Independent compliance monitors have become an increasingly common tool for state and federal law enforcement authorities over the past 20 years. This article will briefly discuss the history and uses of compliance monitors and then review issues related to monitor qualifications, selection of monitors, scope of monitoring agreements, and the monitor’s relationship with the government and with the subject company.

Significant use of independent compliance monitors began in the mid-1990s with settlements negotiated between federal criminal prosecutors and corporate defendants. Monitorship settlements became more common at the turn of the century with the collapse of Enron and other high profile cases of corporate misconduct; and their use in criminal and civil cases continues to grow. The practice offers advantages to both sides. Corporations avoid criminal prosecution and convictions that could destroy the company and lengthy, expensive civil litigation with an uncertain outcome. The government can require systemic changes in corporate operations and culture and rely on a third-party to supervise the changes at the corporation’s expense.

During this time, state attorneys general were also using multistate investigations and settlements to reform corporate misconduct at an industry level. In 1998, 46 state attorneys general negotiated the Tobacco Master Settlement Agreement (MSA). The tobacco manufacturers agreed to pay a minimum of $206 billion to the states over 25 years and also agreed to fundamental changes in tobacco advertising and other business policies and practices. Another example was the 2002 Microsoft antitrust settlement with nine state attorneys general and the U.S. Department of Justice (DOJ), reforming Microsoft’s alleged anticompetitive conduct to create more competitive browser and software development markets.

These industry-wide settlements required state attorneys general to devote significant resources to enforcement. For example, for the past 20 years, almost every office has had one or more lawyers responsible for monitoring and enforcing the Tobacco MSA, including the business-practice provisions. Accordingly, it was only a matter of time before state attorneys general incorporated the use of monitors into multistate settlements to supervise compliance with new industry-wide standards or complex executory terms imposed on individual companies.

Following the crash of the national housing market and an investigation into mortgage servicing and foreclosure practices, 49 states and the federal government secured a $25 billion settlement in 2012 with the five largest U.S. banks. The National Mortgage Settlement (NMS) provided significant monetary and debt relief for affected homeowners and required stringent reform of mortgage servicing standards. To ensure compliance, the state attorneys general and federal partners appointed North Carolina Commissioner of Banks Joseph A. Smith Jr. as compliance monitor for a 3½-year term.

The NMS’s broad scope was particularly suited to management by an external monitor. The settlement involved mortgage servicers that accounted for over half of the market, resulted in over $50 billion in gross dollar relief to more than 640,000 families around the country, required banks to comply with over 300 servicing standards, and involved enforcement of a
new federal law and laws of 49 states. Monitoring a settlement of this breadth would have presented significant administrative and financial challenges to state and federal authorities. As an external monitor, however, whose expenses were paid by the banks, Smith provided continuity over his term and possessed the authority and flexibility needed to hire and supervise “a small army of professionals” as a result, he was able to track on a timely basis the banks’ compliance with consumer relief and servicing requirements and to provide transparency by filing regular public reports with the court.

Shortly after the NMS settlement, state attorneys general turned their attention to the national for-profit school industry. Thirty-seven state attorneys general joined together in 2012 following reports that for-profit schools were engaging in a wide range of bad acts including abusive recruiting practices, false and misleading advertising regarding transferability of credits and student employment rates, and the use of unscrupulous lead generators. State investigations of this sector are ongoing and have generated multiple settlements at the national and state level that have included monitoring requirements.

Standards

Three separate sets of guidelines have been published on monitor selection and scope of duties. Beginning with the “Morford Memo” in 2008, the DOJ has issued multiple guidelines in criminal cases on the method of selection, scope of duties, and duration of terms for monitors, laying out “basic principles” for monitor agreements. In 2016, drawing from the Criminal Division’s experience, the “Delery Memo” established principles and procedures for selecting monitors in civil settlements and resolutions. These memoranda will be referred to collectively as the “DOJ Memos.”

The American Bar Association (ABA) approved “black letter” Standards for Monitors in 2015 following three years of work by a task force of criminal justice lawyers, judges, and experts. The ABA Standards provide comprehensive guidelines for selecting a monitor and for establishing and conducting the monitorship.

