while bias in the world is plainly evident, the exact sequence of mental events that cause it is still a roiling question. Devine, for her part, told me that she is no longer comfortable even calling this phenomenon “implicit bias.” Instead, she prefers “unintentional bias.” The term implicit bias, she said, “has become so broad that it almost has no meaning.”

AN HOUR INTO the workshop in Wisconsin, Devine rolled up one sleeve of her blue paisley blouse and walked over to an African American student sitting in the front row. “People think, ‘If I don’t want to treat people based on race, then I’m going to be colorblind, or gender-blind, or age-blind,’” she said. “It’s not a very effective strategy. First, it’s impossible.” She held her pale forearm next to the student’s. “There’s a difference,” she said. Students exchanged glances. “Who’s the man?” she continued, looking at Cox. Then she raised her eyebrows and gestured to herself. “Who’s the old person?” It was a goofy-Dad joke, but the students chuckled.

(How this borderline-aggressive approach affects students put on the spot is another question. Later, the student Devine had approached with her bare arm said, “I was a little surprised, but I kind of appreciated it.”)
If pointing out skin color in a workshop on overcoming bias seems strange, that may be part of the point. Trying to ignore these differences, Devine says, makes discrimination worse. Humans see age and gender and skin color: That’s vision. Humans have associations about these categories: That’s culture. And humans use these associations to make judgments: That, Devine believes, is habit—something you can engage in without knowing it, the way a person might nibble fingernails down to the bloody quick before realizing they are even doing so.

The entire workshop is crafted as a way to break this habit. To do so, Devine said, you have to be aware of it, motivated to change, and have a strategy for replacing it. Over the course of the two-hour presentation, Cox and Devine hit all these notes: They walked through the science of how people can act biased without realizing it. They barreled through mountains of evidence and detailed explanations of how bias spreads. Halfway through the workshop, they gave students a chance to discuss how these ideas relate to their own personal lives, and everyone had a story. A chemist recounted being steered to a sales internship, despite seven years of chemistry training, because she had “such a nice personality.” An African American student described the eerie sensation he experienced in Italy—before realizing it was the feeling of not having shopkeepers follow and watch him.

At the end, Devine and Cox offered ideas for substitute habits. Observe your own stereotypes and replace them, Cox said. Look for situational reasons for a person’s behavior, rather than stereotypes about that person’s group. Seek out people who belong to groups unlike your own. Devine paced among the desks, making eye contact with each student. “I submit to you,” she said, her voice steady with conviction, “that prejudice is a habit that can be broken.”

It may sound a bit whiz-bang, but the data show that this seemingly simple intervention works. For example, after Devine and a colleague presented a version of the workshop focused on gender bias to STEM faculty at the University of Wisconsin, departmental hiring patterns began to change. In the two years following the intervention, in departments that had received the training, the proportion of women faculty hired rose from 32 percent to 47 percent—an increase...
of almost 50 percent—while in departments that hadn’t received the training, the proportion remained flat. And in an independent survey conducted months after the workshop, faculty members in participating departments—both women and men—reported feeling more comfortable bringing up family issues, and even feeling that their research was more valued.

In another study, the researchers gave hundreds of undergraduate students a version of the intervention focused on racial bias. Weeks afterwards, students who had participated noticed bias more in others than did students who hadn’t participated, and they were more likely to label the bias they perceived as wrong. Notably, the impact seemed to last: Two years later, students who took part in a public forum on race were more likely to speak out against bias if they had participated in the training.

In treating bias as a habit, the Madison approach is unique. Many psychology experiments that try to change implicit bias treat it as something like blood pressure—a condition that can be adjusted, not a behavior to be overcome. The Madison
approach aims to make unconscious patterns conscious and intentional. “The problem is big. It’s going to require a variety of different strategies,” Devine says. “But if people can address it within themselves, then I think it's a start. If those individuals become part of institutions, they may carry messages forward.”

The STEM work suggests this approach at least can have an impact on discrimination against women. What the team has not yet determined is whether the race-focused interventions have an impact on the experiences of people of color. That question is a current priority. “If we’re just making white people feel better,” Devine says, “who cares?”

Another potential strength of the Madison approach is that it’s both rigorously experimental and tested in the real world. When the Princeton psychologist Betsy Levy Paluck reviewed hundreds of interventions designed to reduce prejudice, she found that only 11 percent of all experimental efforts were actually tested outside of a laboratory. By contrast, few of the trainings that have become popular in Silicon Valley and elsewhere are scientifically evaluated. This is very concerning to researchers, because the trainings could be having literally any effect on people. In the words of an uncommonly candid acupuncturist I once visited, “After this treatment, you might get better, you might get worse, or you might just stay the same.”

Making things worse is a serious risk: A 2006 review of more than 700 companies that had implemented diversity initiatives showed that after diversity training, the likelihood of black men and women advancing in their organizations actually decreased. Proving that efforts like these work as intended, Paluck wrote, “should be considered an ethical imperative, on the level of rigorous testing of medical interventions.”

TWO DAYS AFTER the workshop, I sat down in a soaring, glass-walled building on campus with Patrick Forscher, a postdoc in Devine’s lab and a co-author on many of the studies evaluating this workshop. I wanted to know why this approach was working.
Forscher is shy; his voice was so low it was almost sub-auditory. Their success, Forscher explained, may have something to do with the creation of the self. In the 1970s, a social psychologist named Milton Rokeach posited that the self is made of many layers and that some layers are more central to one’s self-concept than others. Values are highly central; beliefs a little less so. Something like associations would likely be less central still. “If you’re asked to describe who you are,” said Forscher, “you’re more likely to say, ‘I’m someone who values equality’ than ‘I’m someone who implicitly associates white people with good.’”

This hierarchy matters, because the more central a layer is to self-concept, the more resistant it is to change. It’s hard, for instance, to alter whether or not a person values the environment. But if you do manage to shift one of these central layers, Forscher explained, the effect is far-reaching. “If you think of therapy, the goal often is to change processes central to how people view themselves,” he said. “When it works, it can create very large changes.”

The Madison workshop, for its part, zeroes in on people’s beliefs about bias—the belief that they might be discriminating, the belief that discrimination is a problem, the belief that they can overcome their own habit of prejudice. As a result of the workshop, these beliefs grow stronger. And beliefs might be just the sweet spot that needs to be targeted. Call beliefs “the Goldilocks layer.” They’re a central enough part of each person to unleash a torrent of other changes, but removed enough from entrenched core values that they can, with the right kind of pressure, be shifted.

“I don’t think it’s dark; it’s real. You can’t pretend it doesn’t exist.”

Watching Devine, I was struck by how charismatic and funny she is when presenting. It’s intentional. If people feel attacked, she told me, they shut down. Avoiding blame is key. The resulting message is carefully balanced: Bias is normal, but it’s not acceptable. You must change, but you’re not a bad person. Watching Cox
and Devine is like watching people play the classic game Operation, tweaking specific beliefs without nicking the wrong reaction.

Still, this approach has shortcomings. A problem as complex as prejudice can’t possibly be solved by a single psychological fix. Joelle Emerson, the CEO of Paradigm, a Silicon Valley consultancy that is in the process of evaluating the effectiveness of its own trainings and interventions, believes that long-term change must come through overhauling workplace systems and processes, not relying on individuals. “Even the most well-designed training is not going to solve things by itself,” she said. “You have to reinforce ideas within broader organizations.” Social scientists such as the psychologist Glenn Adams have begun to call for a shift “from the task of changing individual hearts and minds to changing the sociocultural worlds in which those hearts and minds are immersed.”

There is an elephant in the workshop, too. On the day I attended, almost all the students in the audience were women or people of color, some seeking a way to combat bias directed at them. One student with shoulder-length blond hair confided in me that she cared a lot about these topics, but had hoped the workshop would address what to do about experiencing bias. The absence of white men in the group was conspicuous. Cox said the crowd is usually more mixed, but the audience makeup may point to a fundamental limitation of this kind of work: Its success depends on people already caring enough about these issues to show up in the first place. Not everyone will seek out, in the middle of a weekday, a fairly technical presentation about changing their own habits of mind.

That said, the workshop may come to them anyway. Forscher recently conducted what’s known as a “network analysis” of the workshop’s effect—a look at how its effects spread throughout a community. What he found, in the STEM gender-bias intervention, was that after the workshop, the people who reported doing the most for gender equity weren’t those who’d attended the training, but those who worked alongside them. It’s an unusual finding, and it’s not clear exactly what this means. But it’s possible that as people who attended the workshop changed, they began influencing the people around them.
When Devine first developed the idea that hidden stereotypes can influence people’s behavior without their awareness, a colleague observed that her work revealed “the dark side of the mind.” Devine disagreed. “I actually think that it reveals the mind,” she said. “I don’t think it’s dark; it’s real. You can’t pretend it doesn’t exist.” Neural connections aren’t moral. What people do with them is. And as Devine sees it, that doing starts with awareness.

And if there’s one thing the Madison workshops do truly shift, it is people’s concern that discrimination is a widespread and serious problem. As people become more concerned, the data show, their awareness of bias in the world grows, too. In the days after attending, I noticed my own spontaneous reactions to other people to an almost overwhelming degree. The day I left Madison, in the lobby of my hotel, I saw two people standing near the front desk. They were wearing worn, rumpled clothes, with ragged holes in the knees. As I glanced at them, a story about them flickered in my mind. They weren’t guests staying here, I thought; they must be friends of the clerk, visiting him on his break.

It was a tiny story, a minor assumption, but that’s how bias starts: as a flicker—unseen, unchecked—that taps at behaviors, reactions, and thoughts. And this tiny story flitted through my mind for seconds before I caught it. My God, I thought, is this how I’ve been living?

Afterwards, I kept watching for that flutter, like a person with a net in hand waiting for a dragonfly. And I caught it, many times. Maybe this is the beginning of how my own prejudice ends. Watching for it. Catching it and holding it up to the light. Releasing it. Watching for it again.

Have you attended an unconscious-bias training or had an experience that changed what you think about bias? We’d love to hear from you:

hello@theatlantic.com. (We may post your response anonymously in Notes.)
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CHAPTER 7

MULTICULTURAL LAWYERING AND CULTURAL COMPETENCE

In this chapter we discuss the importance of paying attention to differences between you and your clients. We believe it is important to acknowledge these differences, recognize how they influence the lawyer-client relationship and work toward bridging some of these differences. We believe awareness is an important component of working with clients who are different from us, but that we cannot stop at awareness. This chapter will provide some concepts to help you approach your cross-cultural work; however, we will not provide a recipe for how to bridge those differences. There are no easy recipes in this work, which is what makes it challenging yet interesting. We hope to raise your awareness of some of the issues that affect our relationships with other human beings. We believe understanding the communities our clients work in and come from is an important part of this work. In that sense, cross-cultural lawyering will involve work on your part that we cannot introduce to you in this chapter. You will have to get to know the particular client and specific community and context in which you and your clients work. As a result, you will need to continue some of the concepts we introduced to you in the Interviewing chapter, such as getting to know and understand the work of your clients, their business and industries. That work will include their point of view about creating change in their communities.

In this chapter, we will introduce you to some of the concepts of culture and cultural competence. We will define culture from multiple perspectives, drawing on work from other disciplines, especially sociology and anthropology. We take an expansive view of culture, not limiting ourselves to individuals from other countries. We will discuss research from social psychology (which we have discussed in the Organizing Your Work, Counseling and Negotiation chapters) to understand why all lawyers have work to do when it comes to cultural competence. We then move to discuss sociopolitical aspects of culture, including questions of power and privilege. We end the chapter by discussing some techniques for becoming more conscious of differences and similarities between us and our clients, understanding how those similarities and differences affect the lawyer-client relationship and your work on behalf of your clients, and better understanding and bridging the differences. This discussion
will draw from the rich literature on multi-cultural counseling in psychology and social work.

In her seminal article on cross-cultural lawyering, Michelle Jacobs is critical of lawyer training in working across difference. While the client-centered model of lawyering recognizes the importance of lawyer-client interaction in decision-making, it fails to address “the effects of race, class and . . . gender on the interactions between lawyer and client.” Clients come to lawyers with their own narrative and different sets of expectations based on their cultural experiences and personal values. Jacobs argues against a “race neutral” training of lawyers because it fails to recognize that the lawyer and the client each bring a context to the relationship. True client-centered lawyering requires that we look at clients (and ourselves) “culturally, politically and economically.” We otherwise risk disregarding who the client really is. Michelle Jacobs calls on each of us as lawyers to examine 1) our unconscious racism and cultural bias and how they may affect our relationship with our client and 2) how our client’s cultural experience and internalization of microaggressions affect the client’s view of the relationship not just with the lawyer but with law itself (including the legal system and legal institutions).

In working across difference, the challenge is remaining open to difference (and explaining some of our reactions or our clients’ reactions as relating to our differences) without stereotyping our clients. In these instances we have to proceed from the perspective of informed not-knowing. Our hope is that this chapter will both inform you and make you more comfortable with not knowing.

I. WHAT DO WE MEAN BY CULTURE?

The word “culture” is often conceived in terms of geography. In this chapter we define the concept of culture in broader terms. Culture is the unique character of social groups, “the values and norms shared by its members that set it apart from other social groups.”

2 Id. at 346.
3 Id. at 348.
4 Id. at 348-49.
5 Id. at 352.
6 Id. at 361.
7 Id. at 377. For a discussion of microaggressions, see infra Section II.D.
the “knowledge, values and beliefs shared in a society or community.” It is the sum of inter-generationally transmitted lifestyle ways, behavior patterns and products of a people that includes language, music, art, artifacts, interpersonal styles, habits, history, eating preferences, customs and social rules. Cultures exist in a specific time in history; they are not static but fluid and in flux. Cultures are “neither timeless nor changeless.” But culture is situated in and defined by a particular society.

Culture “organizes and is constituted by beliefs, norms, behaviors and institutional practices.” These values, beliefs and symbols make up “the framework through which members interpret and attribute meaning to both their own and others’ experiences and behavior.” Culture is a quality of social groups and communities. Culture is made up of several dimensions and in that sense is a “complex whole.” Since each of us belongs to multiple groups and thereby several cultures, “culture always comes in the plural.” As a result, “interaction . . . between individuals is likely to be multicultural on several levels.” In addition, culture is “rarely, if ever, perfectly shared by all members of a group or community.” Thus, we cannot assume that because we share some characteristics with another person (even several characteristics for that matter) she is likely to share the same values, attitudes and beliefs as we may have. Psychologists ascertain that each of us has three levels of identity—1) individual (uniqueness); 2) group (shared cultural values and beliefs); and 3) universal (those common features of being human). Even within a group, individuals vary greatly in their levels of cultural identity, acculturation and enculturation.

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10 Michael Wyline, Enhancing Legal Counseling in Cross-Cultural Settings, 15 WINDSOR Y. B. ACCESS JUST. 47, 48 (1996). Others define culture as “shared meanings, beliefs, values, and symbols that accounts for patterns of interpersonal/intergroup behaviour within a specific community.” Id. (citing AUGIE FLERAS & JEAN LEONARD ELLIOTT, MULTICULTURALISM IN CANADA 314 (1992)). Still others define it as a “system of knowledge” that is shared by a large group of people.” Id. (citing WILLIAM GUDYKUNST, BRIDGING DIFFERENCES 44 (1981)).


12 Id.


14 Howard Gadlin, Conflict Resolution, Cultural Differences and the Culture of Racism, 10 NEGOT. J. 33, 35 (1994).

15 Avruch, supra note 13, at 393.

16 THOMPSON, supra note 9, at 254.

17 Avruch, supra note 13, at 393.

18 Id.

19 Id.


Culture has also been equated with an “iceberg” in the shape of a pyramid or triangle. The part of the iceberg that is visible to us (one of the points in the triangle) constitutes traditions, customs, habits, behavior, artifacts and institutions of that culture. The part just below the surface is comprised of norms, beliefs, values and attitudes and is “fairly easily accessible to sensitive observers.” Invisible even to members of the group are “the fundamental assumptions and presuppositions, the sense-and-meaning-making schemas and symbols . . . about the world and the individuals’ experience with it.” These “fundamental assumptions about the world and humanity” are the drivers behind the values and norms. Culture gives us a context through which we understand how the world works; it gives us the cognitive and affective frameworks for interpreting our own behavior and motives and those of others.

Culture is thus not merely the property of national, ethnic, racial or religious groups, the “usual ‘containers’ for culture.” Organizations, institutions, and professions or occupations, including our own legal profession, are also containers for culture and sites for cultural differences. In that sense, all lawyering is in some ways cross-cultural. The law itself is a “culture with strong professional norms that give meaning and reinforce behaviors.” Being a lawyer involves similar tasks, comparable experiences (during three years of law school and in practice) and comparable organizational views. Some of the attributes of this culture include a communication style in which argument predominates, a high value on competition, a particular way of organizing ideas, conversation and describing events, and the predominance of a particular form of linear, analytical thinking which involves rules and categories.

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22 Avrukh, supra note 13, at 394; Thompson, supra note 9, at 254 (citing Wendell L. French & Cecil H. Bell, Organization Development: Behavioral Science in Interventions for Organization Improvement 18 (1923)).

23 Avrukh, supra note 13, at 394.

24 Id.

25 Id.

26 Thompson, supra note 9, at 254.

27 Avrukh, supra note 13, at 395-96.

28 Id. at 398.

29 Thompson, supra note 9, at 254.


31 Pearce, supra note 30, at 2084 (citing Russell G. Pearce, Jewish Lawyering in a Multicultural Society: A Midrash on Levinson, 14 Cardozo L. Rev. 1613, 1632 (1993)).

32 Bryant & Koh Peters, supra note 30, at 47.

While we may be socialized in the lawyering culture, our membership in some groups, such as educational, socioeconomic, institutional, is more fluid and changeable. No one identity is likely to define a person. But though we belong to more than one cultural group, for each person some group identities may be more salient than others.  

II. WHAT IS CULTURAL COMPETENCE AND WHY IS IT IMPORTANT?

In this section, we will discuss why cultural competence is important, what cultural competence might look like and barriers to cultural competence. We begin by talking about why we think this work is important for lawyers.

A. WHY IS CULTURAL COMPETENCE IMPORTANT?

As we wrote in the Interviewing chapter, client-relations skills are an important component of the work of the lawyer. Certainly, a lawyer needs legal knowledge. But a lawyer needs to be able to deal with clients if he is going to be retained and if the clients are going to be satisfied with his work. Studies have found that clients whose case managers were more sensitive to cross-cultural issues have more positive experiences with the services they received and the persons working with them. Trust is an important component of the attorney-client relationship. Cross-cultural communication affects client trust of the lawyer and the ability of the client to fully participate in the lawyer-client relationship.

Cultural competence is an important client-relations skill for three principal reasons. First, you are likely to encounter difference in your lawyering relationships constantly, including your clients, other lawyers with whom you come into contact, and decision-makers with whom you will interact. Second, lawyers need to be able to deal with an increasingly diverse and connected world. As the U.S. is becoming increasingly diverse, lawyers must confront this increasing complexity even considering only diversity in the context of race and ethnicity. By the middle of the
21st century, the U.S. is projected to become a plurality nation, with no one racial or ethnic group in the majority.\textsuperscript{38} The U.S. will become the first major post-industrial society in the world where "minorities will be the majority."\textsuperscript{39} Depending on where you live, practice or intend to practice, you may already live in a state or metropolitan area that is majority minority.\textsuperscript{40} In addition to the diversity in our own country, we are likely to come into contact with people from other countries. Globalization has meant that our economies are becoming more inter-connected, with businesses operating on a global basis.\textsuperscript{41} We will encounter others who are different from us. Third, by becoming better at dealing with difference and working across difference, we become better communicators. The skills involving in developing our cross-cultural capacities are the skills of better communicators. By becoming better communicators we become better lawyers and better human beings, benefiting our clients and the rest of society.

**B. WHAT IS A CULTURALLY COMPETENT LAWYER?**

A culturally competent lawyer is one who is able and willing to acknowledge how race, ethnicity, gender and other group dimensions may influence identity, values, behaviors and the perception of reality for himself and his client. While we define culture broadly (including socioeconomic status, sexual orientation and gender identity, and ability/disability), we acknowledge that race, prejudice, racial discrimination and systemic racial oppression play an important role in U.S. history and society.

A culturally competent lawyer is one who 1) is actively in the process of becoming aware of his assumptions about human behavior, values, biases, and preconceived notions and how those affect his relationship with clients and others in his work; 2) actively tries to understand the worldview of his client, including her beliefs, values, biases, assumptions about human behavior and how those affect the lawyer-client relationship and the nature of the work that the lawyer and client are involved in.

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\textsuperscript{38} Press Release, United States Census Bureau, U.S. Census Bureau Projections Show A Slower Growing, Older, More Diverse Nation a Half Century from Now (Dec. 12, 2012), available at http://www.census.gov/newsroom/releases/archives/population/ch12-245.html. By 2060, Whites are projected to be 43% of the U.S. population; Latinos are projected to make up 31% of the population; African Americans are projected to make up 14.7% of the population; and Asians are projected to make up 8% of the population. Id.

\textsuperscript{39} Id.

\textsuperscript{40} As of early 2013, when we write this, four states (Hawaii, California, New Mexico and Texas) and the District of Columbia have minority populations that exceed 50% of the total population. Press Release, U.S. Census Bureau, Most Children Younger than Age 1 are Minorities (May 17, 2012), available at http://www.census.gov/newsroom/releases/archives/population/ch12-90.html.

Ch. 7

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Ch. 7

MUTLICULTURAL LAWYERING AND
CULTURAL COMPETENCE

213
going; and 3) is in the process of actively developing strategies and skills
for working with culturally diverse clients.42 Understanding our client's
worldview may mean understanding the communities in which she lives and
works.

We can try to understand the experience of our clients even when
they differ from us. Empathy, which we discussed in the Interviewing
chapter, helps us understand others.43 Psychologists Derald Sue and Da-
vid Sue differentiate between cognitive and affective empathy so that
while we may not have lived as a lifetime as a person of color, a woman, a
lesbian, gay, bisexual or transgender person, or a person with a disability,
we may acquire "practical knowledge concerning the scope and nature of
the client's cultural background, daily living experience, hopes, fears, and
aspirations."44 This cognitive empathy includes understanding the "wider
sociopolitical system with which minorities contend every day of their
lives."45 We think of cultural competence in lawyering as "the awareness,
knowledge and skills needed to function effectively in a pluralistic demo-
cratic society."46

Cultural competence entails awareness, attitude, knowledge and
skills.47 At the level of awareness, cultural competence requires that we
be aware of our own cultural heritage, be aware of our values and biases,
be comfortable with the differences that exist between us and our clients,
and value and respect those differences.48 As one anthropologist recogniz-
es, there is "a great distance between knowing that my gaze transforms
and becoming aware of the ways that my gaze transforms."49 Awareness
is the beginning but we must go further. At the level of knowledge, cul-
tural competence requires that we be knowledgeable and informed about
culturally diverse groups and the historical treatment of those groups;
and that we understand concepts of bias and prejudice at both the indi-
vidual and societal level. Finally, at the skills level, cultural competence
requires that we be able to communicate accurately, effectively and ap-
propriately with diverse clients.

42 SUE & SUE, supra note 20, at 48.
43 Psychologist Lillian Comas-Diaz refers to "cultural empathy" as the ability to connect with
the client's cultural orientations while being able to acknowledge similarities and differences.
LILLIAN COMAS-DIAZ, MULTICULTURAL CARE: A CLINICIAN'S GUIDE TO CULTURAL COMPETENCE 4,
140 (2012).
44 Id. at 48-49.
45 Id. at 49.
46 SUE & SUE, supra note 20, at 49 (citing Derald Wing Sue & Gina C. Torino, Racial Cul-
tural Competence: Awareness, Knowledge and Skills, in HANDBOOK OF MULTICULTURAL PSY-
CHOLOGY AND COUNSELING 3–18 (Robert T. Carter ed., 2005)).
47 COMAS-DIAZ, supra note 43, at 23. See also SUE & SUE, supra note 19, at 49–50; Jacobs,
supra note 1, at 409–10.
48 SUE & SUE, supra note 20, at 50.
49 Bryant & Koh Peters, supra note 30, at 47 (quoting RAYMONDE CARROLL, CULTURAL MIS-
UNDERSTANDINGS: THE FRENCH-AMERICAN EXPERIENCE 3 (1988)).
While we like others to see us as unique and complex, we sometimes view others as one dimensional, defining them by reference to their most visible characteristic. The more we recognize the complexity of human experience and identity, the more we are able to understand those individuals we perceive as different.\textsuperscript{50} Psychologist Pamela Hays has created a mnemonic ADDRESSING to understand the complexity of identity and "multiple memberships".\textsuperscript{51}

A = Age. What are the age-related issues and generational influences on this person? Children, adolescents and elders are minority in our culture.