The most recent indicator of the growing use of monitoring was the establishment of a monitors’ trade association. The International Association of Independent Corporate Monitors (IAICM) issued

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a Code of Professional Conduct in December 2016. The IAICM Code is “congruous” with the ABA Standards, relying on the ABA’s definitions and other terms. Accordingly, the analysis in this article will rely primarily on the DOJ Memos and the ABA Standards.

**What do monitors do?**

While a monitor’s specific responsibilities and authority are established by court order or settlement agreement, a monitor’s job generally is to create and supervise compliance programs that remediate the corporate misconduct targeted by a government investigation. As one analysis noted, “What better way to ensure that a company stay on track than to embed an independent monitor at headquarters to oversee the company’s progress?” To that end, monitors often engage in compliance audits and, in some cases, hire an accounting firm as part of the monitoring team. The goal of these activities is not only to ensure corporate compliance during the monitor’s term of office but also to ensure longer-lasting public benefits by changing the corporation’s ethical culture.

**Who serves as a monitor?**

To date, monitors used by state attorneys general have been former state regulators or law enforcement officials supported, typically, by other legal and accounting professionals. The DOJ Memos and ABA Standards provide that entities can also serve as monitors.

**Qualifications**

The Morford Memo mandates that compliance monitors be selected “based on the merits” as the first of its nine principles and states that, at a minimum, the selection process should produce a “highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances” and without potential and actual conflicts of interest. The DOJ Memos and ABA Standards both specify that a monitor should not affiliate with the company for at least one year after the monitorship’s end.

ABA Standard 24-2.4 on “Selection Criteria” expands on the qualification provisions in the DOJ Memos in significant ways. In judging qualifications, the Standard looks for expertise in the relevant industry and subject matter. Because monitorships often involve companies or industries with national operations, the Standard requires examination of the full monitorship team to ensure there are sufficient resources to do the job. The Standard recognizes the need for continuity and stresses that a monitor candidate commit to serving the entire monitoring term.

ABA Standard 24-2.4 also elaborates on who should not be a monitor. The Standard understandably excludes former government employees with prior involvement in the matter giving rise to the monitorship, individuals involved in the corporate activity at issue, and persons involved in any compliance program related to the wrongdoing if the program failed to work. The Standard identifies factors that are not disqualifying but should be considered in weighing qualifications, including prior monitor work for the company, prior non-monitor work for the company unrelated to the wrongdoing depending on its significance, nature and timing, prior affiliation with a firm that provided professional services to the company during the time of affiliation, and any other factor that could bias judgment or give the appearance of bias.

The two individuals selected by state attorneys general to monitor multistate settlements satisfy these qualification criteria. In the National Mortgage case, the states recommended Smith, who served as North Carolina’s banking commissioner from 2002 to 2012. In the Education Management Corp. (EDMC) multistate, for-profit school settlement, former U.S. Associate Attorney General Thomas J. Perrelli was chosen as the “administrator,” the term chosen in that settlement. Both Smith and Perrelli were highly respected within regulatory circles and among those working in and representing the banking and for-profit school industries, respectively.

**Selection**

The Morford Memo states there is no one method that should necessarily be used to select a monitor. Building on elements of the Morford Memo, subsequent DOJ memoranda elaborate further on the selection process. The “Breuer Memo” directs the corporation to provide a slate of three or more monitor candidates in criminal cases; the Delery Memo recognizes that in some civil cases the government may propose a slate. Both memoranda direct that a DOJ screening or standing committee review the slate and select the monitor or request a new slate. Both memos permit a litigation team to request departures from the selection procedure.

The ABA Standards eschew a single process, noting only that both the company and the government should have significant roles in the selection process.
and that the process should encourage consideration of a broad range of candidates. The Standards encourage the government, when possible, to announce its search for a monitor so that interested applicants can apply. The Delery Memo also recognizes the option of using a public application process.\textsuperscript{32}

State attorneys general have not used a formalized monitor-selection process. Rather, monitor selection and scope of duties have been a significant part of settlement negotiations, with the state attorneys general taking the lead in proposing candidates. The NMS specifically named the compliance monitor and contained detailed provisions regarding the monitor's operations, including standard of conduct, employment of additional professionals, compensation, and qualifications of any replacement, if needed.\textsuperscript{33} The EDMC administrator likewise was specifically named in the EDMC Consent Judgment (CJ), and, in the event of a dismissal or vacancy in the position, a replacement would be “appointed by agreement of EDMC and the Attorneys General.”\textsuperscript{34}

**Scope and parameter of monitoring agreements**

Monitoring agreements often come at the end of extensive and contentious government investigations or litigation. The appointment of a monitor should start a new phase in the relationship between the government and the company, moving from investigation to enforcement. While acknowledging that a monitor must understand the circumstances that led to his or her appointment, the Morford Memo makes clear that “[t]he monitor’s mandate is not to investigate historical misconduct.”\textsuperscript{35} Rather, the monitor’s role is to “address and reduce the risk of recurrence of the corporation’s misconduct.”\textsuperscript{36}

Both the Morford Memo and the ABA Standards recognize the key role played by court orders and settlement agreements in defining the monitor’s responsibilities and authority. The Morford Memo looks for a sweet spot where the monitor’s duties are neither too narrow nor too broad.\textsuperscript{37} The ABA Standards call for the order or agreement to define clearly the monitor’s responsibilities, authority, goals, and scope of duties.\textsuperscript{38} Both the Morford Memo and the Standards acknowledge the need to set a defined term of service and allowance for extensions or early termination.\textsuperscript{39}

In practice, extensions have been required in cases where recurring violations have been found.\textsuperscript{40} The authors have not identified any state attorney general cases where a monitorship was terminated early. The EDMC CJ authorized the attorneys general to extend the administrator’s term for up to two years upon a showing of “justifiable cause.” Such determination is subject to EDMC’s right to challenge the basis for the extension and seek injunctive relief relative thereto. Justifiable cause is defined in the agreement as “a failure by EDMC to achieve and maintain substantial compliance with the substantive provisions of the Consent Judgment.”\textsuperscript{41}

The ABA Standards recommend that the order or agreement require the monitor to prepare a work plan at the outset of the monitorship in consultation with the company and government.\textsuperscript{42} Because it is not an order or contract, a work plan can fill in gaps left by the settlement terms, provide the company with certainty and predictability, yet allow the monitor flexibility to adapt to changing circumstances.\textsuperscript{43}

The NMS contained extensive provisions regarding the duties and responsibilities of the compliance monitor and a very detailed framework for the work plan but still provided for the development of additional elements by the monitor in consultation with the monitoring committee and servicers. The settlement addressed the monitor’s access to information, reporting, compensation, duration, violations, right to cure, enforcement, and confidentiality, among other issues. The EDMC CJ also contained detailed provisions addressing these issues. The negotiation of work plans often involved an assessment of costs and benefits of monitoring tools such as mystery shoppers and software that searches and analyzes marketing audio files.

**Relation to government and corporation**

One of the primary advantages to the government of monitorships is that all costs are paid by the company.\textsuperscript{44} Even though the monitor is engaged and compensated by the company, the monitor owes the company no obligations or duties. The DOJ Memos and the ABA Standards both stress that a monitor is independent of the company and the government.\textsuperscript{45} Even if the monitor is an attorney, the monitor does not have an attorney-client or agency relationship with either side.\textsuperscript{46}

This independence raises difficult questions about the company’s proprietary and confidential information. A monitor will have access to company information and employees as reasonably necessary to fulfill the monitor’s obligations, with such access rights usually specified in the court order or settlement
The ABA Standards direct monitors to take reasonable measures to protect a company's proprietary and confidential information. However, both the Morford Memo and the Standards call for scheduled, written reports to the government and the court that contain the monitor's findings, conclusions, and recommendations. The Standards recommend that the court order or agreement state whether these reports are confidential or public, but such confidentiality provisions may conflict with state public record laws. If a report is public, the Standards wisely urge the monitor to consult with the company and government to protect against disclosure of sensitive or disparaging personal information and proprietary business information.