D = Development Disability. What is this person's experience with developmental disability?

D = Disabilities acquired later in life. For both Ds, might she have a disability that is not immediately apparent? Might she have experienced the impact of disability as a caregiver for a child, parent or partner?

R = Religion. What is her religious upbringing and what are her current religious or spiritual beliefs and practices? How might those beliefs and practices influence the work you are to do together? The client might come from a religious minority culture.

E = Ethnic or racial identity. Does this person identify with a racial or ethnic minority? What might it mean to be a member of a racial/ethnic minority where she lives or works? We include skin color here as well.

S = Socioeconomic status. What is her current socioeconomic status defined by her occupation, income, education, marital status, gender, ethnicity, community and family income? Might this status be different from that of her parents? If she is an immigrant is her current status different from that before immigration?

S = Sexual orientation. What is her sexual orientation?

I = Indigenous heritage. Is she from an indigenous community in the U.S. or elsewhere? If she is an immigrant, is that part of her national identity?


\textsuperscript{51} Hays, supra note 50, at 7, 18.
N=National identity. Is she an immigrant, refugee, international student? What is her national identity and primary language? Does she have an accent?

G=Gender identity. What is her gender identity?

This framework can help us become aware of those aspects of our own and a client's multiple identities that might influence our relationship and life experiences. Not all these identities might be relevant for us or our client. In addition, we or our clients may have other identities.\textsuperscript{52}

Several commentators identify three important characteristics of cultural competence—humility, charity and veracity.\textsuperscript{53} Humility helps us to avoid judging others as less than or inferior to us.\textsuperscript{54} Humble lawyers are realistic about what they have to offer, aware of their own limitations (and the limitations of legal solutions) and are accepting of the contributions of others.\textsuperscript{55} Charity, defined as having compassion toward others, allows us to work with and appreciate people who challenge our beliefs and values. Veracity is the ability to see things as they are.\textsuperscript{56} Critical thinking, which can guide us toward truths, helps us to continually challenge our assumptions and helps us look for explanations that go beyond the obvious.\textsuperscript{57} Critical thinking allows us to identify and challenge assumptions, "examine contextual influences . . . and imagine and explore alternatives."\textsuperscript{58}

Before discussing practices for becoming better cross-cultural lawyers, we believe it is essential that we consider some barriers to understanding differences between us and our clients and the social implications of those differences. First, we explore social psychology ideas of how we categorize others whom we see as different from us. Second, and related to those categories we form, we discuss the social manifestations of that categorization. We begin discussing cognitive psychology concepts of prejudice and stereotyping and then discuss concepts of privilege.

\textsuperscript{52} These might include marital status, physical characteristics, role in family, birth order, or other characteristics. Bryant \& Koh Peters, supra note 30, at 48.

\textsuperscript{53} HAYS, supra note 50, at 21. Pamela Hays points out that these are virtues shared by the major religions as well as spiritual traditions. \textit{Id.}

\textsuperscript{54} See Marc Seville, Chinese Soup, Good Horses, and Other Narratives, in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER 284 (Society of American Law Teachers and Golden Gate University School of Law eds., 2011) (referring to Shauna Marshall's reflection that she needed to find humility by listening, observing and reading in order to gain cultural competence). \textit{See also Tremblay \& Wong, supra note 8, at 149. COMAS-DIAZ, supra note 43, at 8 (defining cultural humility as the "lifelong commitment to develop empowering relationships through self-evaluation and self-critique" (citations omitted)).}

\textsuperscript{55} HAYS, supra note 50, at 29.

\textsuperscript{56} \textit{Id.} at 21.

\textsuperscript{57} \textit{Id.} at 21, 29.

\textsuperscript{58} \textit{Id.} at 29 (citing STEPHEN D. BROOKFIELD, DEVELOPING CRITICAL THINKERS: CHALLENGING ADULTS TO EXPLORE ALTERNATIVE WAYS OF THINKING AND ACTING (1987)).
C. SOME BARRIERS TO BECOMING A CULTURALLY COMPETENT LAWYER

As with the process of becoming a better lawyer, we believe becoming a culturally competent lawyer is a lifetime process. Becoming a culturally competent lawyer is a developmental process of becoming a better communicator. It requires respect and curiosity, interest in learning about other people, their perspective and their life experiences, being open to learning (including from other disciplines) and effort. Becoming a culturally competent lawyer is an aspirational process rather than one that is achieved. This process requires more than having an open mind or genuinely believing we harbor no prejudice. Psychology teaches us that we all have work to do in this area.

Social psychologists have found that “the behavior of human beings is often guided by racial and other stereotypes of which they are completely unaware.” Those stereotypes begin with the individual’s tendency to create categories but are given meaning by the society’s construction of meaning, for example that of race. Those of us living in the U.S. “share a common historical and cultural heritage in which racism has played and still plays a dominant role.” In that sense, racial differences are “as much a reflection of our common culture as they are of the cultural differences among the various racial and ethnic” groups. We therefore share many ideas, attitudes and beliefs that attach significance to an individual’s race, which induce negative feelings and opinions about non-Whites, and about which we are unaware. A large part of our behavior is “influenced by unconscious racial motivation.” The human mind defends against this guilt by denying or refusing to recognize those ideas. As a result, the mind excludes this racism from our consciousness. The individual, therefore, is unaware of the “ubiquitous presence of a cultural stereotype.”

We introduced you to some cognitive psychology research in the Organizing Your Work, Counseling and Negotiation chapters. We will introduce you to other concepts of social psychology in the chapter on Working with Groups. We introduce you to other cognitive psychology concepts

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59 Sue & Sue, supra note 20, at 48.
62 Gudgin, supra note 14, at 38.
63 Lawrence, supra note 61, at 322. We discuss racism infra in Section II.D.
64 Id.
65 Id. at 323.
66 Id.
in this chapter as a starting point to talking about issues of prejudice. Social cognition theory informs our discussion by providing three important points. First, cognitive theory demonstrates that all people use categories “to simplify the task of perceiving, processing, and retaining information about people in memory.”

Categorizing objects and people is essential to normal cognitive functioning. Second, stereotypes bias our intergroup judgment and decision-making. Third, stereotypes are beyond the reach of the individual’s self-awareness so that we do not have access to our own cognitive processes. Cognitive bias may be both unconscious and unintentional. These implicit biases are not reflected in explicit self-reported measures.

As we discuss in the Negotiation chapter, the human brain creates categories in order to allow us to simplify the information we receive and act on that less-than-perfect information. We create these categories or schemas out of necessity, as a way to simplify the stimuli and data stream of information we have to process. In that sense categories are “guardians against complexity.” In order to categorize we must decide that a stimulus object is “both equivalent to other stimuli in the same category and different from stimulus objects not in that category.” It appears that we create a mental prototype of the “typical” category member. We seem to match the object that we perceive with the prototype for that category and determine the distance between the two. When we need to make a decision, a “salient aspect of that event or situation will activate a relevant schema.” Once activated, the “schema

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67 A number of law review articles that focus on constitutional equal protection, employment discrimination, and jury deliberation jurisprudence summarize the social psychology literature on implicit bias. For a listing of some of them, see Seville, supra note 54, at 295, n. 25. See also Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 HARV. L. REV. 1261, 1290–95 (2000).


69 Id.

70 Id.

71 Id.


73 Krieger, supra note 68, at 1188.

74 A schema is a “cognitive structure that represents knowledge about a concept or type of stimulus, including the attributes and the relations among those attributes.” Kang, supra note 72, at 1498 (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 88 (2d ed. 1991)).

75 Id. at 1498–99.

76 Krieger, supra note 68, at 1189.

77 Id.

78 Id. at 1189 (citing Eleanor Rosch, Principles of Categorization, in COGNITION AND CATEGORYIZATION 1, 35–38 (Eleanor Rosch & Barbara B. Floyd eds., 1978); Nancy Cantor & Walter Mischel, Prototypes in Person Perception, in 12 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 2, 28–31 (Leonard Berkowitz ed., 1979)).

79 Id.

80 Id. at 1190.
influences the interpretation, encoding, and organizing of incoming information. These schemas allow us to identify stimuli quickly, to fill in missing information and decide on a strategy for filling in information, solving a problem or reaching a goal. The structures of these categories, however, "bias what we see, how we interpret it, how we encode and store it in memory, and what we remember about it later." Social psychologists have also shown that individuals react to the concept of "groupness." When individuals are made to think that objects belong to different groups, they systematically exaggerate the variation between the objects from different groups. This behavior has been called the "bias of enhancement of contrast." Once people are divided into groups, "strong biases in their differences, evaluation, and reward allocation result." When the concept of "groupness" is introduced, we perceive members of our group as more similar to us and members of other groups as more different from us. We also perceive members of other groups as more like each other (an "undifferentiated mass") and the members of our group as less homogeneous. We are better able to remember undesirable behavior of members of the other group as opposed to similar behavior of members of our group. We also tend to attribute the failure of our group members to situational factors and the failures of members of the other group to dispositional factors. Social psychologists theorize that we tend to pay more attention to salient or distinctive stimulus objects than to those that are not salient or distinctive. Additionally, we recall visually encoded information more readily than verbally encoded infor-

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81 Id.
82 Id. (citing Shelley E. Taylor & Jennifer Crocker, Schematic Bases of Social Information Processing, in SOCIAL COGNITION: THE ONTARIO SYMPOSIUM 93–94 (Edward Tory Higgins, C. Peter Herman & Mark P. Zanna eds., 1981)).
83 Id.
84 Id. at 1186.
85 Id. at 1186.
86 Id. at 1187.
87 Id. at 1191. This happens even when the division into groups is done on a random or trivial basis.
88 Id.
89 Id. at 1192.
90 Id.
91 Id.
92 Id. at 1194. This explains why salient individuals are judged more harshly than non-salient individuals. In an experiment, Whites judged a solo Black participant in an otherwise all-White group in more extreme ways and perceived him more prominently in group discussions than when the group was more fully integrated. Id. at 1193. Black applicants to law school with strong credentials were judged more favorably than identical White applicants; while Black applicants with weak credentials were judged less favorably than identical White applicants. Id. at 1194.
Institutional racism, the practice of maintaining racial stratification through policies and procedures in organizations, is a significant factor in cultural stereotypes. This form of racism operates via systemic barriers and institutional policies that perpetuate inequities and disadvantages for racial minorities.

Society, however, provides us with a set of racial categories into which we map individuals according to the racial mapping. Once we assign a particular racial category to someone, that category has particular racial meanings. These racial meanings include thoughts or beliefs (such as generalizations about the person’s particular attributes) as well as emotions, feelings and evaluations (positive or negative; good or bad). While categories may happen in the individual mind, the way we categorize is not in our brain. It is the society that gives us the categories into which to put people. In that sense, prejudice and racism are societal diseases.

Cognitive psychology has shown that racial schemas regularly influence social interactions. These stereotypes are, however, "more easily activated in people who display more conscious prejudice." These racial schemas can be primed sometimes even by subliminal stimuli. One observer notes that the existence of such an automatic process "disturbs us because it questions our self-understanding as entirely rational, free choosing, self-legislating actors." We have no conscious awareness of these stereotypes. We may lack "introspective access to the racial meanings embedded within our racial schemas." These stereotypes are easy to maintain and overcoming them requires effort.

Using the Implicit Association Test, where participants make judgments rapidly about subjects of different races (and other categories),

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63 Id. at 1194. We are particularly sensitive to physical and visual cues. Kang, supra note 72, at 1503. We tend to "understand and process information about most categories not with reference to features, but by means of prototypes . . . or idealized cognitive models." Blasi, supra note 60, at 1255. Blasi uses the example of imagining a carpenter and when you have that image settled in your mind, describing the color of her hair. Id.

64 Tremblay & Weng, supra note 8, at 170.

65 Kang, supra note 72, at 1499.

66 Id.

67 Id. at 1500.


69 Blasi, supra note 60, at 1249 (citing Ziva Kunda, SOCIAL CONDITION 334 (1999)). “Words associated with the negative features of a stereotype will activate the stereotype in persons of both low and high prejudice,” yet positive or neutral words will activate the stereotype only in more prejudiced people. Id. at 1249–50.

100 Id.

101 Id. This stereotype activation takes place at the preconscious or subconscious level. Id. at 1252.

102 Id. at 1249. This process is totally opaque to the individual. Kang, supra note 72, at 1506–07.

103 Kang, supra note 72, at 1508. Psychologists found this by conducting tests involving speed. Id. at 1508–09. The Implicit Association Test (IAT) has become the "state-of-the-art measurement tool." Id. at 1509. You can take the IAT yourself at the Project Implicit website.
psychologists have "documented the implicit bias against numerous social categories." There is also "overwhelming evidence that implicit bias is disassociated from explicit bias measures" so that there is "a discrepancy between our explicit and implicit meanings." We may report positive attitudes toward Latinos in a survey, but the implicit bias study may show that we have negative attitudes toward Latinos. There is, however, a correlation between our explicit and implicit bias. Those who self-report (explicit) bias also show the highest implicit bias and vice versa. There is also evidence that implicit bias toward a category predicts discriminatory behavior. In some of these experiments the race of the person engaged in the behavior did not matter. The data reveal that racial minorities show both impulses—to favor their own group ("in-group") but also those on top of the racial hierarchy (Whites).

You might think that because biased behavior is automatic it cannot be altered. But the evidence supports the contrary conclusion. In order to counter the effects of this automatic behavior we must first accept the existence of the problem. Some studies find that exposure to "positive" or "counterstereotypic" exemplars of subordinated groups can decrease implicit bias. Studies also show that we can behave in substantially non-prejudiced ways if we are so motivated. If in fact our values include self-awareness and treatment people as individuals, then increasing self-awareness should decrease our application of stereotypes.

What does all this social psychology research tell us? First, that there is unlikely to be such a thing as a non-racialized setting in the United States. Second, race matters, especially in settings where significant issues, problems, concepts, or categories are connected to race.

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105 Kang, supra note 72, at 1512.
106 Id. at 1512-13.
107 Id. at 1514.
108 Id. See id. at 1514-28 for a discussion of an experiment using employment interviews and shooting. Nonverbal behaviors thus "leak out from our implicit bias." Id. at 1524. The "unfriendly nonverbal behavior" can cause retaliatory responses as well from target group members thus creating a vicious cycle.
109 Id. at 1527.
110 Id. at 1534. African-Americans on average exhibited no implicit in-group favoritism. Latinos in the U.S. showed no in-group favoritism regardless of whether the person primed was light or dark skinned. Both light-skinned and dark-skinned Latinos favored light-skinned Latinos, though none of this bias manifested itself in explicit surveys. Id. at 1534 n. 230. Whites show substantial implicit in-group favoritism. Id.
111 Id. at 1529.
112 Id. at 1557, 1561.
113 Blasi, supra note 60, at 1276 (citing Samuel R. Sommers & Phoebe C. Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courthouse, 7 PSYCHOL. PUB. POL'y & L. 201, 220 (2001)).
114 Id. at 1277.
115 Id.
116 Id.
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Racial minorities and others whom we tend to stereotype “suffer silent consequences even when, and sometimes ... especially when, group identity is unmentioned or unmentionable.” 117 Third, we need to accept that there are differences in what stereotypes mean in our society. We need to recognize, as Gary Blasi points out, that the consequences are far different for being subjected to a “While male law professor” stereotype and a “young Black male” stereotype. 118 Fourth, we need to accept that stereotyping happens. Denying it “can lead us to continue acting in ways that perpetuate division and oppression.” 119 We can start by accepting and learning more about prejudice in our society, how it is that society gives us the categories into which we place people.

D. THE SOCIETAL ASPECTS OF PREJUDICE—UNDERSTANDING POWER AND OPPRESSION

We move from talking about individual bias to discussing how this bias plays out in society. For some of you this will be the most difficult section of the chapter. For others of you the absence of this section would be difficult. We may not see some of the points in this section because of our perspective, because of where we stand in our own culture. We may not want to acknowledge how a society with such laudable ideals and that has accomplished much good can fall short of those ideas. It may be too painful to discuss these issues or to recognize that each of us plays a part in the subordination and mistreatment of others. 120 Or we may feel a sense of helplessness and inability to change what seems inevitable. Regardless, we think racism and other forms of subordination is the reality for many people living in the U.S., including some of your clients. We focus on racism because it plays such a central role in the history of the U.S. 121 It also provides an explanation for the issues facing the communities in which some of your clients may work. 122

Implicit bias research demonstrates the “prevalence of forms of bias that motivate and justify behavior that creates and perpetuates racial hierarchy and other conditions of dominance and subordination.” 123 While it is important to understand individual bias, it is also important to understand how our society (“culture”) transmits prejudice to all those living within it and how that prejudice affects each of us but especially those

117 Id. at 1274.
118 Id. at 1276.
119 Id.
120 Coppis Hartley & Petrucci, supra note 35, at 164. See also HAYS, supra note 50, at 32–33.
121 See supra Section II.C.
123 Lawrence, supra note 98, at 965.
SEEING THROUGH COLORBLINDNESS: IMPLICIT BIAS AND THE LAW

Jerry Kang *

Kristin Lane **

Once upon a time, the central civil rights questions were indisputably normative. What did “equal justice under law” require? Did it, for example, permit segregation, or was separate never equal? This is no longer the case. Today, the central civil rights questions of our time turn also on the underlying empirics. In a post–civil rights era, in what some people exuberantly embrace as post-racial, many assume that we already live in a colorblind society. Is this in fact the case? Recent findings about implicit bias from mind scientists sharply suggest otherwise. This Article summarizes the empirical evidence that rejects facile claims of perceptual, cognitive, and behavioral colorblindness. It then calls on the law to take a “behavioral realist” account of these findings, and maps systematically how it might do so in sensible, nonhysterical, and evidence-based ways. Recognizing that this call may be politically naive, the Article examines and answers three objections, sounding in “junk science” backlash, “hardwired” resignation, and “rational” justification.

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INTRODUCTION

We start with three fictional stories.

Juan’s Interview. Juan was desperate for the job. But he didn’t get it. Crushed, Juan grabs a beer with his friend. Juan groused how hard he’s hustled all his life, but that somehow things always seem stacked against him. He says, “From the moment that interview started, it wasn’t gonna happen. That guy just didn’t like the look of me.” His friend says, “Stop whining . . . there were lots of applicants. Just the luck of the draw. You’ll get the next one.” Juan shakes his head and says, “You just don’t get it.” Juan is a Chicano.

Skip’s Encounter. After a long flight, Skip finally arrives home late at night, but his front door is jammed. With the help of his driver, he jimmies it open. Just as he lays down his bags, exhausted, he notices a police officer, who asks him to step outside. It’s his home, and Skip yells out that he’s a professor at the
nearby campus, and that everything’s fine. The officer repeats, more sternly, to step outside, and moves his hand closer to his revolver. The officer expects deference. Skip is African American, and he is sick and tired. He wonders why he’s being scrutinized. Disgusted, he reaches quickly for his wallet to offer ID, and yells, “Take it!” The cop flinches and draws his weapon. Skip’s face turns pale, as he stares down the barrel of a gun. He stammers slowly, “it’s my faculty ID . . . .”

Grace’s Hire. The faculty supporting Grace’s candidacy make their final pitch of the hiring meeting. They emphasize that they live in Southern California with a high Asian American population, but don’t have a single Asian American on the faculty. They say that Grace is eminently qualified. They say that she would also be a role model for minorities and women. Some add that she would also counter the stereotypes of Asian women: “She’s eloquent, charismatic, a firecracker! Would do us and our students good.” Those faculty opposed say that Grace is good but that Ben is even better. More important, race should have nothing to do with academic merit, especially in a field like corporate law. It’s wrong, unnecessary for Asians, and probably illegal. Ben happens to be White and liberal, like most of the faculty. He gets hired; Grace does not.

How do you respond to these stories? No doubt your reactions turn on your values. For example, is colorblindness a moral or legal imperative—even in Grace’s Hire? But your reactions also depend crucially on the facts. What really happened in Juan’s interview? Who’s really to blame in Skip’s testy encounter? Would Grace’s hire really “do us good,” or is that just wishful thinking? Put another way, does race really matter? Even when we put aside difficult philosophical questions about equality, justice, and fairness, we still run into tough empirical questions of whether we are, in fact, “colorblind.”

Thankfully, there has been a recent explosion of scientific knowledge on this front. At the nexus of social psychology, cognitive psychology, and cognitive neuroscience has emerged a new body of science called “implicit social cognition” (ISC). This field focuses on mental processes that affect social judgments but operate without conscious awareness or conscious control. These implicit thoughts and feelings leak into everyday behaviors such as whom we befriend, whose work we value, and whom we favor—notwithstanding our

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1. To repeat, this is fiction. Most important, when Professor Skip Gates was arrested at his home, the arresting officer did not draw his gun. For a journalistic account, see Abby Goodnough, Harvard Professor Jailed; Officer Is Accused of Bias, N.Y. TIMES, July 21, 2009, at A13.
obliviousness to any such influence. These discoveries, disseminated from hundreds of research programs, have provoked surprise, fascination, and even anger.

As behavioral realists, we believe such findings should have consequences. Behavioral realism insists that the law account for the most accurate model of human thought, decisionmaking, and action provided by the sciences.\(^3\) Theories and data from the mind sciences are sharpening that model, and as a new scientific consensus emerges, the law should respond. Either the law should change to reflect that more accurate model, or it should provide reasons why it cannot or will not do so.

Part I introduces the science of implicit social cognition and makes the scientific case against colorblindness: We are not perceptually, cognitively, or behaviorally colorblind.\(^4\) With this background, Part II articulates a call for behavioral realism and maps out how social and legal institutions might respond to the new discoveries. Our goal here is not to argue in painstaking detail in favor of specific legal or policy reforms; instead, our goal is to schematize conceptually the various ways that the law could incorporate the new science. Part III answers three predictable objections: “junk science” backlash, “hardwired” resignation, and “rational” justification. Throughout the Article, we revisit Juan’s Interview, Skip’s Encounter, and Grace’s Hire, to see how the mind sciences simultaneously complicate and clarify our simplistic presumptions about colorblindness.

I. SEEING THROUGH COLORBLINDNESS

A. The Psychological Context of Colorblindness

Juan’s interviewer believes that he is colorblind. Skip’s arresting officer believes that he is colorblind. The faculty members who voted for Ben and not Grace believe that they are colorblind. But how well founded are such assumptions?

As a threshold matter, we must unpack the term “colorblind.” To be perceptually colorblind is not to even see race in the way comedian Stephen Colbert insists he does not.\(^5\) There is, however, simply too much evidence of

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\(^1\) See generally infra Part II.A.

\(^2\) Although the same underlying cognitive and social processes apply to other social categories such as gender, nationality, and age, our focus is on race. In other words, the more general phenomenon of interest is category blindness or category agnosticism. But we stick with the more familiar example of colorblindness.

\(^3\) The character Stephen Colbert of The Colbert Report regularly reminds his viewers of his perceptual colorblindness. He knows he’s White only because other people tell him so. This seems to be
automatic classification of individuals into social categories, including race, to maintain this position. To the contrary, race and ethnicity are highly salient and chronically accessible categories. Thus, when people claim colorblindness, they cannot be claiming perceptual colorblindness; instead, they are likely claiming to be cognitively colorblind. In other words, they have no (meaningfully) different attitudes or stereotypes between any two racial categories (e.g., Black and White).

We purposefully distinguish attitude and stereotype. For social psychologists, an attitude is “an association between a given object and a given evaluative category.” Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. For example, “I dislike Blacks” is an example of an attitude, consciously reported. By contrast, a stereotype does not emphasize an evaluative association as much as a more specific attribute, such as “Latinos are undocumented.”

These social cognitions, whether they be attitudes or stereotypes, can be either implicit or explicit. Similar to its usage in cognitive psychology, the term “implicit” emphasizes our unawareness of having a particular thought or feeling. Further, we might even reject that thought or feeling as inaccurate or inappropriate upon self-reflection. By contrast, “explicit” emphasizes awareness of having a thought or feeling; accordingly, we are able to articulate having such

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6. Race (and other social group memberships such as age and sex) appears to be encoded with no substantial effort on the perceiver’s part. See Shelley E. Taylor et al., Categorical and Contextual Bases of Person Memory and Stereotyping, 36 J. PERSONALITY & SOC. PSYCHOL. 778, 782–83 (1978) (showing that race is an organizing principle used in social interactions). Indeed, the very act of trying to be colorblind and ignore race seems to deplete cognitive resources in a way that can actually impair interracial interactions. Evan P. Apfelbaum et al., Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction, 95 J. PERSONALITY & SOC. PSYCHOL. 918, 924–25 (2008) (showing that people who tried to avoid thinking about race performed worse on a task of cognitive control following an interracial interaction).

7. A third way to understand colorblindness is in terms of behavioral colorblindness. We discuss that version infra Part I.B.2.


9. A negative attitude is often called prejudice.

10. Of course, a particular stereotype may support an overall evaluative attitude. If one dislikes undocumented people and one associates Latinos with undocumented status, then this attribute will likely contribute to a negative attitude toward Latinos.

11. Anthony G. Greenwald & Mahzarin R. Banaji, Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes, 102 PSYCHOL. REV. 4, 8 (1995) (“Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.”). Regarding the “inaccurately identified” qualification, the authors explain that “a student may be aware of having been graded highly in a course, but not suspect that this experience influences responses to the course’s end-of-term course evaluation survey.” Id. at 8 n.2.
cognitions. Typically, although not necessarily, we agree with and endorse our explicit thoughts and feelings.

We have attitudes and stereotypes, both explicit and implicit, about objects, like beef, bricks, and broccoli. For example, we may associate bricks with houses even though most houses aren’t made of bricks. In this way, we have a stereotype about houses, which isn’t controversial. But when applied to humans, these basic concepts have been sharply protested. We understand that it is more unsettling to hold two separate (and often divergent) attitudes toward a social group, such as Asians, as compared to mere objects, such as beef or broccoli. But our anxiety says nothing about whether differential implicit social cognitions in fact exist regarding Whites versus Asians.

What legal and policy analysts must appreciate is that the findings in nonsocial and social domains rest on identical scientific foundations.

So, are folks in fact cognitively colorblind? To answer this question, we could simply ask people like Juan’s interviewer for their honest self-reports about their attitudes and stereotypes. But this methodology would be naive for two reasons. First, respondents engage in impression management and provide what they feel are politically correct answers. Second, introspection is strikingly undependable. As Richard Nisbett and Timothy Wilson reported over three decades ago, “[t]he accuracy of subjective reports is so poor as to suggest that any introspective access that may exist is not sufficient to produce generally correct or reliable reports.”

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12. For instance, Hal Arkes and Philip Tetlock suggest that a mere mental association should not be portrayed as an automatic attitude because doing so “converts an association one has to an attitude one endorses at some level.” Hal R. Arkes & Philip E. Tetlock, Attributions of Implicit Prejudice, or “Would Jesse Jackson ‘Fail’ the Implicit Association Test?”, 15 PSYCHOLOGICAL INQUIRY 257, 268 (2004) (emphasis added). But numerous mental constructs, such as attention, perception, and memory all have explicit and implicit counterparts. We do not reject the concept of implicit memory simply because the memory cannot be consciously recalled. Accordingly, we see no reason to carve out attitudes and stereotypes for disparate treatment.

13. We do have implicit biases against Asians, and these biases do predict behavior, such as our evaluations of their lawyering. See Jerry Kang et al., Are Ideal Litigators White? Measuring the Myth of Colorblindness, 7 J. EMPIRICAL LEGAL STUD. (forthcoming Dec. 2010).


15. Even without any conscious strategy to deceive, respondents might alter responses to align with perceived questioner expectations. Cf. Stacey Sinclair et al., Social Tuning of Automatic Racial Attitudes: The Role of Affiliative Motivation, 89 J. PERSONALITY & SOC. PSYCHOL. 583, 590 (2005) (finding that “automatic prejudice shifted toward the ostensible attitudes of a social actor to the degree that individuals were motivated to get along with him or her”).

frightening to believe that one has no more certain knowledge of the working of one's own mind than would an outsider with intimate knowledge of one's history and of the stimuli present at the time the cognitive process occurred.\textsuperscript{17}

To overcome these difficulties, cognitive and social psychologists have developed instruments to measure cognitions without asking for self-reports.\textsuperscript{18} Some tests use linguistic cues;\textsuperscript{19} others use physiological instruments, for instance, by measuring cardiovascular responses,\textsuperscript{20} micro-facial movements,\textsuperscript{21} or neurological activity.\textsuperscript{22} But the largest class of measures relies on reaction times when completing various tasks. The basic assumption of these reaction-time tests is that mentally simple tasks take a (relatively) short time to complete, whereas mentally difficult tasks take a (relatively) long time to complete. For instance, any two concepts that are associated together in our minds will be easier to pair together in a timed task. After hearing the word “doctor,” we are quicker to identify “nurse” as a word than we are to identify “purse” as a word. By measuring the speeds of activations, we can infer their strength of association—in this example, concluding that there is a relatively stronger association between “doctor” and “nurse” than between “doctor” and “purse.” As simplistic as this approach sounds, reaction-time instruments\textsuperscript{23} have produced the most reliable measures for implicit social cognitions.\textsuperscript{24}

\begin{footnotes}
23. There are many such instruments. One commonly used reaction-time measure is semantic priming, which was initially designed to measure memory association strengths. As explained, people respond more quickly to the word “nurse” after having recently been exposed to the word “doctor.” See David E. Meyer & Roger W. Schvaneveldt, Facilitation in Recognizing Pairs of Words: Evidence of a Dependence Between Retrieval Operations, 90 J. EXPERIMENTAL PSYCHOL. 228 (1971). This design was later modified to study evaluative priming—the extent to which a concept is associated with “good” and “bad.” See Russell H. Fazio et al., On the Automatic Activation of Attitudes, 50 J. PERSONALITY & SOC. PSYCHOL. 229, 229 (1986) [hereinafter Fazio, Automatic Activation]. In this measure, pairs of items
Among these instruments, the most widely used is the Implicit Association Test (IAT). The IAT requires participants to rapidly classify individual stimuli into one of four distinct categories using only two responses (for example, participants might respond using only the “E” key on the left side of a computer keyboard, or “I” on the right side). For instance, in a race attitude IAT, there are two social categories, EUROPEAN AMERICAN and ASIAN AMERICAN, and two attitudinal categories, GOOD and BAD. EUROPEAN AMERICAN and ASIAN AMERICAN might be represented by black-and-white photographs of the faces of White and Asian people. GOOD and BAD could be represented by words that are easily identified as being linked to a positive or negative effect, such as Joy or Agony. A person with a negative implicit attitude toward Asian Americans would be expected to go more quickly when ASIAN and BAD share one key, and EUROPEAN AMERICAN and GOOD the other, than when the pairings of GOOD appear serially on a computer screen, and participants are asked to ignore the first item and respond to the second one. For example, in a task that assesses automatic attitudes, participants must press computer keys to categorize a word as either “good” or “bad.” See Russell H. Fazio et al., Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?, 69 J. PERSONALITY & SOC. PSYCHOL. 1013, 1015–16 (1995) (describing the first adaptation of the evaluative priming procedure to measure automatic racial attitudes) [hereinafter Fazio, Variability]. Each word is preceded by a brief picture of, say, pizza or vomit. After seeing the vomit (compared to when they saw the pizza), people were slower to respond to good words such as “happy” or “sunshine” and faster to respond to bad words such as “awful” or “terrible.” The inference is that, on average, the vomit activated negativity more than did the pizza. Interestingly, we can switch from pizza and vomit to pictures of Whites and African Americans and see similar results. See id. at 1013.

24. See supra note 18.

25. Seminal work in this domain was performed by Russell Fazio, who explored how priming could help measure automatic attitudes and beliefs. See Bernd Wittenbrink, Measuring Attitudes Through Priming, in IMPLICIT MEASURES OF ATTITUDES 17 (Bernd Wittenbrink & Norbert Schwarz eds., 2007). Newer tasks, such as the Go/No-Go Association Task, see Brian A. Nosek & Mahzarin R. Banaji, The Go/No-Go Association Task, 19 SOC. COGNITION 625, 626–31 (2001), the Evaluative Movement Assessment, see C. Miguel Brendl et al., Indirectly Measuring Evaluations of Several Attitude Objects in Relation to a Neutral Reference Point, 41 J. EXPERIMENTAL SOC. PSYCHOL. 346, 347 (2005), the extrinsic affective Simon task, see Jan De Houwer, The Extrinsic Affective Simon Task, 50 EXPERIMENTAL PSYCHOL. 77, 79–80 (2003), and the affect misattribution procedure, see B. Keith Payne, An Inkblot for Attitudes: Affect Misattribution as Implicit Measurement, 89 J. PERSONALITY & SOC. PSYCHOL. 277, 277–79 (2005), have been used, and likely more will be developed. See Fazio, Variability, supra note 23; Fazio, Automatic Activation, supra note 23, at 1015–16.


and BAD are switched. The time difference, which is recalibrated into what is known as the IAT D score, is interpreted as reflecting an implicit attitude.

B. The Implicit Social Cognitive Challenge

1. Against Cognitive Colorblindness

For brevity’s sake, we focus on the Implicit Association Test (IAT), although other reaction-time instruments have produced consistent findings. Since 1998 when the IAT was officially introduced, hundreds of peer-reviewed scientific publications have produced largely consistent results. Implicit biases—by which we mean implicit attitudes and stereotypes—are both pervasive (most individuals show evidence of some biases), and large in magnitude, statistically speaking. In other words, we are not, on average or generally, cognitively colorblind.

Clear evidence of the pervasiveness of implicit bias comes from Project Implicit, a research website operated by Harvard University, Washington University, and the University of Virginia. At Project Implicit, visitors can try IATs that examine implicit attitudes and stereotypes on topics ranging across race, gender, age, politics, region, religion, and even consumer brands. With over seven million completed tests, Project Implicit comprises the largest available repository of implicit social cognition data.

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29. See Anthony G. Greenwald et al., Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm, 85 J. PERSONALITY & SOC. PSYCHOL. 200–01 (2003) (providing an improved IAT scoring method). There is an implicit attitudinal preference in favor of White males over East Asian males. See Kang et al., supra note 13, at ¶ 57 (finding a negative implicit attitude against Asian Americans) (IAT D=0.62, t(67)=13.31, p<0.001).

30. A PsycINFO database search for “implicit association test” appearing anywhere in the results, conducted in September 2010, yielded 2613 published works, with 2039 of them in peer-reviewed journals. See screen captures (on file with author) (performed on Sept. 9, 2010, 3:27 PM).


32. Because data are gathered from volunteers, they do not reflect a random sample of the population. However, this sample is more demographically representative than the narrow pool typically used in economics and psychology experiments (often college student volunteers). In any event, data from a web-based sample (from volunteers across the globe) broadly converge with laboratory data. Additionally, the enormous size of the data repository from the internet allows questions to be answered with confidence that is not otherwise possible. For a general discussion about the benefits and costs of using internet data, see Nosek et al., supra note 27, at 102–04.
Table 1 provides results from the seventeen IATs available at Project Implicit. Most participants demonstrated implicit attitudes in favor of one social group over another, away from the neutral position of no bias. Notwithstanding protestations to the contrary, people are generally not “color” blind to race, gender, religion, social class, or other demographic characteristics. More important, participants systematically preferred socially privileged groups: YOUNG over OLD, WHITE over BLACK, LIGHT SKINNED over DARK SKINNED, OTHER PEOPLES over ARAB-MUSLIM, ABLED over DISABLED, THIN over OBESE, and STRAIGHT over GAY.

### Table 1

<table>
<thead>
<tr>
<th>Task</th>
<th>Positive values indicate</th>
<th>IAT</th>
<th>Self-Report</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>Mean</td>
<td>Std. dev'n</td>
</tr>
<tr>
<td>Age attitude</td>
<td>Preference for YOUNG PEOPLE compared to OLD PEOPLE</td>
<td>351,204</td>
<td>0.49</td>
</tr>
<tr>
<td>Race attitude</td>
<td>Preference for WHITE PEOPLE compared to BLACK PEOPLE</td>
<td>732,881</td>
<td>0.37</td>
</tr>
<tr>
<td>Skin-tone attitude</td>
<td>Preference for LIGHT-SKIN PEOPLE compared to DARK-SKIN PEOPLE</td>
<td>122,988</td>
<td>0.30</td>
</tr>
<tr>
<td>Child-race attitude</td>
<td>Preference for WHITE CHILDREN compared to BLACK CHILDREN</td>
<td>28,816</td>
<td>0.33</td>
</tr>
<tr>
<td>Arab-Muslim attitude</td>
<td>Preference for OTHER PEOPLE compared to ARAB-MUSLIMS</td>
<td>77,254</td>
<td>0.14</td>
</tr>
<tr>
<td>Judaism attitude</td>
<td>Preference for OTHER RELIGIONS compared to JUDAISM</td>
<td>66,092</td>
<td>–0.15</td>
</tr>
<tr>
<td>Disability attitude</td>
<td>Preference for ABLED PEOPLE compared to DISABLED PEOPLE</td>
<td>38,544</td>
<td>0.45</td>
</tr>
</tbody>
</table>

33. See Brian A. Nosek et al., Pervasiveness and Correlates of Implicit Attitudes and Stereotypes, 18 EUR. REV. SOC. PSYCHOL. 1, 3–4 (2007).
34. See id. at 11.
35. Id. at 36 (adapted from tbl.1 (pp. 38–39) and tbl.2 (p. 46)). N=number of completed IATs. IAT means are D scores as calculated per the description in Greenwald et al., supra note 29. Explicit means represent the mean for a subset of questions on which participants reported their preferences or stereotypes; d represents Cohen’s d, a standardized unit of the size of a statistical effect. By convention, 0.20, 0.50, and 0.80 represent small, medium, and large effect sizes, respectively. Jacob Cohen, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES (2d ed. 1988). The means for self-reported attitudes or stereotypes are for a selected item or comparison of items.
TABLE 1 (Continued)

<table>
<thead>
<tr>
<th>Task</th>
<th>Positive values indicate</th>
<th>IAT</th>
<th>Self-Report</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>N</td>
<td>Mean</td>
</tr>
<tr>
<td>Sexuality attitude</td>
<td>Preference for STRAIGHT PEOPLE compared to GAY PEOPLE</td>
<td>269,683</td>
<td>0.35</td>
</tr>
<tr>
<td>Weight attitude</td>
<td>Preference for THIN PEOPLE compared to FAT PEOPLE</td>
<td>199,329</td>
<td>0.35</td>
</tr>
<tr>
<td>Race-Weapons stereotype</td>
<td>Stronger BLACK=Weapons, WHITE=Harmless objects associations than the reverse</td>
<td>85,742</td>
<td>0.37</td>
</tr>
<tr>
<td>American-Native stereotype</td>
<td>Stronger WHITE AMERICAN=American, NATIVE AMERICAN=Foreign associations than the reverse</td>
<td>44,878</td>
<td>0.23</td>
</tr>
<tr>
<td>American-Asian stereotype</td>
<td>Stronger EUROPEAN AMERICAN=American, ASIAN AMERICAN=Foreign associations than the reverse</td>
<td>57,569</td>
<td>0.26</td>
</tr>
<tr>
<td>Gender-Science stereotype</td>
<td>Stronger MALE=Science, FEMALE=Humanities associations than the reverse</td>
<td>299,298</td>
<td>0.37</td>
</tr>
<tr>
<td>Gender-Career stereotype</td>
<td>Stronger MALE=Career, FEMALE=Family associations than the reverse</td>
<td>83,084</td>
<td>0.39</td>
</tr>
<tr>
<td>Presidential attitude</td>
<td>Preference for BUSH compared to OTHER US PRESIDENTS</td>
<td>68,123</td>
<td>–0.07</td>
</tr>
<tr>
<td>Election 2004 attitude</td>
<td>Preference for BUSH compared to KERRY</td>
<td>22,904</td>
<td>–0.14</td>
</tr>
<tr>
<td>Election 2000 attitude</td>
<td>Preference for BUSH compared to GORE</td>
<td>27,146</td>
<td>–0.09</td>
</tr>
</tbody>
</table>
These hierarchy-driven biases sometimes counter expected ingroup favoritism—our tendency to favor the groups we belong to. Accordingly, those who belong to social groups deemed to be “good” (e.g., the young, European Americans, straight people) show strong preference for their own group. On the other hand, those who come from groups that the culture assigns as “bad” (e.g., the elderly, African Americans, gay people) do not show strong ingroup preference. Often their data show no ingroup preference at all and sometimes even tilt in the opposite direction. In laboratory studies, we see similar findings for participants who belong to lower-status social groups marked by weight, age, sexual orientation, socioeconomic class, university status (i.e. students at lower-ranked universities), and college dorm status (i.e. students at less popular dorms). In other words, on implicit measures, the overweight, poor, and those associated with less-valued institutions all showed weaker preference for their own group.

If we shift focus away from implicit attitudes to implicit stereotypes, the question changes from liking or disliking to whether some social category is
linked to some attribute. For instance, the question isn’t whether one likes or
dislikes men versus women (an attitude);\footnote{In an important counterexample of ingroup favoritism, “men are less likely than women to show automatic ingroup bias (i.e., own gender preference).” Laurie A. Rudman & Stephanie A. Goodwin, \textit{Gender Differences in Automatic In-Group Bias: Why Do Women Like Women More Than Men Like Men?}, \textit{87 J. PERSONALITY & SOC. PSYCHOL.} \textbf{494}, \textbf{494} (2004). A positive attitude toward women doesn’t say anything about whether we stereotype women.} instead, the question becomes
whether men are more associated with attributes such as tall, career, or
mathematics, whereas women are more associated with short, family, or arts.
Again, the data show that implicit stereotypes are pervasive and robust. For
instance, most participants (72 percent) associated the concepts \textsc{male} with \textsc{science} and \textsc{female} with \textsc{humanities}.\footnote{Nosek et al., \textit{supra} note 33, at 21.} Similarly, participants found it easier
to categorize White faces, rather than Asian American or Native American
faces, with \textsc{american}, reflecting an implicit stereotype that “American = White.”\footnote{See Thierry Devos & Mahzarin R. Banaji, \textit{American = White?}, \textit{88 J. PERSONALITY & SOC. PSYCHOL.} \textbf{447}, \textbf{452–53}, \textbf{457} (2005).} Regardless of what might be the case on the explicit level, on the
implicit level, we are not cognitively colorblind.

But what if these measures are a horrible technical mistake caused by
instrumentation or mathematical error? Maybe we are colorblind after all, and
the machines simply got us wrong. Good scientists instinctively respond to any
new measurement device with skepticism, and reaction-time measures such as
the IAT have been no exception.\footnote{To keep our discussion manageable, we again focus mostly on a single instrument, the IAT, although similar challenges and responses can be made with regard to other measurement devices, ranging from the neurophysiologic to other reaction-time measures.} In particular, scientists have carefully
examined both its reliability\footnote{By reliability, scientists mean that the instrument generates sufficiently reproducible measures over time. For example, a bathroom scale that gave radically different numbers each time you stepped on it might be insufficiently reliable for someone trying to lose five pounds.} and its validity.\footnote{By validity, scientists mean various things, among them statistical conclusion validity (“Did you run the statistics correctly?”), internal validity (“For any causal claims, are you sure there are no confounds?”), and construct validity (“Are you sure you're actually measuring what you think you're measuring?”).} After a decade of research, we believe that the IAT has demonstrated enough reliability and validity that total
denial is implausible.

As for reliability, across twenty studies, the average (and median) correlation between a person’s IAT score at two different times was 0.50,\footnote{See Lane et al., \textit{supra} note 28, at 70 (aggregating test-retest reliabilities across twenty such administrations).} which is a
respectable psychometric measure.\footnote{This result means that IAT scores at two time points share approximately 25 percent of their variance (0.50-squared). A person’s score fluctuates around some mean. Pearson’s \(r\), a correlation coefficient, is always a number ranging from \(-1.0\) to 1.0, which quantifies the strength of the linear} Because of the moderate reliability, nearly
all scientists have discouraged using the IAT in high-stakes individual selection contexts, such as judicial nominations. But this level of reliability is perfectly adequate for the IAT's efficacy as a research tool because we can aggregate across people to discern general patterns between mental constructs and behavior.

As for validity, questions about statistical conclusion validity have been addressed. So have potential confounds that would undermine internal validity, including selection, familiarity of the stimuli, the order in which the relationship between two variables (in this case, IAT scores at two time points). Each correlation coefficient provides information about the direction (by the correlation's sign) and strength (by the correlation's magnitude) of the relationship between the two variables. For explanations of the statistical concepts, see Alan Agresti & Barbara Finlay, Statistical Methods for the Social Sciences (2d ed. 1986). By squaring the $r$, we get the percentage of variance explained, which reveals the extent to which differences among people in a population can be attributed to a single variable. In this example, we see that $r^2=0.25$. This value means that we can account for 25 percent of the variability in one of a person's IAT scores by using the score from the other time point as a linear predictor. To offer another example, if we knew that the correlation between a father's height and a child's height was 0.70 (this number is illustrative for this purpose), when looking at a group of people—some short, some average, some tall—49 percent ($=0.7^2 = 0.49$) of the differences in height among them could be accounted for by knowing their fathers' heights. (Notably, more than half of the variation in heights among them would be due to other factors, such as diet, mother's height, other genetic influences, and luck.).

50. See Shankar Vedantam, See No Bias, WASH. POST, Jan. 23, 2005, at W12 (reporting that Mahzarin Banaji and her colleagues “will testify in court against any attempt to use the test to identify biased individuals”).

51. One final counterintuitive point: Lower reliability levels (which reflect added noise) result in underestimation of causal relationships; so, to the extent that our analysis errs, it does so by understating the impact of implicit bias. See C. Spearman, The Proof and Measurement of Association Between Two Things, 15 AM. J. PSYCHOL. 72 (1904).

52. Statistical conclusion validity asks whether the numerical scores generated by instruments, such as the IAT, and any correlations have been analyzed correctly. For example, Blanton and Jaccard have questioned the meaningfulness of the IAT's scale and challenged whether the IAT is a “ratio” scale; that is, whether a zero on the IAT reflects absence of bias. See Hart Blanton & James Jaccard, Arbitrary Metrics in Psychology, 61 AM. PSYCHOLOGIST 27, 33–34 (2006). This issue is hardly specific to the IAT. Unlike money in our pockets that dwindles down to nothing, it is extraordinarily difficult to determine when there is a total lack of a psychological trait such as self-esteem, happiness, or racial preference. For a response, see Anthony G. Greenwald et al., Consequential Validity of the Implicit Association Test: Comment on Blanton and Jaccard, 61 AM. PSYCHOLOGIST 56, 58–59 (2006) (noting that theories that predict multiplicative balanced relationships among cognitions (e.g., If I am an American and I am good, then Americans must be good) have been borne out by data and showing that the zero point on a BUSH-KERRY IAT corresponded to the zero point on the explicit measure, suggesting that both measures acted as ratio scales).

53. See, e.g., Jason P. Mitchell et al., Contextual Variations in Implicit Evaluation, 132 J. EXPERIMENTAL PSYCHOL.: GEN. 455, 467–68 (2003) (finding that when items changed the categories' construal, implicit biases were diminished). However, analyses of large web-based datasets suggest that unless items change the construal of the category (i.e., the use of Kobe Bryant, Barry Bonds, and Ronde Barber to represent the category “Black” could create the category “Athlete”), differences among them do not have much influence on IAT scores. Brian A. Nosek et al., Understanding and Using the Implicit Association Test II: Method Variables and Construct Validity, 31 PERSONALITY & SOC. PSYCHOL. BULL. 166, 170–71 (2005).

54. See Nilanjana Dasgupta et al., The First Ontological Challenge to the IAT: Attitude or Mere Familiarity?, 14 PSYCHOL. INQUIRY 238, 239–42 (2003). Dasgupta et al. argued that three lines of evidence
combined tasks are completed, previous experience with the IAT, inter-trial interval duration, assignment of categories to a right or left key, right- or left-handedness of the participant, cognitive fluency of the participant, and fakeability. Finally, there are answers to construct validity challenges have “decisively laid the familiarity explanation to rest” at the micro level (the extent to which some of the items in the categories are more or less known to participants). Id. at 241. First, controlling for familiarity did not influence results. Second, implicit preference for Whites emerged even when the task used pictures of people unknown to participants. Finally, preference for Whites over Blacks emerges even when the stimuli are carefully matched on frequency according to census data. Id. at 238–43; see also Nilanjana Dasgupta et al., Automatic Preference for White Americans: Eliminating the Familiarity Explanation, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316, 325–26 (2000); Scott A. Ottaway et al., Implicit Attitudes and Racism: Effects of Word Familiarity and Frequency on the Implicit Association Test, 19 SOC. COGNITION 97, 130 (2001).