The NMS and EDMC settlements both have detailed provisions granting the companies the ability to designate confidential material and requiring the government to notify the companies if it determines it is legally required by court order, subpoena, or open records laws to disclose information the company has designated as confidential. The companies are permitted a short window – 10 calendar days in the NMS and 10 business days in the EDMC CJ – to seek a protective order or stay of production. The EDMC CJ expressly authorizes the sharing of confidential information with other law enforcement agencies.

Regarding monitor reports, the NMS required the monitor to confer with the servicers and monitoring committee prior to issuance of reports and to provide an opportunity for written comments. Final reports were submitted to the court and the parties and published online. The EDMC CJ requires the monitor to prepare both a non-public and a public report and provides the parties with an opportunity to review and comment on drafts of the reports.

**Conclusion**

To date, the use of monitors by state attorneys general in multistate settlements has resulted in successful implementation of national consumer settlements while reducing enforcement costs for the states. Given these advantages, state attorneys general are likely to increase the use of monitors, both at the state and multistate level. As the practice expands, state attorneys general will bring the collective perspectives and experiences of their offices to addressing these and other issues related to this important and evolving enforcement tool.

**Endnotes**

-The views expressed in this article are the authors’ own and do not necessarily reflect the views of their organizations.

1 See Richard Lissack et al., Monitorships, in THE PRACTITIONER’S GUIDE TO GLOBAL INVESTIGATIONS 28.2.1 & n.8, http://globalinvestigationsreview.com/benchmarking/the-practitioner’s-guide-to-global-investigations/1079360/monitorships. (The first recognized monitorship in a DOJ criminal settlement was in 1995 in connection with Consolidated Edison's sentencing for disclosure failures following a steam-pipe explosion.)


3 See, e.g., Patterson & Jaffe, supra note 2, at 1 ("This field of corporate monitors is ripe for continued growth and expansion."); Gary F. Giampetruzzi et al., Not Finished with You Yet – The U.S. Government Extends Its Deferred Prosecution Agreement with Biomet, Inc., Again Underscoring the FCPA Risks in Life


9 Joseph A. Smith, Jr., *A Review and Assessment of the National Mortgage Settlement by Its Monitor*, 21 N.C. Banking Inst. 29, 32-38 (2017). While the monitorship of the initial five banks concluded in March 2016, Smith continues to serve as monitor for subsequent consent judgments under the settlement’s structure with three additional banks. *Id.* at 29.

10 *Id.* at 35.

11 *Id.* at 35-36, 38.


14 In addition to the Morford Memo, see Memorandum from Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep’t of Justice, to All Criminal Division Personnel, on Selection of Monitors in Criminal Division Matters (June 24, 2009), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf [hereinafter Breuer Memo] (providing additional detail on monitor selection process); Memorandum from Gary G. Grindler, Acting Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Department Components and U.S. Attorneys, on Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010), https://www.justice.gov/archives/dag/memorandum-heads-department-components-united-states-attorneys (adding tenth
“basic principle” on resolving disputes between monitor and corporation). There is extensive scholarly commentary regarding the U.S. Department of Justice's use of corporate monitors in the criminal context, especially involving large financial institutions and Foreign Corrupt Practices Act cases, where the use of deferred prosecution agreements has drawn particular interest. See, e.g., Cindy Alexander & Mark Cohen, The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements, 52 Am. C RIM. L. REV. 537 (2015).


16 See ABA Standards, supra note 4, Table of Contents.


18 Morford Memo, supra note 13, Principle 3 & comment; Delery Memo, supra note 15, at 1; ABA Standards, supra note 4, Introduction.