At the macro level, it seems unlikely that familiarity can account for the entirety of IAT effects because preferences emerge for arbitrary groups with nonsense names (such as Xanthie) to which participants are introduced and assigned in the laboratory. See Ashburn-Nardo et al., supra note 37, at 789.

55. See Greenwald et al., supra note 26; Nosek et al., supra note 53, at 177–79 (finding that order has a small effect on IAT scores, which can be minimized by increasing the number of practice trials).

56. See Greenwald et al., supra note 29, at 211 (finding that prior experience slightly reduced the magnitude of IAT effects in subsequent trials).

57. See Greenwald et al., supra note 26, at 1469 (finding essentially no effect on the magnitude of IAT depending on the time interval, ranging from one-hundred milliseconds (ms) (or one-tenth of a second) to 700 ms, between successive trials).

58. See id. (finding no effects). The IAT counterbalances the side to which, for instance, pleasant and unpleasant categories are assigned by systematically varying the lateral location of the categories between participants.


These studies vary in their conclusions about the extent to which participants are able to control (or fake) their scores on the IAT. The best strategy to fake one’s IAT scores is to slow down intentionally on the compatible block (e.g., the FLOWER + GOOD pairing in an IAT measuring Flower-Insect attitudes). Although few subjects derive this strategy on their own, some certainly may. We note, though, that even if the IAT were susceptible to participants’ intentions to “beat the test,” it seems quite unlikely that this would undermine the basic results. Implicit measures often reveal attitudes and stereotypes that are quite discrepant from self-reported ones. Given that people want to minimize the appearance of bias—even implicit biases—faking test scores simply indicates that implicit biases in the population are in fact larger than reported.
suggesting that the IAT measures not individual bias but salience asymmetry or general cultural associations unattributable to any specific person.

This brief summary cannot exhaustively detail the evidence in support of the IAT’s reliability and validity. Curious readers should turn to the cited

62. To demonstrate construct validity, researchers generally point out the ways in which some instrument shows both convergent and discriminant validities. As applied to the IAT, that would mean that the IAT scores converge with measures that we would expect them to converge with (e.g., other measures of attitudes and stereotypes) and depart from measures that we would expect them to depart from. Implicit bias as measured by reaction-time techniques converges with physiological measures. For example, people with higher levels of implicit race bias showed more activation in the amygdala—an area of the brain associated with emotional responses, particularly fear—when viewing unfamiliar Black (versus White) faces. See William A. Cunningham et al., Neural Components of Social Evaluation, 85 J. PERSONALITY & SOC. PSYCHOL. 639, 640 (2003); Phelps et al., supra note 22. These correlations were stronger when faces were presented subliminally (that is, they appeared on the screen for such a brief moment that viewers were not even aware that they had been presented) than when they were presented supraliminally (faces appeared on the screen long enough for participants to be aware of seeing them). Additionally, Whites with greater levels of implicit racial bias showed more physiological stress when speaking to a Black audience than those with lower levels. See Wendy B. Mendes et al., Why Egalitarianism Might Be Good for Your Health: Physiological Thriving During Inter-Racial Interactions, 18 PSYCHOL. SCI. 991, 996–97 (2007).

63. See Klaus Rothermund & Dirk Wentura, Underlying Processes in the Implicit Association Test: Dissociating Salience From Associations, 133 J. EXPERIMENTAL PSYCHOL.: GEN. 139, 156 (2004). The claim here is that particularly salient items are easier to group together. If BLACK is more salient than WHITE (for example, to White subjects), and if BAD is more salient than GOOD, then the Black-Bad association may be driven by salience, not a negative attitude toward Blacks. For a responsive comment, see Anthony Greenwald et al., Validity of the Salience Asymmetry Interpretation of the Implicit Association Test: Comment on Rothermund and Wentura (2004), 134 J. EXPERIMENTAL PSYCHOL.: GEN. 420, 420 (2005) (pointing out that salience asymmetries “have the potential to contribute to IAT effects, much as do any other features that afford a basis for distinguishing among categories” but that they cannot account for findings of predictive validity or the emergence of preferences of novel groups). For a reply to the comment, see Klaus Rothermund et al., Validity of the Salience Asymmetry Account of the Implicit Association Test: Reply to Greenwald, Nosek, Banaji, and Klauer (2005), 134 J. EXPERIMENTAL PSYCHOL.: GEN. 426 (2005).

64. See, e.g., Arkes & Tetlock, supra note 12; Phillip E. Tetlock & Hal R. Arkes, The Implicit Prejudice Exchange: Islands of Consensus in a Sea of Controversy: Response, 15 PSYCHOL. INQUIRY 311–21 (2004); Michael A. Olson & Russell H. Fazio, Reducing the Influence of Extrapersonal Associations on the Implicit Association Test: Personalizing the IAT, 86 J. PERSONALITY & SOC. PSYCHOL. 653, 663–65 (2004); Andrew Karpinski & James L. Hilton, Attitudes and the Implicit Association Test, 81 J. PERSONALITY & SOC. PSYCHOL. 774, 786–87 (2001). For responses and analysis, see Mahzarin R. Banaji et al., No Place for Nostalgia in Science: A Response to Arkes and Tetlock, 15 PSYCHOL. INQUIRY 279, 283–85 (2004); Brian A. Nosek & Jeffrey J. Hansen, The Associations in Our Heads Belong to Us: Searching for Attitudes and Knowledge in Implicit Cognition, 22 COGNITION & EMOTION 582–88 (2008); Eric Luis Uhlmann et al., Automatic Associations: Personal Attitudes or Cultural Knowledge?, in IDEOLOGY, PSYCHOLOGY, AND LAW (Jon Hanson ed., 2010), available at http://www.projectimplicit.net/articles.php. We resist overly stylized demarcations that separate culture from person. Quite obviously, culture plays a huge role in feeding the associations in our brains. See, e.g., Kang, supra note 14, at 1339–40 (describing the role of mass media providing “vicarious” experiences with racial others). But if IAT scores simply reflected a tally of the associations seen in the world around us and revealed nothing about the individual, we would not expect them to systematically correlate with individual behavior, as they do. Moreover, it’s not clear how and why some of these cultural explanations should have moral or legal significance. See Jerry Kang, Comment on Uhlmann et al., Automatic Associations, in IDEOLOGY, PSYCHOLOGY, AND LAW, supra.
scientific papers, which include critiques and responses. More important, we are not claiming that the IAT is somehow immaculate. No psychological measure is perfectly pure; even a simple self-reported scale to assess a person’s self-esteem\(^65\) can be affected by variables such as participants’ literacy, the comfort of the room in which they respond, and any immediately prior success or failure. We simply suggest that the IAT is no different than other psychological measures, and the evidence suggests that none of the potential confounds can account for IAT effects in the hundreds of studies that have used the measure.

2. **Against Behavioral Colorblindness**

All that we have reported so far are pervasive differences in a computerized speed test. But do these differences, measured in milliseconds, matter in the real world? In other words, even if a person is not cognitively colorblind, these cognitions may not affect real-world behavior,\(^66\) in which case, who cares? Perhaps, cognitive colorblindness is unimportant; it’s behavioral colorblindness that we’re really after. We analyze this possibility with the help of our fictional stories.

Recall Skip’s Encounter. Perhaps Skip could have defused the situation simply by putting on a smile. But it turns out that even the same facial expression can be interpreted differently as a function of implicit bias. In one study, participants watched a video of computer-generated faces that morphed slowly from a frown to a smile and were instructed to hit a key when they thought the expression changed. In general, people saw hostility “linger” on the Black face for a longer period of time than on the White face. Moreover, the extent that hostility was perceived as lingering was predicted by implicit bias (as measured by the IAT) against Blacks.\(^67\)

If a neutral facial expression is seen as more angry on a Black face, could a wallet be mistaken for a gun more often when held by a Black man? Unfortunately, the data suggest yes. A “shooter bias” paradigm has explored whether people are prone to accidentally shoot Black suspects more often than White people are prone to accidentally shoot Black suspects more often than White people are prone to accidentally shoot Black suspects more often than White.

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65. For example, “On the whole, I am satisfied with myself” is an item from the Rosenberg self-esteem scale. See Morris Rosenberg, Society and the Adolescent Self-Image 307 (1965).

66. By “behavior,” we adopt the standard psychological distinction between mental constructs, on the one hand, such as attitudes and stereotypes, and some behavioral manifestation, on the other hand, which includes differential evaluations, judgments, and physical behaviors.

67. See Kurt Hugenberg & Galen V. Bodenhausen, Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat, 14 PSYCHOL. SCI. 640, 641–42 (2003) (showing that when the video went from hostile to friendly, implicit anti-Black bias predicted the extent to which hostility would “linger”; p=0.04). Implicit bias scores predicted responses to Black β=0.46, p=0.02, but not White, β=0.09, ns, faces. See id. at 642. In a second study, the video showed faces going from friendly to hostile. In this situation, people with higher implicit bias scores were quicker to report detecting hostility in Black rather than White faces, p=0.02. See id.
suspects. In this measure, individuals (targets) holding an object appear in front of ordinary background scenes, such as bus stations and parks. Participants view these scenes on a computer and have a simple task: make one response if the person holds a weapon and another response if the person holds a harmless object, such as a cell phone or wallet.  

Responses differed as a function of the target's race: Participants were quicker to “shoot” an armed Black target than an armed White target, but slower to “not shoot” an unarmed Black target than an unarmed White target.  

When time pressured (to better mimic life-or-death decisions), unarmed Black targets were mistakenly shot more often than unarmed White targets, and armed White targets were mistakenly not shot more often than armed Black targets. Interestingly, these stereotype-consistent behaviors emerged among both Black and White participants. On the margins, then, Skip’s Encounter was more dangerous because of his race, regardless of the cop’s race. These findings suggest that we don’t find behavioral colorblindness even in deadly serious situations.

But maybe a police confrontation is too extreme an example (especially for readers who experience police interactions as courteous and nonthreatening). What about the more mundane context of Juan’s Interview? Why did that interview go badly? Of course, it’s impossible to know for sure in any particular case. Still, we have learned that implicit attitudes correlate with facial expressions, eye contact, and body posture. In one of the earliest demonstrations of

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69. See id. at 1317.

70. See id. at 1319.

71. See id. at 1324–25.


Skeptics have challenged McConnell and Leibold’s results. See Hart Blanton et al., Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT, 94 J. APPLIED PSYCHOL. 567, 574–76 (2009). Specifically, Blanton et al. argue that the relationship between the IAT and the judges’ global ratings of the interactions rely too heavily on unreliable ratings by the judges and are dependent on a single judge’s ratings. We concur with McConnell and Leibold, who in their reply echo the point we made earlier: “Any dissimilarities between judges’ ratings would only increase variability in their assessments, making it more (not less) difficult to observe the significant relations between the IAT and biased behaviors found in the study.” Allen R. McConnell & Jill M. Leibold, Weak Criticisms and Selective Evidence: Reply to Blanton et al., 94 J. APPLIED PSYCHOL 583, 585 (2009).

The skeptics also raise concerns about a participant who was several decades older than other participants and exhibited an implicit preference for WHITE several standard deviations greater than the sample mean, without whose data the correlation between the IAT and observers’ ratings of participants no longer met conventional standards of significance (r=0.34, p<0.05), but would still be considered “marginally” significant (r=0.27, p<0.10). Blanton et al., supra, at 572–73.
implicit racial attitudes, people with more negative implicit attitudes toward Blacks (compared to Whites) on an evaluative priming measure were rated less friendly by a Black interaction partner who was unaware of their scores than those with more positive implicit attitudes toward Blacks.\textsuperscript{73} This unfriendliness seeps out through nonverbal cues: the more negative the implicit attitude, the more awkward the body language.

Body language matters because if one person acts awkwardly to another, the other person will reciprocate, thus generating a vicious circle.\textsuperscript{74} This interaction will then sour the interview without either party recognizing the implicit causal forces. If Juan’s interviewer had a negative implicit attitude toward Latinos, that

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\textsuperscript{73} See Fazio et al., \textit{Variability}, supra note 23, at 1019.

\textsuperscript{74} See Mark Chen & John A. Bargh, \textit{Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation}, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 554–55 (1997) (showing that hostility in one game partner, induced by racial priming, induced hostility in the other game partner in a password game); Carl O. Word et al., \textit{The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction}, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109, 119 (1974) (finding that when White interviewers treated White interviewees with unfriendly nonverbal behavior, the White interviewees gave worse interviews as measured by third-party evaluators blind to the purpose of the experiment).
attitude may have leaked through his body language, which could have triggered a negative response from Juan. If we zoom out on Juan’s timeline, things get potentially worse for him. Before Juan got the interview, he had to submit a resume. In 2004, behavioral economists Marianne Bertrand and Sendhil Mullainathan sent comparable resumes out to numerous employers in Boston and Chicago but used names such as “Emily” or “Greg” to signal Whiteness and “Lakisha” or “Jamal” to signal Blackness. They found that the trivial manipulation of name produced a 50 percent difference in callback rates.

In 2007, Dan-Olof Rooth replicated and extended this experiment by connecting the callback discrimination to implicit bias. He created resumes that again were similar in background, experience, and qualifications but varied the applicant’s name to denote ethnicity. Applications from an Arab-Muslim job candidate (whose experience, education, and short biography made clear that he was born and educated in Sweden) and a Swedish job candidate were each sent to 1552 posted job listings in Sweden.

Only one of the two applicants was invited for an interview in 283 of the job postings. And in these cases, a clear preference emerged for the candidate with the Swedish-sounding name (217 invites) over the one with...
the Arab-Muslim-sounding name (66 invites). In other words, the identically qualified candidate was 3.3 times more likely to be called back simply because he enjoyed a Swedish name. Coupled with the cases in which neither or both applicants were invited, these data reveal that candidates with Swedish-sounding names had an approximately 9 percent advantage in callback rates.

Several months later, Rooth located 193 of the recruiters or managers responsible for the hiring decision. They reported explicit attitudes and stereotypes in their hiring preferences and completed an IAT assessing the Arab-Muslim male stereotypes. Recruiters generally reported some explicit preference for both hiring Swedish men (54 percent of recruiters) and having warmer feelings toward them (45 percent of recruiters). Although they did not, on average, explicitly endorse the stereotype that Swedish men were more productive than Arab-Muslim men, the IAT revealed a strong implicit association between SWEDISH MEN and High Productivity.

The critical empirical question was the extent to which implicit stereotypes predicted the callback disparity. Among the firms that had invited at least one candidate to interview, higher levels of implicit bias predicted discrimination. A one standard deviation increase in implicit bias translated into an approximately 12 percent decrease in the probability that an Arab-Muslim candidate received an interview. Put another way, approximately half of the large discrepancy between interview invitations for men with Arab-Muslim names and men with native Swedish names could be accounted for by implicit bias, and approximately one quarter could be accounted for by explicit bias.

Let’s tie this evidence back to Juan’s Interview. His name alone on the resume might make it harder to get an interview because of implicit stereotypes. If Juan gets a callback, then the social interaction may sour, partly because of negative implicit attitudes. And if he were to get the job, managers may interpret ambiguous performance in ways that confirm prior expectations.

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79. See id. In 239 cases, both applicants were invited to interview.
80. They indicated strong, moderate, or some preference for hiring Arab-Muslim men (in Sweden) to native Swedish men. Id. at 8.
81. See id. at 8–9.
82. Among all firms, including those that had extended no interview offers, a one standard deviation increase was associated with a smaller (3 percent) but still statistically significant decrease in the probability that an Arab-Muslim candidate would receive an interview. See id. at 11–12. In both cases, the explicit measures did not significantly predict decisions, although Rooth noted that such bias may nevertheless be “economically important.” Id. at 13.
83. See id. at 16.
84. See, e.g., John M. Darley & Paget H. Gross, A Hypothesis-Confirming Bias in Labeling Effects, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 27–29 (1983). In this study, cues about a child’s social class affected interpretation of her academic performance. Perceivers who believed she was from a higher
not want to overstate the case. If Juan is truly stellar, he will likely be celebrated; if Juan is truly incompetent, subtle biases are the least of his worries. But if he is somewhere in the vast undifferentiated middle, then implicit biases may substantially alter his work trajectory over the life of his career.85

One final objection might emerge from the organizational accountability literature, which suggests that in the real world, firms have adopted decision-making procedures to minimize the behavioral manifestation of various biases, including implicit ones.86 We agree that implicit biases are malleable and that the environment can strongly influence how and whether implicit biases translate into behavior.87 That said, it is heroic to think that minimizing implicit biases is easy88 and is somehow already taking place.

Motivation to be egalitarian should influence whether implicit bias translates into discriminatory behavior.89 Indeed, data confirm this. In one study, implicit bias as measured by priming techniques predicted differential trait ratings of Blacks (relative to Whites) for those who report little motivation to control bias; however, this was not the case with those highly motivated to control bias.90

Similar results have been found with IAT-measured implicit bias.91 In other socioeconomic status described her performance and abilities as stronger than perceivers who believed she was from a lower socioeconomic status. Id.

85. It’s also possible that increased social interaction on the job could help decrease implicit bias. This is what the social contact hypothesis suggests. See, e.g., Kang & Banaji, supra note 2, at 1101–05 (summarizing social contact hypothesis findings); Thomas F. Pettigrew & Linda R. Tropp, A Meta-Analytic Test of Intergroup Contact Theory, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 751–52 (2006).


87. For a general discussion of the debiasing literature, see, for example, Adam Benforado & Jon Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 EMORY L.J. 311 (2008) (finding that intergroup contact negatively correlates with prejudice).


89. See Russell H. Fazio & Tamara Towles-Schwen, The MODE Model of Attitude-Behavior Processes, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY, supra note 88, at 97.

90. In fact, the latter category showed the opposite pattern, suggesting the possibility of overcorrection. See Michael A. Olson & Russell H. Fazio, Trait Inferences as a Function of Automatically-Activated Racial Attitudes and Motivation to Control Prejudiced Reaction, 26 BASIC & APPLIED SOC. PSYCHOL. 1, 4 (2004); Tamara Towles-Schwen & Russell H. Fazio, Choosing Social Situations: The Relation Between Automatically-Activated Racial Attitudes and Anticipated Comfort Interacting With African Americans, 29 PERSONALITY & SOC. PSYCHOL. BULL. 172, 179 (2003). Similarly, for White participants low in motivation to control prejudicial responses, implicit bias predicted anticipated comfort levels during an unscripted interaction with a Black partner. However, implicit bias was not predictive for those strongly motivated to control prejudice. See id. at 176–78.

91. For example, implicit prejudice toward gay people predicted nonverbal nondiscriminatory behavior during an interaction with a gay partner only for participants with egalitarian motives and a tendency to control their behavior. See Nilanjana Dasgupta & Luis M. Rivera, From Automatic
words, one can be cognitively color conscious and still be behaviorally colorblind. We won't be motivated to check bias, however, if we are cocksure that we are bias-free to begin with. Unfortunately, we readily see bias in others but not in ourselves.91

This analysis cross-applies to institutions. To be sure, the accountability literature reveals that individuals who must explain their decisionmaking to others are less prone to various biases.92 And, in the workplace, today’s human resources departments and supervisors are accountable to their superiors for employment actions. That said, organizations generally do not ask their decisionmakers to account for implicit-bias-actuated discrimination. Given our misguided faith in our own objectivity94 and the difficulty identifying whether implicit bias was a but-for (much less proximate) cause for any isolated behavior, it seems premature to assume that general accountability pressures are automagically solving95 the problem.96

Indeed, the evidence is to the contrary. Recall Juan’s Interview: If accountability to antidiscrimination laws and policies were solving the problem, “Jamal” should have been called back as often as “Greg.” Recall Skip’s Encounter. Surely our brave men and women in blue feel heightened accountability to avoid shooting an innocent person. Although the evidence is mixed, in at least one set of shooter bias studies, police officers responded like civilians and were more likely to shoot unarmed Black than unarmed White targets.97

93. See, e.g., Jennifer S. Lerner & Philip E. Tetlock, Accounting for the Effects of Accountability, 125 PSYCHOL. BULL. 255, 267–70 (1999).
96. See, e.g., Lerner & Tetlock, supra note 93, at 270 (warning readers against believing “that accountability is a cognitive or social panacea . . . [that] ‘[a]ll we need to do is hold the rascals accountable’”). We thus agree more with Tetlock collaborating with Lerner in 1999 than with Tetlock collaborating with Mitchell in 2006. See Mitchell & Tetlock, supra note 86, at 1120–21.
97. E. Ashby Plant & B. Michelle Peruche, The Consequences of Race for Police Officers’ Responses to Criminal Suspects, 16 PSYCHOL. SCI. 180, 181–82 (2005). In another study, police officers showed a similar tendency to respond faster to armed Blacks (compared to armed Whites) and unarmed Whites (compared to unarmed Blacks), but they did not exhibit racial bias on the arguably more important criterion of accuracy: Unarmed Blacks were not more likely to be “shot” than unarmed Whites. See Joshua Correll et al., Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010–13, 1015–17 (2007) (describing results from two studies).
Rather than slog through more predictive validity studies, we rely on two summaries. In a recent paper, John Jost and colleagues respond to critiques of the implicit bias science by Philip Tetlock and Gregory Mitchell. Jost et al. note that summary dismissal of the research on implicit bias would be tantamount to disputing the “major tenets of 20th century cognitive psychology.” They review “10 studies that no manager should ignore” showing the effects of implicit bias in various domains, including hiring, policing, budget cuts, verbal slurs, medical diagnoses, and voting.

If ten studies aren’t enough, how about 122? Anthony Greenwald and colleagues completed a meta-analysis of 122 research reports that included 184 independent samples and 14,900 subjects, and that included the IAT and participant behaviors in domains ranging from personal relationships to consumer preferences to intergroup biases.

This meta-analysis revealed that both explicit biases (measured by self-reports on surveys) and implicit biases (measured by the IAT) predicted certain variables, such as nonverbal behavior, social judgments, physiological responses, and social action. The correlations for each bias were moderate in size, with explicit biases being a slightly better predictor on average across all topics, including issues such as voting behavior and consumer choices. However, the IAT predicted socially sensitive behavior better than did explicit self-reports.

In the White-Black discrimination domain (i.e. whether anti-Black implicit attitude predicts behavior toward Blacks), implicit bias predicts 5.7
percent of the variability in behavior. One might retort that this number is too low to have policy significance. But the correlation between implicit bias and behavior may be substantially higher, and may be masked by imperfections in the instruments that measure both the bias and the behavior. Even if this is not the case, explaining 5.7 percent of the variability in Black-White discrimination is meaningful because we are summing up all the differential treatment over all interactions, over all time, and over all the people within each racial category.

Here's a baseball analogy. With two outs in the ninth inning, and a man on second base, who do you want at the plate: All-Star Matt Holliday (0.321 average in 2008) or John Buck (0.224 average in 2008)? In statistical terms, Robert Abelson has demonstrated that the batting average difference explains only 1.3 percent of the variance in a single at-bat (hit or no hit). This counterintuitive result stems in part from the fact that we are looking at one player and one at-bat, instead of a string of players batting in a game, over an entire season.

In sum, the evidence reviewed in Part I makes a prima facie case against any facile claim of colorblindness, either cognitive or behavioral. Thus, when

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105. The correlation is $r=0.24$. Squaring the $r$ ($r^2=5.7$ percent) explains the percentage of variance, which reveals the extent to which differences in behavior can be attributed to a single variable (implicit bias). Id. at 24.

106. See Gregory Mitchell & Philip Tetlock, Facts Do Matter: A Reply to Bagenstos, 37 Hofstra L. Rev. 737, 757–58 (2009) (“If we accepted this estimate as reliable, the psychometric fact that IAT scores have low positive correlations with behavior expansively defined as discrimination would guarantee that many individuals labeled implicitly biased by the IAT will not exhibit discriminatory behavior of any kind.”).

107. If we assume that implicit measures have a test-retest reliability of approximately 0.56, and that the behavior has a reliability of 0.80, the correlation between implicit bias and behavior generally (not just in socially sensitive domains) could rise from 0.274 to what is called a disattenuated correlation that adjusts for error or “noise” in measurement of 0.41. This would then explain 16.7 percent of the variability in behavior. To focus again on behaviors within socially sensitive domains such as Black-White discrimination, a disattenuated correlation could rise from 0.24 to 0.36. The 0.56 test reliability comes from Nosek et al., supra note 28, at 274. The 0.80 behavior reliability is an estimate with no strong empirical basis, but it is the same number used by Greenwald et al., supra note 102, at 29, in their similar calculation. The formula for this new variable—the correlation corrected for attenuation—is $r_{xy}/\sqrt{\text{Measure}_x\text{reliability } \times \text{Measure}_y\text{reliability}}$. Notably, as the reliability of the measures decreases, the corrected correlation increases. Thus, an estimate of behavior’s reliability of 0.80 is a conservative choice in calculating the disattenuated correlation.


109. As Abelson cautioned, “[T]he attitude toward explained variance ought to be conditional on the degree to which the effects of the explanatory factor cumulate in practice . . . . In such cases, it is quite possible that small variance contributions of independent variables in single-shot studies grossly underestimate the variance contribution in the long run.” Id. at 133.
we hear the stories of Juan, Skip, and Grace, we should be skeptical of any
defense of strict colorblindness. Suppose that the supporting evidence accumu-
lates into a widespread scientific consensus, especially regarding behavioral
consequences in the real world. What impact should this consensus have on law
and legal institutions?

II. LEGAL UPTAKE

A. Behavioral Realism

In answering such questions, our general approach is to seek “behavioral
realism” in the law. Behavioral realism involves a three step process:

First, identify advances in the mind and behavioral sciences that
provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of
human behavior and decision-making embedded within the law. These
latent theories typically reflect “common sense” based on naive psy-
chological theories.

Third, when the new model and the latent theories are discrepant,
ask lawmakers and legal institutions to account for this disparity. An
accounting requires either altering the law to comport with more accurate
models of thinking and behavior or providing a transparent explanation of
“the prudential, economic, political, or religious reasons for retaining a less
accurate and outdated view.”

Although simple sounding, this algorithm involves some complexity. For
example, the first step raises the hard question of what counts as a “more accurate
model” of human action. Whenever we have rapid advancements in instrumen-
tation, measurement, and experimentation, we will have fractures within
scientific understandings. Some scientists will cling to the traditional view; some
will prefer the new. All sciences have periods of vigorous debate. How certain,

behavioral realism, understood as a prescriptive theory of judging, stands for the proposition that as judges
develop substantive legal doctrines, they should guard against basing their analyses on inaccurate concep-
tions or irrelevant real-world phenomena).

111. For example, cancer researchers and advocates debated for decades about the effectiveness and
utility of mammogram screenings for breast cancer, with the policy recommendations shifting to reflect
the state of the science. See Donald A. Berry et al., Effect of Screening and Adjuvant Therapy on Mortality
From Breast Cancer, 353 NEW ENG. J. MED. 1784, 1785 (2005); Gina Kolata, Mammograms Validated as
FIVE HABITS FOR CROSS-CULTURAL LAWYERING

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Practicing law is often a cross-cultural experience. The law, as well as the legal system in which it operates, is a culture with strong professional norms that give meaning to and reinforce behaviors. The communication style of argument predominates, and competition is highly valued. Even when a lawyer and a non-law-trained client share a common culture, the client and the lawyer will likely experience the lawyer-client interaction as a cross-cultural experience because of the cultural differences that arise from the legal culture.

In addition to these cultural differences, we know that the global movement of people, as well as the multicultural nature of the United States, creates many situations where lawyers and clients will work in cross-cultural situations. To meet the challenges of cross-cultural representation, lawyers need to develop awareness, knowledge, and skills that enhance the lawyers' and clients' capacities to form meaningful relationships and to communicate accurately.

This chapter, and the habits it introduces, prepares lawyers to engage in effective, accurate cross-cultural communication and to build trust and understanding between themselves and their clients. Section 1 identifies some ways that culture influences lawyering and the potential issues that may arise in cross-cultural lawyer-client interactions. Section 2 identifies the principles and habits that are skills and perspectives that can be used to identify our own cultural norms and those of our clients and to communicate effectively, knowing these differences. As one anthropologist has recognized, there is “a great distance between knowing that my gaze transforms and becoming aware of the ways that my gaze transforms.” To help lawyers identify the ways their gaze transforms and the cultural bridges that are needed for joint work between lawyers and clients, we have developed five habits for cross-cultural lawyering.
CULTURE AND THE ROLE IT PLAYS IN LAWYERS’ WORK

To become good cross-cultural lawyers, we must first become aware of the significance of culture in the ways in which we make sense out of the world. Culture is like the air we breathe; it is largely invisible, and yet we are dependent on it for our very being. Culture is the logic through which we give meaning to the world. Our culture is learned from our experiences, sights, books, songs, language, gestures, rewards, punishments, and relationships that come to us in our homes, schools, religious organizations, and communities. We learn our culture from what we are fed and how we are touched and judged by our families and significant others in our communities. Our culture gives us our values, attitudes, and norms of behavior.

Through our cultural lens, we make judgments about people based on what they are doing and saying. We may judge people to be truthful, rude, intelligent, or superstitious based on the attributions we make about the meaning of their behavior. Because culture gives us the tools to interpret meaning from behavior and words, we are constantly attaching culturally based meaning to what we see and hear, often without being aware that we are doing so.

In this chapter, when we talk about cross-cultural lawyering, we are referring to lawyering where the lawyer’s and the client’s ethnic or cultural heritage comes from different countries, as well as where their cultural heritage comes from socialization and identity in different groups within the same country. By this definition, everyone is multicultural to some degree. Cultural groups and cultural norms can be based on ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin color, or a variety of other characteristics.

This broad definition of culture is essential for effective cross-cultural lawyering because it teaches us that no one characteristic will completely define the lawyer’s or the client’s culture. For example, if we think about birth order alone as a cultural characteristic, we may not see any significance to this factor. Yet if the client (or lawyer) comes from a society where “oldest son” has special meaning in terms of responsibility and privilege, identification of the ethnicity, gender, or birth order alone will not be enough to alert the lawyer to the set of norms and expectations for how the oldest son ought to behave. Instead, the lawyer needs to appreciate the significance of all three characteristics to fully understand this aspect of the client’s culture.

A broad definition of culture recognizes that no two people have had the exact same experiences and thus no two people will interpret or predict in precisely the same ways. People can be part of the same culture and make different decisions while rejecting norms and values from their culture. Understanding that culture develops shared meaning and, at the same time, allows for significant differences helps us to avoid stereotyping or assuming that we know that which we have not explored with the client. At the same time that we recognize these individual differences, we also know that if we share a common cultural heritage with a client, we are often better able to predict or interpret and our mistakes are likely to be smaller misunderstandings.

When lawyers and clients come from different cultures, several aspects of the attorney-client interaction may be implicated. The capacities to form trusting relationships, to evaluate credibility, to develop client-centered case strategies and solutions, to gather information, and to attribute the intended meaning from behavior and expressions are all affected by cultural experiences. By using the framework of cross-cultural interaction, lawyers can learn to anticipate and name some of the difficulties they or their clients may be experiencing. By asking ourselves as part of the cross-cultural analysis to identify ways in which we are similar to clients, we identify the strengths of connection. Focusing on similarities also alerts us to pay special attention when we see ourselves as “the same” as the client so that we do not substitute our own judgment for the client’s through overidentification and transference.

Establishing Trust

Lawyers and clients who do not share the same culture face special challenges in developing a
trusting relationship where genuine, accurate communication occurs. Especially where the culture of the client is one with a significant distrust of outsiders or of the particular culture of the lawyer, the lawyer must work hard to earn trust in a culturally sensitive way. Similarly, cultural difference may cause the lawyer to mistrust the client. For example, when we find the client's story changing or new information coming to light as we investigate, we may experience the client as “lying” or “being unhelpful.” Often this causes us to feel betrayed by our client’s sanctions.

Sometimes when a client is reacting negatively to a lawyer or a lawyer’s suggestions, lawyers label clients as “difficult.” Professor Michelle Jacobs has warned that while lawyers interpreting clients’ behavior may fail to understand the significance of racial differences, thereby erroneously labeling African American clients as “difficult.” Instead, the lawyer may be sending signals to the client that reinforce racial stereotypes, may be interpreting behavior incorrectly, and therefore may be unconsciously failing to provide full advocacy.

In these situations, lawyers should assess whether the concept of insider-outsider status helps explain client reactions. Where insider-outsider status is implicated, lawyers must be patient and try to understand the complexities of the relationship and their communication while building trust slowly.

Accurate Understanding

Even in situations where trust is established, lawyers may still experience cultural differences that significantly interfere with lawyers’ and clients’ capacities to understand one another’s goals, behaviors, and communications. Cultural differences often cause us to attribute different meanings to the same set of facts. Thus one important goal of cross-cultural competence is for lawyers to attribute to behavior and communication that which the actor or speaker intends.

Inaccurate attributions can cause lawyers to make significant errors in their representation of clients. Imagine a lawyer saying to a client, “If there is anything that you do not understand, please just ask me to explain” or “If I am not being clear, please just ask me any questions.” Many cultural differences may explain a client’s reluctance to either blame the lawyer for poor communication (the second question) or blame himself or herself for lack of understanding (the first question). Indeed clients from some cultures might find one or the other of these results to be rude and therefore be reluctant to ask for clarification for fear of offending the lawyer or embarrassing themselves.

Cultural differences may also cause lawyers and clients to misperceive body language and judge each other incorrectly. For an everyday example, take nodding while someone is speaking. In some cultures, the nodding indicates agreement with the speaker, whereas in others it simply indicates that the listener is hearing the speaker. Another common example involves eye contact. In some cultures, looking someone straight in the eye is a statement of open and honest communication, whereas a diversion of eyes signals dishonesty. In other cultures, however, a diversion of eyes is a sign of respect. Lawyers need to recognize these differences and plan for a representation strategy that takes them into account.

Organizing and Assessing Facts

More generally, our concepts of credibility are very culturally determined. In examining the credibility of a story, lawyers and judges often ask whether the story makes “sense” as if “sense” were neutral. Consider, for example, a client who explains that the reason she left her native country was that God appeared to her in a dream and told her it was time to leave. If the time of leaving is a critical element to the credibility of her story, how will the fact finder evaluate the credibility of that client’s story? Does the fact finder come from a culture where dreams are valued, where an interventionist God is expected, or where major life decisions would be based on these expectations or values? Will the fact finder, as a result of differences, find the story incredible or evidence of a disturbed thought process or, alternatively, as a result of similarities, find the client credible?

The way different cultures conceptualize facts may cause lawyers and clients to see
different information as relevant. Lawyers who experience clients as "wandering all over the place" may be working with clients who categorize information differently than the lawyer or the legal system. If a lawyer whose culture is oriented to hour, day, month, and year tries to get a time line from a client whose culture is not oriented that way, she may incorrectly interpret the client's failure to provide the information as uncooperative, lacking intelligence, or, worse, lying. A client who is unable to tell a linear time-related story may also experience the same reaction from courts and juries if the client's culture is unknown to the fact finders.

Individual and Collective

In other settings, the distinction between individual and collective cultures has been called the most important concept to grasp in cross-cultural encounters. Understanding the differences between individual and collective cultures will help lawyers see how they and clients define problems, identify solutions, and determine who important players are in a decision.

Lawyers who explore differences in individual and collective cultures may see different communication styles, values, and views of the roles of the lawyer and client. In an individualistic culture, people are socialized to have individual goals and are praised for achieving these goals. They are encouraged to make their own plans and "do their own thing." Individualists need to assert themselves and do not find competition threatening. By contrast, in a collective culture, people are socialized to think in terms of the group, to work for the betterment of the group, and to integrate individual and group goals. Collectivists use group membership to predict behavior. Because collectivists are accepted for who they are and feel less need to talk, silence plays a more important role in their communication style.

Majority culture in the United States has been identified as the most individualistic culture in the world. Our legal culture reflects this commitment to individualism. For example, ethical rules of confidentiality often require a lawyer to communicate with an individual client in private if confidentiality is to be maintained and may prohibit the lawyer from representing the group or taking group concerns into account to avoid potential conflicts. Many client-empowerment models and client-centered models of practice are based on individualistic cultural values.

Here is an example of how a result that appeared successful to the lawyers can nevertheless be unacceptable when taken in the context of the client's collective culture. In this case, lawyers negotiated a plea to a misdemeanor assault with probation for a battered Chinese woman who had killed her husband and who faced a 25-year sentence if convicted of murder. The client, who had a strong self-defense claim, refused to plead to the misdemeanor charge because she did not want to humiliate herself, her ancestors, her children, and their children by acknowledging responsibility for the killing. Her attorneys did not fully comprehend the concept of shame that the client would experience until the client was able to explain that the possibility of 25 years in jail was far less offensive than the certain shame that would be experienced by her family (past, present, and future) if she pled guilty. These negative reactions to what the lawyers thought was an excellent result allowed the lawyers to examine the meaning of pleas, family, responsibility, and consequences within a collective cultural context that was far different than their own.

Legal Strategy and Decision Making

In another case, attorneys—whose client was a Somalian refugee seeking political asylum—had to change their strategy for presenting evidence in order to respect the client's cultural and religious norms. Soldiers had bayoneted her when she resisted rape, and she was scarred on a breast and an ankle. To show evidence of persecution, the plaintiff would have had to reveal parts of her body that she was committed, by religion and culture, to keeping private. Ultimately the client developed a strategy of showing the injury to the INS lawyer who was also female. This strategy, challenging conventional legal advocacy and violating cultural norms of the adversarial system, allowed the client to present a case that honored her values and norms.
Immigrant clients often bring with them prior experiences with courts or interactions with governments from their countries of origin that influence the choices they make in their cases. Strategies that worked in their country of origin may not be successful here. For example, clients from cultures that punish those challenging governmental action may be resistant to a lawyer’s suggestion that a Supplemental Security Income (SSI) benefits appeal be taken, challenging the government’s decision to deny a claim. Conversely, those who come from societies where refusal to follow government requirements is a successful strategy may be labeled as belligerent by the court when they consistently resist or challenge the court.

Finally, cultural differences may cause us to misjudge a client or to provide differential representation based on stereotype or bias. Few lawyers engage in explicit open racial or cultural hostility toward a client. However, if recent studies in the medical field have relevance for lawyers, we need to recognize that even lawyers of goodwill may engage in unconscious stereotyping that results in inferior representation. Studies in the medical field show that doctors are less likely to explain diagnoses to patients of color and less likely to gather significant information from them or to refer them for needed treatment. Although no studies of lawyers to our knowledge have focused on studying whether lawyers engage in discriminatory treatment, two recent studies have identified differential treatment by the legal system based on race. One study done by Child Welfare Watch shows that African American children are far more likely to be removed from their home, put in foster care, and left there longer than similarly situated white children. Another study showed that African American juveniles received disproportionate sentences when compared with similarly situated white youths. In each of these legal studies, lawyers—as prosecutors, representatives, and judges—were deeply implicated in the work that led to the differential treatment.

Once a cultural difference surfaces, we can see stark cultural contrasts with clear connections to lawyering choices. In hindsight, it is easy to see the cultural contrasts and their effect on the clients’ and lawyers’ challenges to find acceptable accommodations to the legal system. In the moment, however, cases are more difficult, and the differences and similarities are more subtle and, at times, invisible. The following sections give you some insights into how to make this more visible.

Culture-General and Culture-Specific Knowledge

In addition to developing awareness of the role that culture plays in attributing meaning to behaviors and communication, a competent cross-cultural lawyer also studies the specific culture and language of the client group the lawyer represents. Culture-specific knowledge, politics, geography, and history, especially information that might shed light on the client’s legal issues, relationship with the lawyer, and process of decision making will assist the lawyer in representing the client better. As the lawyer develops culture-specific knowledge, he or she should apply this knowledge carefully and examine it on a case-by-case basis. Finally, a lawyer will have a greater capacity to build trust and connection if he or she speaks the client’s language even if they do not share a common culture.

If the lawyer represents clients from a multitude of cultures, the lawyer can improve cross-cultural interactions by acquiring culture-general knowledge and skills. This culture-general information is also helpful to lawyers who are beginning to learn about a specific culture. Because learning any new culture is a complex endeavor (remember the number of years that we spent learning our own), the lawyer can use culture-general knowledge and skills while learning specifics about a new culture.

Habit 1: Degrees of Separation and Connection

The first part of Habit 1 encourages lawyers to consciously identify the similarities and differences between their clients and themselves and to assess their impact on the attorney-client relationship. The framework of similarities and differences helps assess lawyer-client interaction, professional distance, and information gathering.
The second part of the habit asks the lawyer to assess the significance of these similarities and differences. By identifying differences, we focus consciously on the possibility that cultural misunderstanding, bias, and stereotyping may occur. By focusing on similarities, we become conscious of the connections that we have with clients as well as the possibility that we may substitute our own judgment for the client’s.

Pinpointing and Recording Similarities and Differences

To perform Habit 1, the lawyer brainstorms, as quickly as possible, as many similarities and differences between the client and himself as he can generate. This habit is rewarded for numerosity—the more differences and similarities the better. A typical list of similarities and differences might include the following:

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>Economic Status</th>
<th>Marital Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race</td>
<td>Social Status</td>
<td>Role in Family</td>
</tr>
<tr>
<td>Gender</td>
<td>Language</td>
<td>Immigration Nationality</td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td>Religion</td>
<td>Education</td>
</tr>
<tr>
<td>Age</td>
<td>Physical Characteristic</td>
<td>Time</td>
</tr>
<tr>
<td>Individualistic/Collective</td>
<td>Direct or Indirect</td>
<td>Communication</td>
</tr>
</tbody>
</table>

With each client and case, you may identify different categories that will influence the case and your relationship. These lists will change as the relationship with the client and the client’s case changes. Exhaustive lists help the lawyer make conscious the less obvious similarities and differences that may enhance or interfere with understanding.

Consciously identifying a long list of similarities and differences allows lawyers to see clients as individuals with personal, cultural, and social experiences that shape the clients’ behavior and communications. In asking you to create long lists, we do not mean to suggest that all similarities and differences have the same order of importance for you or your client. For example, in interactions involving people of color and whites, race will likely play a significant role in the interaction given the discriminatory role that race plays in our society. In some cases, such as rape or domestic violence, gender differences may also play a greater role than in others. The connections that cause a lawyer to feel connected to a client may be insignificant to a client.

The most important thing is to make this list honestly and nonjudgmentally, thinking about what similarities and differences you perceive and suspect might affect your ability to hear and understand your client’s story and your client’s ability to tell it.

Another way to illustrate the degrees of connection and separation between client and lawyer is through the use of a simple Venn diagram. Draw two circles, overlapping broadly if the worlds of the client and of the lawyer largely coincide, or narrowly if they largely diverge. By creating a graphical representation of Habit 1, the lawyer can gain insight into the significance of the similarities and differences. For example, the list of similarities may be small, and yet the lawyer may feel “the same” as the client because of one shared similarity, or the lawyer may have many similarities and yet find herself feeling very distant from the client.

Analyzing the Effect of Similarities and Differences on Professional Distance and Judgment

After creating the lists and diagrams, the lawyer can identify where the cross-cultural challenges might occur. By naming the things that unite and distance us from our clients, we are able to identify relationships that need more or less professional distance because they are “too close” or “too far.” No perfect degree of separation or connection exists between lawyer and client. However, where the list of similarities is long, the lawyer may usefully ask, “Are there differences that I am overlooking? Am I developing solutions to problems that may work for me but not for my client?” By pondering these questions, we recognize that even though similarities promote understanding, misunderstanding may flow from an assumption of precise congruence. Thus, in situations where lawyers and clients have circles that overlap, the lawyer should ask herself, “How do I develop proper professional distance with a client who is so similar to me?”
In other cases, where the list of differences is long, the question for the lawyer is “Are there any similarities that I am missing?” We know that negative judgments are more likely to occur when the client and lawyer see the other as an “outsider.” Thus the lawyer who identifies significant cultural differences between the client and herself will be less likely to judge the client if she also sees herself as similar to the client. Where large differences exist, the lawyer needs to consciously address the question “How do I bridge the huge gap between the client’s experiences and mine?”

What does the analysis of connection and difference indicate about what we ought to share with clients about ourselves? Lawyers usually know far more about their clients than the clients know about the lawyers. Some information of similarity and difference will be obvious to a client, and other significant information will be known only if the lawyer chooses to tell the client. In thinking about establishing rapport with clients, lawyers often think about revealing information that will reveal similarities and establish connections to clients. Of course, exactly what information will cause the client to bond with the lawyer is difficult to know, as the significance of specific similarities and differences may be very different for the lawyer and the client.

Analyzing the Effect of Similarities and Differences on Gathering and Presenting Information

Differences and similarities or assumptions of similarity will significantly influence questioning and case theory. One example of how differences and similarities in the lawyer-client dyad may influence information gathering can be seen in the way lawyers probe for clarification in interviews. Lawyers usually ask questions based on differences that they perceive between their clients and themselves. Thus a lawyer, especially one with a direct communication style, tends to ask questions when a client makes choices that the lawyer would not have made or when he perceives an inconsistency between what the client is saying and the client’s actions. A lawyer tends not to ask questions about choices that a client has made when the lawyer would have made the same choices; in such a situation, the lawyer usually assumes that the client’s thought processes and reasoning are the same as his own.

For example, in working with a client who has fled her home because of spousal abuse and is living with extended family members, a lawyer might not explore the issue of family support. In contrast, had the client explained that she could not go to her family for support, the same lawyer might have explored that and developed housing alternatives. The probing occurs when the lawyer perceives the client’s choices as different from the ones the lawyer might make, and therefore she tries to understand in this case why the client has failed to involve her family. The same lawyer might ask few questions about family support when she assumes that a client living with family had family support, because the lawyer would expect her own family to support her in a decision to leave an abusive spouse.

In her failure to ask questions of the first client, the lawyer is probably making a host of assumptions about cultural values that relate to the client’s and the lawyer’s family values. Assumptions of similarities that mask differences can lead the lawyer to solutions and legal theories that may not ultimately work for the client. For example, in assuming that the first client has family support, the lawyer in the previous example may neglect to explore other housing arrangements or supportive environments that the client needs. Family relationships are incredibly rich areas for cultural misunderstanding, and thus assumptions of similarity are perhaps even more problematic when issues of family are involved.

To identify the unexplored cultural assumptions that the lawyer may be making, the lawyer should ask what she has explored and what she has left unexplored. Reflection on the attorney-client interview allows the lawyer to identify areas where the lawyer may have missed relevant explanations of behavior.

HABIT 2: RINGS IN MOTION

If the key to Habit 1 is “identifying and analyzing the distance between me and my client,” the key to Habit 2 is identifying and analyzing how cultural differences and similarities influence
the interactions between the client, the legal decision makers, the opponents, and the lawyer.

Lawyers interview clients to gain an understanding of the client's problem from the client's perspective and to gather information that will help the lawyer identify potential solutions, particularly those that are available within the legal system or those that opponents will assent to. What information is considered relevant and important is a mixture of the client's, opponent's, lawyer's, and legal system's perspectives.

If these perspectives are different in material ways, information will likely be presented, gathered, and weighed differently. Habit 2 examines these perspectives explicitly by asking the lawyer to identify and analyze the similarities and differences in different dyads and triads to assess the various cultural lenses that may affect the outcome of a client's case.

Like Habit 1, the lawyer is encouraged to name and/or diagram the differences and similarities first and then to analyze their effect on the case.

Pinpoint and Record
Similarities and Differences in the Legal System—Client Dyad

The lawyer should identify the similarities and differences that may exist between client—law and legal decision maker—law. As in Habit 1, the similarities and differences can be listed or can be put on a Venn diagram. In many cases, multiple players will influence the outcome and should be included when identifying the similarities and differences. For example, a prosecutor, a prospective jury, a presentence probation officer, and a judge may all make decisions that influence how the client charged with a crime will be judged and sentenced. Or a forensic evaluator in a custody case may play a significant role in deciding the outcome of a case. Therefore, at various points in the representation, different, important players should be included in the diagram of similarities and differences.

For example, a forensic evaluator in examining a capacity to parent may look for signs of the parent's encouragement of separation of parent and child. In cultures that do not see this kind of separation as healthy for the child, the evaluator may find little that is positive to report. For example, the parent may be criticized for overinvolvement, for practices such as sharing beds with children, or for failing to tolerate "normal" disagreements between child and parent. Lawyers should identify the potential differences that exist between the client and decision makers and focus on how to explain the client's choices where they differ from the evaluator's norms.

In thinking about how differences and similarities might influence the decision makers, lawyers often try to help clients make connections to decision makers to lessen the negative judgments or stereotyping that may result from difference. To the extent that lawyers have choices, they may hire or suggest that the court use expert evaluators that share a common culture or language with the client. Cross-cultural misunderstandings and ethnocentric judgments are less likely to occur in these situations. By checking with others that have used this expert, lawyers can confirm that, despite their professional education, the expert has retained an understanding and acceptance of the cultural values of the client. When the client and decision makers come from different cultures, the lawyer should think creatively about similarities that the client shares with the decision makers. By encouraging clients and decision makers to see similarities in each other, connections can be made cross-culturally.

In addition to focusing on the decision makers, the lawyer should identify the cultural values and norms implicit in the law that will be applied to the client. Does the client share these values and norms, or do differences exist?

Pinpoint and Record
Similarities and Differences in the Legal System—Lawyer Dyad

The lawyer should also focus on the legal system—lawyer dyad and assess the similarities and differences between herself and the legal system. To what extent does the lawyer adopt the values and norms of the law and legal decision makers? How acculturated to the law and legal culture has the lawyer become? In what ways does the lawyer see the "successful" client the same as the law and legal decision makers.
and to what extent does the lawyer have different values and evaluations? Understanding the differences and similarities between the lawyer and the legal system players will help the lawyer assess whether her evaluation of the case is likely to match the legal decision maker.

Again, the lawyer can list or create a diagram that indicates the similarities and differences. By studying these, the lawyer can develop strategies for translation between the client and the legal system that keeps the client and her concerns central to the case.

Pinpoint and Record Similarities and Differences of Opponents to Legal Decision Makers/Clients/Lawyers

The cultural background of an opposing party may also influence the outcome of a case. By listing or diagramming similarities and differences of the opponent with the various other players involved in a case, the lawyer can assess a case and design creative solutions. Often in settling cases, lawyers look for win-win solutions that meet the needs of clients and their adversaries. For example, in assessing the possibility of resolving a custody case, a lawyer may want to know what the norms of custody are in the opposing party’s culture and the extent to which the opposing party still embraces these values. How might gender norms about who should have custody influence the opponent’s capacity or willingness to settle the case? Will the opponent be the only decision maker in resolving the case, or might the extended family, especially the grandparents, be the people who need to be consulted for the settlement to take place. All these factors and more should be included in a lawyer’s plan for negotiation.

Reading the Rings: Analyze the Effect of Similarities and Differences

After filling in the diagrams and/or making the lists of the different dyads, the lawyer can interpret the information to look for insights about the impact of culture on the case and potential successful strategies. The lawyer’s goal in reading the rings is to consciously examine influences on the case that may be invisible but will nonetheless affect the case.

The following questions may help identify some of those insights:

Assessing the legal claim: How large is the area of overlap between the client and the law?

Assessing cultural differences that result in negative judgments: What are the cultural differences that may lead to different values or biases, causing decision makers to negatively judge the client or the opponent?

Identifying similarities that may establish connections and understanding: What does a successful client look like to this decision maker? How similar or different is the client from this successful client?

Assessing credibility: How credible is my client’s story? Does it make “sense”? To what extent is knowledge of the client, her values, and her culture necessary for the sense of the story? How credible is my client? Are there cultural factors influencing the way the client tells the story that will affect her credibility?

Identifying legal strategies: Can I shift the law’s perspective to encompass more of the client’s claim and desired relief? Do my current strategies in the client’s case require the law, the legal decision maker, or the client to adjust perspectives?

Identifying bones to pick with the law: How large is the area of overlap between the law and myself?

Identifying how my biases shape the inquiry: How large is the area of overlap between the lawyer-client, lawyer-law, and client-legal system circles? Notice that the overlap is now divided into two parts: the characteristics relevant to the legal case that the lawyer shares with the client and those relevant characteristics that the lawyer does not share with the client. Does my client have a plausible claim that is difficult for me to see because of these differences or similarities? Am I probing for clarity using multiple frames of reference—the client’s, the legal system’s, the opponent’s, and mine? Or am I focused mostly on my own frame of reference?

Identifying hot-button issues: Of all the characteristics and perspectives listed on the rings, which loom largest for me? Are they the same ones that loom largest for the client? For the law?
Habit 2 is more cumbersome than Habit 1 and requires looking at multiple frames of reference at once.22 However, lawyers who have used Habit 2 find that it helps them to focus when a case or client is troubling them. The lawyer can identify why she has been focusing on a particular aspect of a case even when that aspect is not critical to the success of the case. She may gain insight into why a judge is bothered by a particular issue that is presented in the case. In addition, lawyers might gain insight into why clients are resisting the lawyer’s advice or the court’s directive and are “uncooperative.” Lawyers might also begin to understand why clients often see the lawyer as part of a hostile legal system when a high degree of overlap between the lawyer and the legal system is identified.

What can the lawyer do with the insights gained from reading the rings or lists? Lawyers can ask whether the law and legal culture can be changed to legitimate the client, her perspective, and her claim. Can the lawyer push the law or should she persuade the client to adapt? Hopefully, by discovering some of these insights, the lawyer may be better able to explain the client to the legal system and the legal system to the client.

Habit 3: Parallel Universes

Habit 3 helps a lawyer identify alternative explanations for her client’s behavior. The habit of parallel universes invites the lawyer to explore multiple alternative interpretations of any client behavior. Although the lawyer can never exhaust the parallel universes that explain a client’s behavior, in a matter of minutes the lawyer can explore multiple parallel universes to explain a client’s behavior at a given moment.

For example, if a lawyer has a client in a custody dispute who has consistently failed to follow a court order to take her child for a psychiatric evaluation, the lawyer might assume that her client has something to hide. Although the client tells the lawyer she will do it, it remains undone. A lawyer using parallel universe thinking can imagine many different explanations for the client’s behavior: the client has never gone to a psychiatrist and is frightened; in the client’s experience, only people who are crazy see psychiatrists; going to a psychiatrist carries a lot of shame; the client has no insurance and is unable to pay for the evaluation; the client cannot accept that the court will ever give the child to her husband, who was not the primary child caretaker; the client may fear that she will be misinterpreted by the psychiatrist; or the client simply did not think that she needed to get it done so quickly.

Using parallel universe thinking, the lawyer for a client who fails to keep appointments can explore parallel universe explanations for her initial judgment that “she does not care about the case.” The behavior may have occurred because the client lacked carefare, failed to receive the letter setting up the appointment, lost her way to the office, had not done what she promised the lawyer she would do before their next appointment, or simply forgot about her appointment because of a busy life.

The point of parallel universe thinking is to get used to challenging oneself to identify the many alternatives to the interpretations to which we may be tempted to leap on insufficient information. By doing so, we remind ourselves that we lack the facts to make the interpretation, and we identify the assumptions we are using. The process need not take a lot of time; it takes only a minute to generate a number of parallel universe explanations to the interpretation to which the lawyer is immediately drawn.

Parallel universe thinking would cause the lawyer in the introductory example to try to explore with the client why she is resistant or to talk to people who share the client’s culture to explore possible cultural barriers to her following the court’s order.

Parallel universe thinking is especially important when the lawyer is feeling judgmental about her client. If we are attributing negative inferences to a client’s behavior, we should identify other reasons for the behavior. Knowledge about specific cultures may enlarge the number of explanations that we can develop for behavior. Parallel universe thinking lets us know that we may be relying on assumptions rather than facts to explain the client’s behavior and allows the lawyer to explore further with the client or others the reasons for the behavior. This exploration may also be helpful in explaining the client’s behavior to others.
By engaging in parallel universe thinking, lawyers are less likely to assume that they know why clients are doing what they are doing when they lack critical facts. Parallel universe thinking also allows the lawyer to follow the advice of a cross-cultural trainer who suggests that one way to reduce the stress in cross-cultural interactions is to ask, "I wonder if there is another piece of information that, if I had it, would help me interpret what is going on."23

**Habit 4: Red Flags and Remedies**

The first three habits focus on ways to think like a lawyer, incorporating cross-cultural knowledge into analyzing how we think about cases, our clients, and the usefulness of the legal system. Habit 4 focuses on cross-cultural communication, identifying some tasks in normal attorney-client interaction that may be particularly problematic in cross-cultural encounters as well as alerting lawyers to signs of communication problems.

Good cross-cultural interaction requires mindful communication where the lawyer remains cognitively aware of the communication process and avoids using routine responses to clients. In cross-cultural communication, the lawyer must listen deeply, carefully attuned to the client and continuously monitoring whether the interaction is working and whether adjustments need to be made.

Habit 4 is accomplished in the moment and requires little planning for the experienced lawyer. The lawyer can identify ahead of time what she will look for to spot good communication and "red flags" that will tell her that accurate, genuine communication is probably not occurring.

In addition to paying attention to red flags and corrective measures, culturally sensitive exchanges with clients should pay special attention to four areas: (1) scripts, especially those describing the legal process; (2) introductory rituals; (3) client’s understanding; and (4) culturally specific information about the client’s problem.

**Use Scripts Carefully**

The more we do a particular activity, the more likely we are to have a “script.” Lawyers often have scripts for the opening of interviews, explaining confidentiality, building rapport, explaining the legal system, and other topics common to the lawyer’s practice. However, a mindful lawyer uses scripts carefully, especially in cross-cultural encounters, and instead develops a variety of communication strategies to replace scripts and explore understanding.

**Pay Special Attention to Beginnings**

A lawyer working with a client from another culture must pay special attention to the beginnings of communications with the client. Each culture has introduction rituals or scripts as well as trust-building exchanges that promote rapport and conversation. A lawyer who is unaware of the client’s rituals must pay careful attention to the verbal and nonverbal signals the client is giving to the lawyer. How will the lawyer greet the client? What information will be exchanged before they “get down to business”? How do the client and lawyer define “getting down to business”? For one, the exchange of information about self, family, status, or background is an integral part of the business; for another, it may be introductory chitchat before the real conversation takes place. If an interpreter who is familiar with the client’s culture will be involved with the interview, the lawyer can consult with the interpreter on appropriate introductory behavior.

**Use Techniques That Confirm Understanding**

Both clients and lawyers in cross-cultural exchanges will likely have high degrees of uncertainty and anxiety when they interact with someone they perceive to be different. The lack of predictability about how they will be received and their capacity to understand each other often leads to this uncertainty and anxiety. To lessen uncertainty and anxiety, both the lawyer and the client will be assisted by using techniques that consciously demonstrate that genuine understanding is occurring. Active listening techniques, including feedback to the client rephrasing his or her information, may be used to communicate to the client that the lawyer understands what the client is saying.24
In addition to giving the client feedback, the lawyer should look for feedback from the client that she understands the lawyer or is willing to ask questions if she does not understand. Until the lawyer knows that the client is very comfortable with a direct style of communication, the lawyer should refrain from asking the client if she understands and instead probe for exactly what the client does understand.

Gather Culture-Sensitive Information

How do we gather information that helps us interpret the client within her cultural context? In the first instance, the lawyer should engage in “deep listening” to the client’s story and voice. For reasons identified in Habit 1, the lawyer, in question mode, will often be too focused on his or her own context and perspective. When exploration of the client’s values, perspective, and cultural context is the goal, the lawyer needs to reorient the conversation to the client’s world, the client’s understandings, the client’s priorities, and the client’s narrative. Questions that get the client in narrative mode are usually the most helpful.

Questions that ask the client how or what she thinks about the problem she is encountering may also expose differences that will be helpful for the lawyer to understand the client’s worldview. What are the client’s ideas about the problem? Who else has the client talked to and what advice did they give? What would a good solution look like? What are the most important results? Who else besides the client will be affected? Consulted? Are there other problems caused by the current problem? Does the client know anybody else who had this problem? How did they solve it? Does the client consider that effective?

If the client has come from another country, the lawyer should ask the client how this problem would be handled in the client’s country of origin. For example, in many legal cultures, the lawyer is the “fixer” or the person in charge. In contrast, most law students in the United States are taught client-centered lawyering, which sees the lawyer as partner, and our professional code puts the client in charge of major decisions about resolving the case.

Look for Red Flags That the Interaction Is Not Working

What are the red flags that mindful lawyers pay attention to in assessing whether the conversation is working for the client and lawyer? Red flags that the lawyer can look for include the following:

- The client appears bored, disengaged, or even actively uncomfortable;
- the client has not spoken for many minutes, and the lawyer is dominating the conversation;
- the lawyer has not taken any notes for many minutes;
- the lawyer is using the lawyer’s terminology instead of the lawyer using the client’s words;
- the lawyer is judging the client negatively;
- the client appears angry; or
- the lawyer is distracted and bored.

Each lawyer and client and each lawyer–client pair will have their own red flags.

The first step is to see the red flag and be shaken out of complacency. “Uh-oh, something must be done.” The next step is the corrective one. This must be done on the spot, as soon as the red flag is seen. The general corrective is to do anything possible to return to the search for the client’s voice and story.

Explore Corrective Measures

In creating a corrective, the lawyer should be careful to use a different approach than the one that has led to the red flag. For example, if the client is not responding to a direct approach, try an indirect approach. If the call for narrative is not working, ask the client some specific questions or ask for narrative on a different topic.

Other suggested correctives include:

- turning the conversation back to the client’s stated priority;
- seeking greater detail about the client’s priority;
- giving the client a chance to explain in greater depth her concerns;
- asking for examples of critical encounters in the client’s life that illustrate the problem area.
exploring one example in some depth;

asking the client to describe in some detail what a solution would look like; and

using the client’s words.

Again, these are only a few examples of many correctives that can be fashioned. Encounter by encounter, the lawyer can build a sense of the red flags in this relationship and the correctives that “work” for this client. Client by client, the lawyer can gain self-understanding about her own emblematic red flags and correctives that specifically target those flags. Red flags can remind the lawyer to be aware of the client and to be focused on the client in the moment. With reflection, the red flags can help the lawyer avoid further problems in the future.

Habit 5: The Camel’s Back

Like the proverbial straw that breaks the camel’s back, Habit 5 recognizes that, in addition to bias and stereotype, there are innumerable factors that may negatively influence an attorney–client interaction. A lawyer who proactively addresses some of these other factors may limit the effect of the bias and stereotyping and prevent the interaction from reaching the breaking point. Once the breaking point has been reached, the lawyer should try to identify why the lawyer–client interaction derailed and take corrective actions or plan for future corrective action.

Consider the case of a woman client with a horrible story of torture, whom the lawyer had very limited time to prepare for in an asylum trial (she lived out of town). During their conversation, the woman spoke in a rambling fashion. The lawyer, just back from vacation, was thinking angry thoughts toward the client. In the extreme stress caused by time pressure and by listening to the client tell about some horrible rapes that she had suffered, the lawyer fell back on some awful, old conditioning: against people who are of a different race, people who are overweight, and people who “talk too much.”

In the midst of these feelings, which were causing the lawyer shame, what can the lawyer do to put the interview back on track and prevent a collision? This lawyer, like all lawyers, had biases and stereotypes that he brought to this attorney–client interaction. Research on stereotypes indicates that we are more likely to stereotype when we are feeling stress and unable to monitor ourselves for bias. By identifying the factors contributing to the negative reactions and changing some of them, the lawyer could prevent himself, at least sometimes, from acting on the basis of his assumptions and biases.

For example, the lawyer in the previous situation can take a break, have some food and drink, and identify what is interfering with his capacity to be present with the client before he resumes the interview. This, however, requires that the lawyer accept his every thought, including the ugly ones, and find a way to investigate and control those factors that are simply unacceptable in the context of lawyering. Knowing oneself as a cultural being and identifying biases and preventing them from controlling the interview or case are keys to Habit 5 thinking.

Over time, lawyers can learn to incorporate the analysis that they are doing to explore bias and stereotype into the analysis done as part of Habit 1. In addition to biases and stereotypes, straws that break the lawyer’s back frequently include stress, lack of control, poor self-care, and a nonresponsive legal system. Final factor analysis identifies the straws that break the lawyer’s back in the particular case and corrective steps that may work to prevent this from happening.

For example, assume that a lawyer, after working with a few Russian clients, begins to stereotype Russians as people who intentionally communicate with a lack of candor with lawyers. Habit 5 encourages this lawyer to be extra mindful when interviewing a Russian client. Given her biases, there is a higher likelihood that the lawyer will not find herself fully present with this client. In addition to using the other habits, the lawyer can improve the communication by controlling other factors (hunger, thirst, time constraints, and resource constraints), knowing that she is at greater risk of misunderstanding this client.

The prudent lawyer identifies proactively factors that may impede full communication with the client. Some she cannot control: pressure from the court, lack of resources, bad
timing, excessive case load. But some she can:
the language barrier (through a competent inter-
preter), her own stress (through self-care and
adequate sleep, food, and water), and the amount
of time spent with the client (increase as needed).

Habit 5 thinking asks the lawyer to engage
in self-analysis rather than self-judgment. A
lawyer who has noticed a red flag that recurs in
interactions with clients can brainstorm ways to
address it. Likewise, a lawyer who has noticed
factors that tend to be present at particularly
smooth encounters with clients can brainstorm
ways to make more use of these advantages. By
engaging in this reflective process, the lawyer is
more likely to respond to and respect the indi-
vidual clients.

NOTES

1. This work grew out of a joint collaborative
process that was conceived in conversations in the
early 1990s and began as a project in fall 1998 with a
concrete goal of developing a teaching module about
cross-cultural lawyering. Ultimately that project
resulted in these materials for use in clinical
courses, which we first presented at the 1999 CUNY
Conference, “Enriching Legal Education for the
21st Century, Integrating Immigrant Perspectives
Throughout the Curriculum and Connecting With
Immigrant Communities.” This work has also con-
tributed to a chapter written by Jean Koh Peters in the
supplement to her book, Representing Children in
Child Protective Proceedings: Ethical and Practical
Dimensions.

Many wonderful colleagues, students, and staff
from CUNY and Yale aided us in the development of
this work. The Open Society Institute, Emma Lazarus
Fund, provided support for the conference, our work,
and the publication of these materials.

2. R. Carroll, Cultural Misunderstandings 3
(University of Chicago Press 1988). Others have
referred to this as “conscious incompetence,” where
the individual recognizes that cross-cultural com-
petence is needed, but the person has not yet acquired
the skills for this work. See W. S. Howell, The

3. Carroll, Cultural Misunderstandings 2.
Objective culture includes that which we observe
including artifacts, food, clothing, and names. It is
relatively easy to analyze and identify its use.
Subjective culture refers to the invisible, less tangible
aspects of behavior. People’s values, attitudes, and
beliefs are kept in people’s minds. Most cross-cultural
misunderstandings occur at the subjective culture level.
See K. Cushner & R. Brislin, Intercultural Interactions

4. Those who grew up in cultures in the United
States that prized individualism and self-reliance can
identify specific experiences from their childhood
that helped them develop these traits, such as paper
routes and baby-sitting jobs and proverbs such as
“God helps those who help themselves” and “The
early bird catches the worm.” Cushner & Brislin,
Intercultural Interactions, p. 7. Not all who grew up
in the United States share this commitment to indi-
vidualism; significant cultural groups in the United
States prize commitment to community. They might
have heard “Blood is thicker than water.”

5. Ethnocentrism occurs when a person uses his
own value system and experiences as the only refer-
ence point from which to interpret and judge behavior.

6. Cushner & Brislin, Intercultural Interactions,
p. 10.

7. Critical feminist race theorists have established
the importance of intersectionality in recognizing, for
example, that women of color have different issues
than white women or men of color. The intersecting-
ness of race and gender gives women of color different
vantage points and life experiences. Angela P. Harris,
Race and Essentialism in Feminist Legal Theory, 42
Stan. L. Rev. 581 (1990); Kimberlé Crenshaw, Mapping
the Margins: Intersectionality, Identity Politics, and
1241, 1249 n. 29 (1991); see also Melissa Harrison and
Margaret E. Montoya, Voices/Voces in the Border-
lands: A Colloquy on Re/Constructing Identities in
Re/Constructed Legal Spaces, Columbia Journal Of
Gender and Law (1996), 387, 403. Professors Montoya
and Harrison discuss the importance of seeing multiple
and changing identities.

8. The insider/outsider group distinction is one of
the core themes in cross-cultural interactions.
K. Cushner & D. Landis, The Intercultural Sensitizer,
in Handbook of Intercultural Training 189 (2d ed.;
D. Landis and R. Bhugat eds., 1996). Historical strug-
gles between native countries of the lawyer and client
or situations where lawyer’s or client’s native country
has dominated the other’s country can create diffi-
cult power dynamics between lawyer and client.
For example, racial discrimination both historical and current by Anglo-Americans against African Americans can have significant influences on the lawyer-client relationship. Infra, note 32.


10. Harrison and Montoya, supra note 4, at 160. For example, after discussing the scholarship on lawyer as translator or ethnographer, Professor Zuni Cruz invited Esther Yazzie, a federally certified Navajo translator, to describe and enact the skills necessary to work successfully with language interpreters. "Ms. Yazzie's presentation debunked for all of us the idea that languages are transparent or that representations of reality somehow exist apart from language. One of several examples cited by Ms. Yazzie involved different conceptualizations of time: 'February' translated into Navajo as 'the time when the baby eagles are born.' Certainly, this is a temporal concept more connected to nature and to place than a word such as 'February' and, as such, is a different construct."


14. Hofstede 1980 and 1991 as cited in Cusner & Brinsin, Intercultural Interactions, supra note 4. at 302. Other nations that rank high on this dimension are Australia, Canada, Great Britain, the Netherlands, and New Zealand. Nations that score high on collectivism are primarily those in Asia and South America.

15. See also Kimberly O'Leary, Using "Difference Analysis" to Teach Problem-Solving, Clin. L. Rev. 65, 72 (1997), at 72. Professor O'Leary points to both the ethical rules and concepts of standing as limiting lawyers' conceptions about who is involved in a dispute. Following our presentation at the 2000 AALS Clinical Teacher's conference, Peter Joy alerted us to a contemplated change in California professional responsibility rules on confidentiality, allowing the privilege to be maintained when family members or others were part of the interview process.

16. This scenario was told to me by Professor Holly Maguiigian, who for years has represented a number of battered women in criminal cases. In this case, her students worked with a lawyer from the Legal Aid Society. These lawyers were significantly aided by the advocates of the New York Asian Women's Center who perform both language and cultural translations. The New York Asian Women's Center is a community-based organization that works with a diverse group of Asian women in assisting them to deal with issues of intimate violence. For a more detailed analysis of the difference between individualism and collectivism, see Cusner & Landis, Handbook of Intercultural Training, note 11 supra, at 19.

17. Peter Margulies, Re-framing Empathy in Clinical Legal Education, 5 Clin. L. Rev. 605 (Spring 1999). Margulies also presented this case at the 1999 CUNY Conference, "Enriching Legal Education for the 21st Century, Integrating Immigrant Perspectives Throughout the Curriculum and Connecting With Immigrant Communities."

18. The classic fact finder, the judge, never saw the evidence. The adversary learned about the evidence not from the lawyer, but from the client, and the adversary, not the advocate, presented the evidence to the court.

19. See Jacobs, People From the Footnotes.


21. The legal system's focus on the protection of individual rights and personal liberties reflects the essential and pervasive cultural value of individualism. The American values of free-market competition, decentralized and minimized government intervention, and laissez-faire economies are mirrored in the adversarial process. The American legal model, including the "rules of the game," fosters competition between largely autonomous and self-interested, zealous advocates in a winner-take-all scheme.

22. Because Habit 2 requires the exploration of multiple frames of reference, Jean came up with the rings as a way to assess the perspectives and analyze where there was overlap of all three perspectives and where there were differences. Not everyone comfortably uses the diagrams or thinks in the visual
ways that diagramming encourages. Habit 2 can be done with lists, filled-in Venn diagrams, or other imaginative ways that help the lawyer concretely examine the cultural differences and similarities that are involved in a case.


24. I do not know how the recommendation that we engage in active listening by identifying the emotional content of the client’s communication works for clients from more indirect cultures. One might hypothesize that a client who would be reluctant to directly name the way she is feeling may feel uncomfortable with the lawyer giving feedback of the emotional content of the message.
Tax Law

Implicit Bias and the Earned Income Tax Credit

Dorothy A. Brown

The purpose of the earned income tax credit (EITC) is to eliminate tax-related incentives to remain on welfare. It operates by reimbursing low-income workers for income and Social Security tax withholdings that are not withheld from welfare payments. One persistent problem associated with the EITC is the large number of tax returns with EITC-related errors – referred to as the “error rate.” The inappropriately payments that flowed from the public treasury as a result of these errors are estimated at more than $10 billion for 2006 alone.

President Bill Clinton and the Republican Congress battled in the mid-1990s over the EITC’s future. Republican President Gerald Ford signed the EITC into law in 1975 in part to reduce “the welfare rolls,” but it was the Republican Congress that wished to abolish the EITC and President Clinton who wanted to save it. The choice to reform or abolish the EITC depended on why the error rate occurred and how readily the problem could be redressed.

The first theory to explain the error rate is that, because of the EITC’s complexity, it is easy to make a mistake in calculating the credit. For instance, the Internal Revenue Service (IRS) informational booklet explaining the EITC is more than fifty pages long and includes several worksheets. The solution for the problem of complexity would be to simplify the EITC to reduce error rates. The second theory to explain the error rate is that it is the result of taxpayer fraud. Under this theory, taxpayers want something for nothing, so they cheat and claim an EITC amount that they know they are ineligible to receive. The solution to a problem based on fraud would be to increase audits of low-income taxpayers to crack down on the fraud.

I would like to thank the editors for their extremely helpful suggestions. I would also like to thank the participants at the Tulane Tax Roundtable. Finally, I thank Daniel M. Reich and Ryan M. Richards for excellent research assistance.
The political compromise between President Clinton and the Republican Congress was to single out EITC taxpayers for audit, an enforcement mechanism that cost taxpayers $1 billion over five years. This chapter examines the role that implicit racial bias might have played in the decision to spend $1 billion dollars to audit EITC recipients as opposed to simplifying the EITC filing process. Implicit racial bias refers to the process of employing preexisting knowledge about race (i.e., stereotypes) to make sense of something new (the EITC error rate) without conscious thought. The widespread impact of implicit bias on daily decision-making has been documented extensively over the past decade, especially in contexts in which decision-makers are given great discretion.

So why did Congress (and the president) choose to conduct audits of claimants rather than to simplify the EITC application process? Implicit bias likely is responsible in significant part for that choice. Given that the error rate stemmed from ambiguous behavior (meaning that we do not know whether complexity or cheating is to blame) and in the absence of empirical data, the question of whether EITC recipients were cheating or not depended on who our legislators believed these people to be. Most welfare recipients are white. Yet Americans tend to associate welfare policies with black Americans. Indeed, scholars have suggested that “opposition to welfare may be specifically rooted in the erroneous perception that welfare recipients are overwhelmingly black.” Perceiving welfare as a program for black people does not in itself explain why Congress would choose to audit rather than to simplify. Rather the decision as to which remedy to choose depended on how Congress perceived black welfare recipients.

Survey data collected by Professor Mark Peffley and his colleagues contemporaneous to the policy shift showed that a “substantial portion” of Americans agreed that blacks are “lazy,” “irresponsible,” and “lacking discipline.” Peffley found that “a very sizable number of whites – as many as one in every two – openly endorse frankly negative characterizations of ‘most’ blacks.” These openly reported attitudes likely were the tip of the iceberg. The implicit bias literature demonstrates beyond any real doubt that the hidden biases that people hold toward black Americans differ in number and strength from those that are openly reported. Indeed, it is often the egalitarian-minded citizens – those who know better than to say openly (and perhaps do not consciously believe) that blacks are lazy, irresponsible, and lacking discipline – who show the greatest divergence between explicitly reported racial attitudes and those that measures such as the Implicit Association Test reveal them to hold. Perhaps it is because welfare reform is so “implicitly racialized” that scholars find

3. Id.
“the relationship between [racial] perceptions and opposition to welfare appears to be stronger” among the college-educated.4

The central argument is that members of Congress – educated and egalitarian-minded as they might be – are people just like the rest of us. In the context of welfare, which many commentators believe the EITC to be a form of, legislators are primed to think in racial terms. The decision to audit was made in the context of viewing welfare as a policy for black people and viewing black people as lazy, irresponsible, and lacking discipline. This activation of racial stereotyping of welfare made the welfare cheat explanation easier for politicians to believe.

Although this chapter focuses on implicit bias related to the EITC, one could easily imagine how implicit racial bias in the broader context of tax policy would be an area of fruitful further study. Congress enacts tax laws, and one could expect to see an implicit bias in favor of middle-class taxpayers, a group that by and large represents the lifestyles of members of Congress. For example, why does Congress decide that homeowners, but not renters, are eligible to receive a tax break? The greatest beneficiaries of the tax breaks for homeownership are middle and upper-middle income taxpayers.5 In contrast, lower income taxpayers and the majority of blacks and Latinos are most likely to be renters and not eligible for the tax break.

Further, the joint return provision of the Internal Revenue Code favors single wage-earner heterosexual households. Some couples pay higher taxes as a result of getting married, whereas others get a tax cut. White married couples are more likely to be single wage-earner couples than black married couples. Therefore when blacks marry their taxes are more likely to go up; in contrast, when whites marry, their taxes are more likely to be reduced.6

Implicit bias in the EITC context has led to three problems. First, instead of auditing the tax returns of lazy, disproportionately black welfare cheats (the perception of who is on welfare), the IRS most likely audited the tax returns of many hard-working white taxpayers, because contrary to conventional wisdom the typical EITC claimant is white – not black.

Second, when Congress concluded the problem was fraud and targeted $1 billion of auditing dollars solely on EITC-claimants, other non-EITC taxpayers who were actually committing fraud were allowed to do so without fear of reprisal. Implicit bias has thus prevented decision-makers from cracking down on real taxpayer fraud, committed especially by the wealthy.

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4 Id at 586. See also Federico, supra note 1, at 174-91 (2004). (‘Black stereotypes are now a major covert theme in discussions of welfare; those with the highest levels of cognitive ability may be more likely to represent welfare recipients in terms of the categories suggested by these discussions.’) (Internal citation omitted). [emphasis added].


Third, by focusing on audits and not simplifying the EITC, implicit bias has left the error rate pretty much intact. Had Congress instead simplified the EITC, the error rate would have decreased significantly without costing taxpayers more than $1 billion. Simplification would have had the added benefit of reducing the very high percentage of EITC taxpayers who spend precious dollars on tax return preparers and refund anticipation loans because of the EITC’s complexity. Further, if the credit were easier to claim, those eligible for it but who do not file for the EITC might be encouraged to do so. Implicit bias has gotten in the way of meaningful tax reform and has cost those least able to pay significant amounts of money.

I. THE EITC

Republican President Gerald Ford established the EITC in 1975. The legislative history tells us that it was designed to “refund” the income and Social Security taxes withheld from taxpayers’ paychecks, thereby providing them with an incentive to get off of welfare and into the workforce. Specifically, the legislative history describes the EITC’s “most significant objective” as “encouraging people to obtain employment, reducing the unemployment rate and reducing the welfare rolls.” It estimates a $0.1 billion reduction in welfare payments “resulting from the increase in income for those receiving the [earned income tax] credit.”

The EITC was made a permanent part of the Internal Revenue Code in 1978. The EITC is a refundable credit for the working poor, which means low-income taxpayers may receive a tax refund in excess of their income tax withholding and, in certain instances, in excess of their Social Security withholding. Only taxpayers with wages or “earned income” are eligible for the EITC, and they can only have a limited amount of investment income and still remain eligible. One way to look at the EITC is as an alternative to increasing the minimum wage. More than two-thirds of EITC claimants do not receive a net transfer payment, but use the EITC to offset their income, Social Security, and excise taxes that they have actually paid. Accordingly, less than one-third receive an EITC greater than the taxes they pay.

According to the Center on Budget and Policy Priorities in 2009, the EITC lifted about 6.6 million people out of poverty, about half of whom were children. Without the EITC, the poverty rate among children would have been almost one-third higher.

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7 Leslie Book, Symposium: Closing the Tax Gap: Refund Anticipation Loans and the Tax Gap, 20 Stan. L. & Pol'y Rev. 85, 93–94 (2009) ("Estimates of EITC error rate approximate twenty-five to thirty-five percent, despite the government's significant efforts over the past ten years to increase compliance.").
9 Id. at 35.
As originally enacted the EITC did not increase for family size. The Senate Finance Committee did not want to increase the EITC for each additional child out of concern for providing an "economic incentive for having additional children." It was not until 1990 that the EITC was amended to allow increased credit amount for additional children. Currently, the maximum EITC depends on whether the taxpayer has no children, one child, two children, or three or more children.

Similarly, it was not until 2001 that an adjustment was made to the calculation of the EITC to take marriage into account. A marriage penalty exists where for the same household income, two singles receive a higher EITC than they would if they were married. The marriage penalties associated with the EITC are severe and have been well known for many years. President Bush signed into law the first EITC adjustment for marital status in 2001, and there have been subsequent amendments. Although the adjustment for marriage reduces the marriage penalties associated with the EITC, it does not eliminate them because the income level at which the EITC phase-out begins for married couples is not double the amount for singles. As a result, married dual-income wage earners are penalized. Consider the following example as described by Professor Waters Lindsey:

For an unmarried couple with two children, where each parent earns $14,000 in wages and each parent claims a child as an exemption and for EITC purposes for taxable year 2000, each parent will receive the maximum EITC of $3243 for a combined EITC of $6,486. In contrast, due to the marriage penalty, a married couple with two children receives a smaller EITC... the married couple's EITC is only $5,642, substantially less than the combined EITC of $6,486 for the unmarried couple. As a result, there remains a substantial marriage penalty under the EITC.

As earned income rises, the credit increases. When income reaches the "earned income amount" the maximum EITC is reached. As income rises past the "earned income amount" the credit remains the same until the "threshold phase-out amount" of income is reached. At that point for each additional dollar of earned income, the credit amount decreases – or is phased out – until the credit becomes zero. When income reaches the "phase-out ends" income level, the EITC is zero. Consider the following three examples.

Example #1: Sally has two children and is the head of her household. She earns $10,000 of wages for the year. Her EITC will be $4,000. Sally's income is not in excess of the earned income amount ($12,780); therefore for each dollar she earns, her EITC amount increases.

11 Brown, Children, supra note 8, at 766.
14 Because her income of $10,000 is less than the “earned income amount,” her EITC calculation is relatively simple: $10,000 multiplied by the credit percentage of 40% = $4,000.
Example #2: Jerry and Maria Smith are married with two children and have earned income of $25,000. The Smiths will not receive the maximum EITC of $5,142 for families with two children for the following reason: their earned income of $25,000 is greater than the point at which the EITC is reduced for every additional dollar earned – here $21,770. Instead the Smiths’ EITC will be $4,431.76. For every dollar they earn in excess of $21,770, the Smiths lose a portion of their EITC. Because $25,000 is well below the point at which the Smiths lose their entire credit (the married phase-out amount of $46,044), they still receive a significant EITC.

Example #3: Bob is head of his household, has one child, and earns $25,000 of income. Bob will not receive the maximum credit of $3,094 because $25,000 is greater than the threshold phase-out amount of $16,600. For every dollar he earns between $16,600 and $25,000 he is losing part of his EITC. He will receive a credit of $1,766.06, significantly below the maximum EITC.

Current law still reflects EITC’s legislative history, which seeks to discourage the working poor from having children. For example, the maximum EITC for households with two children is not double the amount for households with one child, nor is the maximum EITC for households with three or more children triple the amount for those with one child. In contrast, the middle-class Child Tax Credit (CTC) increases proportionately to the number of children. The CTC for two children is double the amount for one child, and it triples for a family with three children. According to the legislative history surrounding the CTC, those levels reflect the fact that, for each additional child, a family’s financial well-being is under some additional stress. Yet the same could be said about low-income taxpayers.

In addition, the EITC is reduced once household income reaches $16,600 for all households with children, regardless of the number of children. The CTC reflects more fully the fact that a family has a reduced ability to pay taxes as family size increases. Although the EITC does provide a larger credit based on the existence and number of children in the household, it could be more generous by recognizing, as the CTC does, that $16,600 does not go as far if you have three children than if you have one child or even two children.

Finally, as the examples showed, the EITC is extraordinarily complicated. The EITC’s complexity was documented by a Government Accounting Office (GAO) study that found that EITC errors were made not only by taxpayers but also by tax preparers and IRS staff. Because the EITC is so complicated, 72 percent

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95 $12,980 × 40% = $5,192 − [(21.06%) × ($25,000 − 21,770)] = $680.228 = $4,431.76

96 $9000 × 34% = $3094 − [(15.98%) × ($25,000 − 16,600)] = $1,347.93 = $1,766.06

97 S. REP. NO. 105-53, at 3 (1997) ("[T]he individual income tax structure does not reduce tax liability by enough to reflect a family’s reduced ability to pay taxes as family size increases."); see also H. R. REP. NO. 105-45, at 530 (1997).

of low-income taxpayers pay for tax return preparation, at an estimated cost of $1.75 billion annually. This figure is in contrast to only 60 percent of all taxpayers who pay tax preparers. Thus EITC claimants use some of their EITC dollars to pay for tax services – at a higher percentage than the typical taxpayer.

II. EITC BECOMES WELFARE . . . AGAIN . . . AND SUFFERS BACKLASH

Then this Congress took a dramatic step: instead of taxing people with modest incomes into poverty, we helped them to work their way out of poverty by dramatically increasing the earned-income tax credit. It will lift 15 million working families out of poverty, rewarding work over welfare, making it possible for people to be successful workers and successful parents. Now that’s real welfare reform.21

– President Bill Clinton

In his 1994 State of the Union address, President Clinton echoed the EITC legislative history from almost two decades earlier by equating current EITC claimants with former welfare recipients. Later that year, the Republicans took over Congress. An early Republican legislative agenda item was “reforming” welfare, which occurred in 1996. In 1997, the CTC was enacted for the benefit of middle-class children and was expressly denied to certain families eligible for the EITC.

When politicians refer to taxpayers as welfare recipients, they are playing the race card to some extent.22 American opposition to welfare is due in large part to the belief that welfare recipients are disproportionately black because blacks are not as committed to work as others.23 Professor Dorothy Roberts has described how welfare conveys the imagery “of the lazy welfare mother who breeds children at the expense of taxpayers in order to increase the amount of her welfare check.”24 Her description sounds eerily familiar in this context. First, the EITC as originally enacted did not

Credit (EIC) was the source of many errors by taxpayers and tax practitioners in preparing returns. Those errors, along with errors by IRS staff in following IRS procedures for handling EIC claims, increased IRS’ [sic] error resolution workload and delayed taxpayers’ receipt of benefits.25 (emphasis added).


21 David Marzillii, Executive Director, Center for Economic Progress, Presentation to the President’s Advisory Panel on Federal Tax Reform: Issues, Challenges and Opportunities: Low Income Taxpayers and the ITC Code, at 7 (2005).


23 KENNETH J. NEUBERG & NOEL A. CAZENAVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA’S POOR 90 (2001) ("The racialization of welfare has reached the point where politicians can now exploit racial animus to promote their political ambitions and goals simply by speaking the word welfare.").

24 Brown, Children, supra note 8 at 795.

increase with the number of children so as to not "encourage" taxpayers to have additional children. Second, Congress held the notion that taxpayers engaged in fraudulent behavior by cheating on their tax returns so as to increase the amount of their tax refund. It is ironic that Clinton equated taxpayers, who are only eligible for the EITC because they work for a living, with welfare recipients who can receive welfare without working.

The irony was not lost on certain Democratic members of Congress when discussing payments to farmers in 1996—coincidentally the same year that welfare reform was enacted. Rep. Barney Frank (D-Mass.) compared the payments to farmers with Aid to Families with Dependent Children (AFDC), stating, "I would not necessarily mind welfare for farmers, but they get 7 years of welfare, the AFDC recipients get 5, and of course there is no work requirements [sic]." Democratic members of Congress who referred to the payments to farmers as "welfare" were severely chastised by Republicans and Democrats alike. Rep. Roberts (R-Kans.) stated that "farm programs are not welfare and partisan statements equating farm programs with welfare do a disservice to farmers and ranchers." Sen. Harkin (D-Iowa) stated that "farmers work very hard for their money. They are proud people. They want to get their income from the market and not from the mailbox." Given the racial breakdown of farmers, this discourse should not be surprising.

Professor Jim Chen has described government subsidies to farmers as "an almost perfectly race-matched system of affirmative action for whites." American farm owners are 98% white and are presumed to be hard working and not desirous of handouts. Those who receive the EITC are perceived differently. When a government subsidy disproportionately benefits whites, they are receiving the money because they are "hard working." However, when a government subsidy goes to blacks, they are receiving the money because they are "lazy" and not "hard working."

Congress decided not to extend the full range of CTC benefits to EITC taxpayers in 1997. During that debate, Republican members of Congress referred to the EITC as welfare. House Speaker Newt Gingrich (R-Ga.) stated that giving "an additional $500-per-child tax credit to those who pay no taxes is welfare, plain and simple." Rep. Jack Kingston (R-Ga.) stated that giving the CTC to low-income taxpayers would be giving "another welfare benefit to people who are not paying taxes." Rep. Bill Archer (R-Tex.) reportedly said that extending the CTC to low-income.

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25 Brown, Children, supra note 8, at 797–801.
26 Id. at 797–98 n.201.
27 Id. at 798 n.202.
28 Id. at 799 n.210.
30 Id. at 1266–67.
31 149 CONG. REC. E1365 (daily ed. July 8, 1997).
32 Id. at H3855 (daily ed. June 18, 1997).
taxpayers would amount to "a welfare payment." Very few Democrats came out in support of EITC taxpayers. Rep. Ken Bentsen (D-Tex.) was one who did by arguing that Congress was denying "the full $500 per child tax credit to 15 million working, taxing parents because it doesn't let them count the credit against their payroll taxes." In addition to members of Congress, Republican Treasury Secretary Paul O'Neill stated that the IRS must "examine the devil out of those receiving the [earned income] tax credit, which, to be frank, is a form of welfare."

In 1998, Congress authorized the IRS to begin an EITC compliance initiative that targeted EITC taxpayers for increased audits. The increased audits were the result of a political compromise between President Clinton and the Republican Congress in exchange for not repealing the EITC. Since 1998, well over $1 billion has been spent on the effort. Ironically, this compliance initiative came only a few years after Congress ordered the IRS to stop doing random taxpayer audits because of the "excessive burdens and intrusion" imposed on taxpayers. Apparently what is burdensome for the average taxpayer can be ignored when dealing with EITC taxpayers.

EITC overpayment estimates range anywhere from 27 percent to 31 percent. Congress, observing the ambiguous behavior – namely, the high error rate – and concluding that fraud was the culprit, has conducted numerous hearings and requested an overwhelming number of GAO reports, most of which focus on noncompliance issues.

EITC noncompliance has been defined to include "erroneous [EITC] claims caused by negligence, mistakes, confusion, and fraud." However, most of the GAO reports did not consider taxpayers who were eligible to receive EITCs but did...

33 Richard W. Stevenson, Main G.O.P. Tax Writer Balking at a Credit that Clinton Wants, N.Y. TIMES, July 17, 1997, at A18 ("The Republican, Representative Bill Archer of Texas, the chairman of the Ways and Means Committee, said he would not include the costs of providing the proposed $500 per child credit to low-income working families who have no Federal income tax liability. . . . Instead, Mr. Archer said, he would consider it a welfare payment, not a tax cut.").

34 143 CONG. REC. H4804 (daily ed. June 24, 1997).


36 David Cay Johnston, Perfectly Legal 132 (2003); See also Lee, supra note 35 at 273, 293 ("Declines in audit rates commenced in 1969," but "accelerated in 1995, after Congress, by then controlled by Republicans, cut [the Service’s] spending sharply and required the agency to devote more resources to customer service. . . . Congress also directed the Service to devote more audit resources to EITC issues largely for political reasons.").


38 See Brown, Children, supra note 5, at 773 n.74 (citing 17 different GAO reports).

not claim them, according to one study, "for every three households that claimed the credit, there was an additional eligible household that did not." Thus considerable numbers of eligible EITC taxpayers are not taking advantage of this credit.

In the IRS Data Book is a table titled "Costs Incurred by the Internal Revenue Service, by Budget Activity," which for years had a separate line for the EITC. The remarkable feature of the table was that it singled out no other tax provision. If we wanted to find out how much, if any, the IRS spends on denying unlawful tax shelters to high-income taxpayers or to corporations, we could not do so because that data are not stated separately.

The Improper Payments Information Act of 2002 requires each federal agency to identify all programs that "may be susceptible to significant improper payments" and the steps it has taken to reduce such payments. However, the Office of Management and Budget (OMB) interpreted this act to require the IRS to notify it of improper payments associated with only one tax provision – the EITC. The EITC is the only tax provision about which the OMB has requested improper payment information.

During 2003, a second set of debates occurred around the decision to expand the CTC to include certain EITC claimants. Rep. Spencer Bachus (R-Ala.) stated that "increasing the child tax credit to [EITC recipients] who don’t pay income taxes amounts to turning the tax code 'into a welfare system.'" Rep. Robert Portman (R-Ohio) stated that the EITC "is not a tax issue – it’s a government transfer payment to people who do not pay income taxes." Rep. Ernest Istook (R-Okla.), chairman of the Appropriations subcommittee that has authority over the IRS budget, stated, "The problem is that welfare payments are being mislabeled as tax rebates. [T]o end the confusion, we should stop putting the 'tax refund' label on government checks that are actually public assistance." Finally, then-House Majority Leader Tom

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42 See, e.g., Internal Revenue Service, 1999 Data Book 59 tbl.33 (1999). The IRS singled out the EITC until FY 2007. Since then, Table 25 has listed only general enforcement costs.


44 Zelenak, supra note 10, at 1896–97.

45 Id. at 1897. It remains unclear whether OMB will continue to interpret the law this way after the passage of The Improper Payments Elimination and Recovery Act of 2010 (IPERA), Pub. L. No. 111-204 (2010).


48 Chris Casteel, Senators Explain Votes, Say Low-Income Families off Tax Rolls, DAILY OKLAHOMAN, June 7, 2003, at 30. Representative Istook was in the news several years ago on a non-EITC tax matter: the congressman inserted a provision into a 2004 spending bill that would have given legislators and their staff assistants the ability to examine income tax returns. David E. Rosenbaum, G.O.P. Says Motive for Tax Clause in Budget Bill Was Misread, N.Y. TIMES, Nov. 22, 2004, at A22.
Dorothy A. Brown

DeLay (R-Tex.) stated, “To me, it’s a little difficult to give tax relief to people that don’t pay income tax.”
Congressman DeLay ignored the fact that all wage earners pay Social Security and Medicare taxes.

In August 2003, the IRS announced that it was subjecting 25,000 EITC claimants to precertification, which requires EITC claimants to provide additional documentation to the IRS that they are eligible for the credit. EITC claimants had to prove that they had a child who qualified them for the larger credit amount. No other taxpayers had to file additional forms to receive a refund.

The IRS issued preliminary results from the first set of precertification claimants in May 2004, including information that almost 20 percent of the taxpayers did not claim the EITC on their 2003 return. The IRS could not determine whether failure to claim the credit was the result of ineligible taxpayers choosing not to file or of eligible taxpayers being deterred from filing. No other tax provision requires precertification, although all welfare-type programs do so. The results of precertification were decreased participation in the EITC and increased burdens on taxpayers. As a result, the IRS stopped the precertification program.

The error rate still hovers around 25%. In 2009, for EITC claims totaling $43 billion, the IRS paid out between $10 and $12 billion in error. Because the high error rate has been attributed to taxpayer fraud, the focus of reducing the error rate has been primarily on enforcement – specifically increased audits and precertification. Yet these measures have done very little to reduce the problem. Implicit bias has caused Congress to ignore the obvious; namely, that simplicity is the only thing that will decrease the error rate, because most errors are due not to fraud but to the EITC’s complexity.

III. H ARMS OF IMPLICIT B IAS

This section describes three primary harms that implicit bias in the EITC context has wrought on different taxpayer groups. First, targeting the EITC for special

49 Zelenak, supra note 10, at 1871–72.
52 Zelenak, supra note 10, at 1871.
53 Id. at 1872.
54 Id. at 1884.
government audits and scrutiny has primarily harmed hard-working white taxpayers. Further by focusing solely on errors made by existing EITC filers, limited efforts were made to reach out to those who are eligible but have not filed for their EITC, a failure that also has a racial impact.

Second, by focusing solely on EITC taxpayers, Congress and the IRS have ignored far larger instances of tax fraud. The IRS estimates that there is a gap between taxes owed and unpaid by individuals and corporations of almost $500 billion. Even if all errors in the EITC were to magically disappear tomorrow, the tax gap would remain largely intact. Noncompliance by corporations, high-income individuals, and cash-based business owners are each instances where additional audit dollars would bear much fruit but have been largely ignored.

Finally, by concluding that the ambiguous behavior of high error rates is due to fraud and not complexity, there has been little reduction in the error rate even after more than a decade of effort. Congress has missed an opportunity to simplify the EITC, which would not only reduce the error rate but would also put more EITC dollars in the hands of EITC taxpayers and potentially encourage new EITC filers who are eligible but not currently filing, thereby lifting even more hard-working Americans out of poverty.

A. Who Are EITC Taxpayers?

One study showed that 54 percent of those eligible for the EITC were white, 24 percent were black, almost 18 percent were Latino/a, and 3.6 percent were "other." It is likely therefore that the majority of EITC taxpayers who were audited by the IRS were white. When members of Congress told the IRS to audit EITC taxpayers it is unlikely that they had in mind auditing lots of white taxpayers.

In addition, by focusing on those who were claiming the EITC fraudulently, Congress largely ignored the significant percentage of taxpayers who were eligible for the EITC but were not applying for it. A study using the 2002 National Survey of America’s Families showed that only 58 percent of all low-income parents had heard of the EITC. Whereas the knowledge gap between black parents and white parents was relatively small (68% vs. 73%), the gap between Latino parents and white parents was extremely large (27% vs. 73%). More outreach dollars, coupled

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with simplification, would probably allow additional eligible taxpayers to file and receive their EITC.

B. Tax Gap Is More than the EITC

By focusing virtually all auditing efforts at lowering the EITC error rate in recent years, the tax gap between taxes owed but unpaid grew unabated. Although the IRS estimate of the EITC noncompliance rate is high, its noncompliance rate is not the highest of all such rates. The IRS estimates that the gap between taxes owed but unpaid by individual and corporate taxpayers is more than $300 billion. In addition, the IRS states that its most current enforcement efforts only resulted in the collection of about 16% of the tax gap. Underreported income by self-employed taxpayers totaled nearly $68 billion of the more than $300 billion tax gap. In contrast, the estimated tax gap for the EITC approaches $12 billion. The EITC represents less than one-half of 1 percent of the total tax gap.

The IRS estimates that self-employed individuals generally underreport their income by 64%, and self-employed individuals who operate in a cash business underreport their income by 89%. Small corporations and sole proprietors constitute 29% of the tax gap. Thus, significant noncompliance areas that generate greater revenue losses than are estimated for the EITC go unaudited. Because Congress has been obsessed with the EITC error rate, other tax cheats have been allowed to continue without fear of reprisal.


61 IRS Updates Tax Gap Estimates, IRS (February 14, 2006), http://www.irs.gov/newsroom/article/0, id=134496,00.html ("IRS enforcement activities, coupled with other late payments, recover about $55 billion of the tax gap [$435 billion], leaving a net tax gap of $290 billion.").


63 U.S. Gen. Accounting Office, Support for Low Income Individuals and Families: A Review of Recent GAO Work 7 (2010), available at http://www.gao.gov/new.items/d10927t.pdf ("IRS estimates on overpayments have ranged from 24 to 32 percent of dollars claimed at a cost of up to $12 billion per year.").


65 U.S. Gen. Accounting Office, Tax Gap: Many Actions Taken, but a Cohesive Compliance Strategy Needed 2, 7 (1994) ("As a starting point, IRS could focus more of its efforts on highly noncompliant groups, such as small corporations and sole proprietors, who make up 29 percent of the tax gap.").

66 See Philip J. Hamelink et al., The Challenge of the EITC, 100 Tax Notes 955, 960 (2003) (showing that individual noncompliance was estimated at $12 billion, offshore noncompliance at $70 billion, corporate noncompliance at $46 billion, and partnership noncompliance at $30 billion, compared with the estimates for EITC noncompliance, which was placed at $10 billion).
C. Simplification

Because of the complexity of the EITC, tax return preparers, IRS personnel, and others are more prone to make mistakes when filing the return. In tax year 2003, 71 percent of EITC tax returns were filed by paid professionals.67 In fact, EITC filers, who should have the simplest returns, are more likely to use paid return preparers than middle and upper income taxpayers. Because of congressional inaction in simplifying the EITC, hard-working low-income taxpayers have had to pay a part of their credit to tax return preparers.

A cottage industry in the form of refund anticipation loans (RALs) disproportionately used by EITC filers has developed. For the 2005 tax year, 63 percent of RAL recipients were EITC taxpayers, even though they made up only 17 percent of individual taxpayers.68 One estimate places the cost of RAL loan fees at $570 million per year for EITC taxpayers.69 A 2002 study by the Brookings Institution found that electronic tax filing and preparation services proliferate in neighborhoods where large numbers of families claim the EITC.70 EITC taxpayers are not only targeted by the IRS but also are easy prey for others.

Given the EITC’s complexity, one wonders what simplification would look like. Currently the IRS produces a chart that calculates tax liability for incomes below a certain level so that all taxpayers have to do is check their income level, marital status, and family size to see how much taxes they owe. The IRS could create such a chart for the EITC, showing credit amounts for different income amounts, different marital statuses, and different numbers of children. If the IRS did more of the heavy lifting, taxpayers would not have to and would be less likely to use tax return preparers and RALs.

Consider how simplification in other contexts has produced dramatic results. Dr. Atul Gawande explains how something as simple as a checklist decreased deaths during surgery at Columbia Presbyterian Hospital.71 Put another way, complexity kills. When discussing EITC claimants, additional money that would no longer have to be spent on tax return preparers could produce equally significant outcomes. If we were dealing with white farmers in Idaho who were receiving government funds at a level 25-30% higher than they were entitled to, what would be the result? Would

69 Id.
70 See Berube, et al., supra note 19, at 1 ("High-EITC zip codes are home to 50 percent more electronic tax preparation services per filer than low-EITC zip codes.").
we assume that the farmers are lazy and decide to audit them, or would we assume that the farmers are hard working and decide to simplify the program?

IV. CONCLUSION

In President Obama’s January 2011 State of the Union address, he called for simplifying the tax code. There is no better place to start than with the EITC. Yet implicit bias has largely gotten in the way of EITC simplification. Implicit bias allows members of Congress to make judgments based on the high error rates and conclude they occur due to fraud and not complexity. Members of Congress see lazy, welfare cheats instead of the reality of hard-working taxpayers struggling to make ends meet while trying their best to calculate their proper share of EITC benefits – or trusting tax return preparers to do it for them. The EITC lifts millions of Americans and their families out of poverty every year. Implicit bias has gotten in the way of simplification for far too long. America’s working poor deserve better. The time for change is now.
16th Annual Tax Lawyering Workshop Speakers
Penelope Andrews
Distinguished Visiting Professor of Law
Co-Director, Racial Justice Project

Curriculum Vitae
Penelope Andrews joined NYLS in January 2019 as Distinguished Visiting Professor of Law and teaches comparative and international law courses. She also serves as Co-Director of NYLS’s Racial Justice Project, focusing on international and South African issues.

Professor Andrews was the 2018–19 Sabbatical Scholar at the Center for the Study of Law and Culture at Columbia Law School. She previously completed two terms as Dean: From 2016 to 2018 as the first Black dean at the University of Cape Town Faculty of Law, and from 2012 to 2015 as the first female dean of Albany Law School in New York. She was previously the Associate Dean for Academic Affairs at the City University of New York (CUNY) School of Law and Director of International Programs at Valparaiso Law School.

She began her teaching career at La Trobe University in Melbourne, Australia, where she taught for eight years before moving to CUNY, where she was on the faculty for 15 years, teaching public international law, gender and law, race and law, comparative law, torts, and lawyering. She has also held visiting appointments at several law schools in the U.S. and internationally, including in South Africa, Canada and Australia. Professor Andrews received her B.A. and LL.B. degrees from the University of KwaZulu-Natal (formerly University of Natal) in South Africa and an LL.M. from Columbia Law School.

Professor Andrews is active in international collaborative research and mentoring networks and is particularly committed to ensuring the relevance of law and society scholarship to academic communities in the global south and global north. She is an editor of the International Journal of Law in Context, the Human Rights and the Global Economy E-Journal, and the African Law E-Journal.

She has also published several books and articles that focus on comparative constitutional law, gender and racial equality, human rights—particularly the tension between respect for
indigenous law and implementing broader human rights norms—the judiciary, and legal education. Her book *From Cape Town to Kabul: Rethinking Strategies for Pursuing Women’s Human Rights* was published in 2012. She publishes regularly in the popular media and on social media, focusing on issues of race, poverty, legal education, public interest litigation, and the ongoing challenges of transforming an economically unequal and racially divided society. Professor Andrews’s focus on the judiciary in South Africa seeks to bridge the divide between theory and practice. She is a trainer for the Judicial Institute for Africa, focusing on opinion writing and communications skills for new and experienced judges. She also served as an Acting Judge of the North Gauteng High Court in Pretoria for the 2018 third term, presiding over criminal appeals, motion court, and civil trials. She has served as an arbitrator in hearings on racial discrimination in South Africa.

She has served on significant law school committees and the boards of public interest and human rights organizations, including the Africa Section of Human Rights Watch, South Africa Partners, the Legal Resources Center, and the National Center for Law and Economic Justice. Professor Andrews has received many awards for her work, including, in 2015, the National Bar Association’s International Award for her global human rights advocacy. In recognition of her human rights work, the University of KwaZulu-Natal provides an annual award in her name.

She will start her two-year term as the President of the Law and Society Association in June 2019.

**Education:**

University of KwaZulu-Natal, B.A., LL.B.
Columbia Law School, LL.M.
SHARON L. BROWN

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Sharon concentrates her practice on the federal tax treatment of tax-exempt bond financings and serves as bond counsel, underwriters’ counsel, and special tax counsel. She has worked on transactions involving multi-modal structures, complex refundings, derivative products, multiple-year tranches, general obligation bonds, and revenue bonds. She also negotiates with letter of credit banks, including Fannie Mae and Freddie Mac, swap providers, direct purchasers, underwriters, and financial advisors regarding tax matters related to tax-exempt financings.

Sharon has extensive transactional experience with multi-family financings involving low-income housing tax credits, historical tax credits, and a variety of issuer and government subsidies and incentives. Sharon also has experience with power and energy financings.

Sharon advises issuers and borrowers on IRS examinations of tax-exempt bond transactions, and post-issuance tax compliance.
Representative Experience

- Serves as tax counsel in connection with the development and preservation of thousands of affordable housing units in mixed-use and mixed-income developments across the United States that are financed with tax-exempt bonds, backed by traditional bank letters of credit, and/or involve Fannie Mae and Freddie Mac credit enhancement, HUD risk-sharing program insurance, derivative products through public offerings, and the direct loan or purchase of bonds.

- Serves as tax counsel to a state housing finance agency in connection with the creation of a multi-family tax-exempt warehousing facility that provides recycling and bond volume cap preservation.

Practice Areas

- Public Finance
- Tax

Education

- New York Law School, LL.M.
- Long Island University, M.S., with distinction, Sigma Beta Delta National Business Honor Society
- Suffolk University Law School, J.D., cum laude, Suffolk Transnational Law Review, Executive Board Member, Chief Note Editor
- Northeastern University, B.S.

Admitted To Practice

- New York
- District of Columbia
- U.S. Tax Court

Memberships & Affiliations

- American Bar Association

Civic Activities

- Monroe College, Federal Income Tax Adjunct
- Nazareth Regional High School, Board of Trustees Chair
- The Episcopal Diocese of Long Island, Conference Committee Chair
- The Episcopal Diocese of Long Island, Diocesan Council, Vice Chair
- The Bayview Houses Community Association, Board Chair

Speaking & Publications
- Law360 Profile, "Public Finance Atty Joins Barclay Damon's NYC Office," June 2018
- New York State Association for Affordable Housing, Annual New York City Conference, "Tax-Exempt Bonds," May 2014
- New York State Association for Affordable Housing, Annual New York City Conference, "Tax-Exempt Bonds," May 2012
- Presenter, various client training sessions on tax rules pertaining to tax-exempt bond financings

Honors
- John Payton Leadership Academy of the District of Columbia Bar, Class of 2017

Prior Experience
- Hawkins Delafield & Wood LLP, Tax Group

Alerts
- Treasury and IRS Release Proposed Reissuance Regulations
- Treasury and IRS Finalize TEFRA Regulations
Sally M. Donahue
Partner
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Sally M. Donahue is a partner in the Firm’s Trusts and Estates Practice Group. Ms. Donahue primarily concentrates in Surrogate’s Court litigation, an area in which she has twenty years of experience. Ms. Donahue handles all aspects of Trusts and Estates and Guardianships, including trials and appeals.

Prior to joining the Firm, Ms. Donahue was a Court Attorney-Referee at the Nassau County Surrogate’s Court. As a Court Attorney-Referee, Ms. Donahue presided over non-jury hearings, rendered rulings at depositions, conferenced cases, mediated cases to settlement, assisted the Nassau County Surrogate at trial, and prepared decisions and orders, stipulations, trial memoranda and jury instructions. Ms. Donahue also practiced for many years at two prestigious law firms on Long Island in the areas of Trusts and Estates, Guardianships and Commercial Litigation. After graduating from law school, Ms. Donahue was a Law Clerk for a Federal District Judge and a Federal Magistrate Judge in the Eastern District of New York. Ms. Donahue taught Legal Ethics from 1991 through 1996 at Adelphi University’s Lawyers’ Assistant Program.

In 1990, Ms. Donahue received her Juris Doctor, magna cum laude, from Touro College, Jacob D. Fuchsberg Law School, where she was a Dean’s Fellow, entitling her to a full academic scholarship. While in law school, Ms. Donahue received five American Jurisprudence Awards and won the American Society of Composers, Authors and Publishers’ Nathan Burkan Memorial Competition. Ms. Donahue was a Notes and Comments Editor of the Touro Law Review, where her article, “Copyrightability of Useful Articles: The Second Circuit’s Resistance to Conceptual Separability,” was published. Ms. Donahue received her Bachelor of Arts, summa cum laude, from Adelphi University in 1986.

Ms. Donahue is a member of the New York State Bar Association.
for which she currently serves as a Co-Chair of the Long Section of the Guardian Ad Litem Committee and she is a member of the Nassau County Bar Association where she has been appointed Co-Chair for the 2016-2018 term for the Trusts and Estates Committee. She is a frequent lecturer at Continuing Legal Education programs for both the New York State Bar Association and the Nassau County Bar Association. Ms. Donahue also is a member of the Heckscher Museum Development Committee, the Touro Law School Alumni Executive Board and the Touro Law School Dean’s Advisory Board.

EDUCATION

- B.A., Adelphi University - 1986
- J.D., Touro College, Jacob D. Fuchsberg Law School - 1990

BAR ADMISSIONS

- Connecticut
- New York
- United States District Court for the Eastern and Southern Districts of New York
- United States Court of Appeals for the Second Circuit
Ann Berger Lesk is of counsel in Fried Frank's Trusts and Estates Department, resident in the New York office. She joined the Firm in 1978 and became a partner in 1984. She was head of the Trusts and Estates Department from 1992 to 2011.

Ms. Lesk advises high-net-worth individuals and families concerning sophisticated estate and gift tax planning strategies, international tax planning issues, estate and trust administration and related matters.

Professional Associations
Fellow, American College of Trust and Estate Counsel
Former President, New York County Lawyers' Association
Former Treasurer, New York County Lawyers' Association Foundation
Former Co-chair, Section on Estates, Trusts and Surrogate's Court Practice, Committee on Trusts and Estates Legislation and Governmental Affairs, New York County Lawyers' Association
Former Member, House of Delegates, American Bar Association
Vice-president, First District, and Member of the Executive Committee, New York State Bar Association
Committee on Trusts, Estates and Surrogates' Courts, New York City Bar Association
Director, Appalachian Mountain Club (a 90,000-member conservation organization)
Member, Professional advisory committee, Metropolitan Museum of Art
Member, Professional advisory committee, Museum of Arts and Design
Member, Professional advisory committee, Anti-Defamation League
Member, Professional advisory committee, Friends of Israel

Clerkships
Prior to joining Fried Frank, Ms. Lesk clerked for Justice Worrall F. Mountain, Jr. of the New Jersey Supreme Court.

Bar Admissions/Licensed Jurisdictions
New York

Practices & Industries

Trusts and Estates
Pro Bono

Education
Rutgers School of Law, Newark, JD – 1977
  • High honors
  • Editor-in-Chief, Rutgers Law Review
Radcliffe College, AB – 1968
  • cum laude

Language
  • French

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CLAUDE M. MILLMAN

Claude M. Millman is a former Assistant United States Attorney (S.D.N.Y.) and New York City government contracting chief who litigates complex commercial disputes; advises clients on government procurement and contracting, land use, and environmental issues; and handles internal investigations and white collar defense. Formerly a partner at Proskauer Rose LLP, Mr. Millman joined Kostelanetz & Fink, LLP, in 2011.

Mr. Millman leads the firm’s commercial civil litigation efforts, which received Corporate Live Wire’s 2015 award for Excellence in Complex Commercial Disputes Litigation. He also oversees its government procurement and contracting practice and advises clients on land use and environmental matters and on dealing with regulatory agencies, such as the New York City Business Integrity Commission. That procurement and contracting practice received Acquisition International’s M&A Award for Government Specialists of the Year – USA (2014) and Best Government Procurement Practice – USA (2015).

Mr. Millman has been recognized for his work as a litigator and a procurement and government contracts lawyer. He has been listed in “Best Lawyers of America” since 2013. He has received a Martindale-Hubbell Peer Review Rating – 5 out of 5 – “AV” Rating, “Preeminent” in Litigation, Government Contracts, and Commercial Law. Mr. Millman has been recognized by “New York Super Lawyers” every year since 2008 in Business Litigation. He was elected to Fellowship by the Litigation Counsel of America, in 2011. In 1992, he received the United States Attorney General’s John Marshall Award for Outstanding Achievement, which is the United States Department of Justice’s highest award presented to attorneys for contributions of excellence in legal performance.

Mr. Millman taught civil discovery as an Adjunct Associate Professor from 1996 to 2005 at Brooklyn Law School and has also been an Instructor at the National Institute for Trial Advocacy.

CLAUDE M. MILLMAN REPRESENTATIVE MATTERS

- AndrX - Defended a subsidiary of Watson Pharmaceuticals in a Hatch-Waxman patent infringement suit filed by AstraZeneca

- Continuum Health Partners - Secured a preliminary injunction against Oxford/United’s efforts to remove 1,200 physicians from their networks; represented the client in a related arbitration

- ADT - Defeated a putative consumer fraud class action in a $40 million action concerning the shift from analog to digital alarm transmitters
BACKGROUND

- Partner, Proskauer Rose, LLP, 2003-2011
- Counsel, Solomon, Zauderer, Ellenhorn, Frischer & Sharp, 2000-2003
- Commissioner, N.Y.C. Charter Revision Commission, 2001
- New York City Chief Procurement Officer & Director, N.Y.C. Mayor's Office of Contracts (now Mayor's Office of Contracts Services), 1998-2000
- Executive Director, New York City Charter Revision Commission, 1999
- Deputy Commissioner, Litigation & Rate Regulation, New York City Trade Waste Commission (now Business Integrity Commission), 1996-1998
- Chief, Environmental Protection Unit, United States Attorney's Office, S.D.N.Y., 1994-1996
- Law Clerk, Honorable William C. Conner, United States District Court, S.D.N.Y., 1988-1989

AWARDS AND RECOGNITIONS

- Listed in "Best Lawyers of America"
- Recognized by "New York Super Lawyers" every year since 2008 in Business Litigation
- Elected to Fellowship by the Litigation Counsel of America, 2011
- United States Attorney General's John Marshall Award for Outstanding Achievement, 1992

SPEAKING ENGAGEMENTS

- Panelist, New York City Bar, Construction Industry Investigations and Prosecutions, 2011
- Panelist, New York City Bar, Representing Clients Before State and City Agencies: Tips and Techniques for Effective Criminal Advocacy, 2008
• Adjunct Associate Professor at Brooklyn Law School, 1996-2005

• Instructor at the National Institute for Trial Advocacy, 1996

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NEWS

APRIL 22, 2019
Claude M. Millman quoted in "Standing up for excellence and opportunity at NYC’s top high schools", New York Post

APRIL 20, 2019
Claude M. Millman quoted in "Seven NYC Students Didn’t Get Seats in Elite Schools, So They Asked State for Help", Wall Street Journal

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PUBLICATIONS

APRIL 01, 2019
Avoiding Litigation When Auditing Government Contractors

JUNE 08, 2017
Tips To Help NonProfits Avoid Conflicts Of Interest

View All >

EDUCATION

Stanford University, B.A. (1985), With Honors and Distinction, Phi Beta Kappa

Stanford University, M.A. (1985), Modern European History

Columbia Law School, J.D. (1988), Harlan Fiske Stone Scholar
Articles Editor, Journal of Law & Social Problems

BAR ADMISSIONS

New York State, 1989
S.D.N.Y., 1989
E.D.N.Y., 2012
Second Cir. Court of Appeals, 1990
Federal Cir. Court of Appeals, 2003
David Moldenhauer
Partner
Clifford Chance, New York

David T. Moldenhauer, a partner in the U.S. Tax, Pensions and Employment group, practices U.S. and international tax law.

David provides tax and structuring advice for a wide variety of international financial and business transactions, including investment funds, carried interest and management co-investment arrangements, private equity investments, corporate acquisitions and restructurings, domestic and cross-border real estate transactions, joint ventures, financing transactions, financial instruments, equipment leasing and project finance.

David also regularly consults on tax compliance and other technical U.S. tax issues. He regularly writes, speaks and teaches on matters of US and international taxation.

David is a member of our global Tax Risk team.

Career and qualifications
- Princeton University (AB, Politics) 1981
- New York University School of Law (JD) 1986
- Admitted as an Attorney-at-Law in New York 1987
- Joined Clifford Chance 1994
- Partner since 1998

Professional bodies
- American Bar Association

From:
https://www.cliffordchance.com/people_and_places/people/partners/us/david_moldenhauer.html
In 1992, Ann F. Thomas began a second career in academic law with a fellowship year at the Bunting Institute at Radcliffe College, after 17 years (10 as partner) working in the corporate tax department at Fried Frank Harris Shriver & Jacobson, where she specialized in mergers and acquisitions. Professor Thomas spent two years as an adjunct professor at Yale Law School and joined New York Law School’s faculty in 1995.

Professor Thomas, who teaches a range of tax courses and is Director of the Graduate Tax Program, was drawn to academia because of the chance to explore and develop a subject she views as fundamental to how societies function.

We need to promote greater tax literacy among lawyers. Teaching is very rewarding from that point of view, Professor Thomas says. Some students here are already working in tax and a good number are interested in the tax field executive and corporate practice and they really add to the fruitful discussion of tax issues.

Professor Thomas says her first love in taxation research is in the corporate and business context, but she also concentrates her scholarship on income tax and urges a re-examination of the assumptions about marriage and family that underlie current policy.

Our tax subsidies should work to promote the care and nurturing of children. In modern society, families can come in many different configurations. Tax policy should support family life and not just the traditional sole-earner household, says Professor Thomas.
In 1999, Professor Thomas organized a symposium for the *New York Law School Journal of Human Rights* on the subject of Women, Equity, and Federal Tax Policy: Open Questions. More than 20 experts from across the country legal scholars, economists, and activists spent a full day examining tax policy problems that diminish the financial security of women, including the possible marriage penalty within the income tax code. With the help of the Marjorie Cook Foundation, the *Journal of Human Rights* distributed the symposium volume to every member of Congress, key Treasury and White House staff, law professors, and economists. The timing coincided with fierce debates in both houses of Congress over marriage and income tax.

Although teaching tax law to future lawyers and practitioners is her primary mission, Professor Thomas uses her work in tax history to bring tax policy back to the citizens. As she sees it, tax literacy is the only way to ensure tax policies that reflect the needs of all citizens. We need to make the theory and the history of taxation more accessible so that voters can have a more informed view of our tax policy choices. Only then will they be able to set the agenda for future policy choices, she says.

Professor Thomas studies and teaches about comparative systems of corporate taxation around the world and sees a need in the increasingly global marketplace for an expansion of international cooperation on business and tax issues.

Professor Thomas is in the process of finishing a book examining the history of the U.S. tax system during the Progressive Era and the emergence of the modern income tax system in 1913.

Professor Thomas is admitted to practice in New York.

Education:

Fellow, Bunting Institute at Radcliffe College, 1992
Harvard-Radcliffe, A.B. 1973
Yale, J.D. 1976