20 See Morford Memo, supra note 13, at 2. The U.S. Department of Justice has, in addition to announcing principles guiding the selection of compliance monitors, issued extensive guidance for federal prosecutors in assessing capabilities of corporate compliance programs. This guidance is to be used in investigating a corporate entity, determining whether to bring charges, and negotiating plea or other agreements. The factors evaluated, commonly known as the “Filip factors,” “include the existence and effectiveness of the corporation’s pre-existing compliance program and the corporation’s remedial efforts to implement an effective corporate compliance program or to improve an existing one.” U.S. DEP’T OF JUSTICE, CRIMINAL DIVISION, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1 (2017) (internal quotations omitted), https://www.justice.gov/criminal-fraud/page/file/937501/download.

21 See Morford Memo, supra note 13, Principle 1; ABA Standards, supra note 4, Standard 24-2.1; see also Delery Memo, supra note 15, at 2 (term “monitor” includes any third party).

22 Morford Memo, supra note 13, Principle 1; see also Delery Memo, supra note 15, Principle 1; ABA Standards, supra note 4, Standard 24-2.4.

23 ABA Standards, supra note 4, Standard 24-4.1; Delery Memo, supra note 15, Principle 7; Morford Memo, supra note 13, Principle 1.

24 ABA Standards, supra note 4, Standard 24-2.4.1. In contrast, the Delery Memo provides direction on filling monitor vacancies. See Delery Memo, supra note 15, Principle 8.

25 ABA Standards, supra note 4, Standard 24-2.4.3.

26 Id. Standard 24-2.4.4.

27 Perrelli previously served as compliance monitor in the Iowa Attorney General’s settlement with for-profit school Bridgepoint/ Ashford, which involved many of the same issues of concern in the EDMC multistate. The Kentucky Office of Attorney General selected the author, Robert E. Cooper, Jr., to serve as compliance monitor in Kentucky’s Daymar College settlement in 2015. In addition to serving as Attorney General of Tennessee, Cooper had extensive experience in higher education issues, including serving as a member of the for-profit school working group and executive committee on the 2012 QuinStreet/GI Bill.com lead-generator multistate settlement and on the Standards Review Committee of the American Bar Association Section of Legal Education and Admission to the Bar.

28 Morford Memo, supra note 13, Comment to Principle 1.

29 Breuer Memo, supra note 14, at 3; Delery Memo, supra note 15, Principle 2. But see Breuer Memo, supra note 14, at 4 n.7 (if corporation has not proposed acceptable monitor candidates, government attorneys may provide a list of candidates to the corporation).

30 Delery Memo, supra note 15, Principles 2-6; Breuer Memo, supra note 14, at 2-5.

32 ABA Standards, supra note 4, Standard 24-2.1, – 2.2; Delery Memo, supra note 15, Principle 2.


35 Morford Memo, supra note 13, Comment to Principle 4.

36 Id. Principle 4.

37 Id. Comment to Principle 4 ("Neither the corporation nor the public benefits from employing a monitor whose role is too narrowly defined (and, therefore, prevents the monitor from effectively evaluating the reforms intended by the parties) or too broadly defined (and, therefore, results in the monitor engaging in activities that fail to facilitate the corporation's implementation of the reforms intended by the parties).”).

38 ABA Standards, supra note 4, Standard 24-3.1.

39 Id. at Standard 24-3.1, – 3.2; Morford Memo, supra note 13, Principle 9.

40 See e.g., Zimmer Biomet Holdings, Inc., Current Report (Form 8-K) (March 25, 2016), https://www.sec.gov/Archives/edgar/data/1136869/000119312516518185/d318910d8k.htm (noting extension of 2012 deferred prosecution agreement ("DPA") and monitorship). The monitorship eventually terminated in 2016 with the statement that the monitor was unable to certify compliance with the DPA. Biomet subsequently was found to have violated the Foreign Corrupt Practices Act again and, in 2017, entered into another DPA, requiring an additional 3 years of monitoring. See Biomet, Inc., File No. 3-17771 (Jan. 12, 2017), https://www.sec.gov/litigation/admin/2017/34-79780.pdf.


42 ABA Standards, supra note 4, Standard 24-3.3.

43 Walsh, supra note 17, at 2.

44 ABA Standards, supra note 4, Standard 24-3.4.

45 Morford Memo, supra note 13, Principle 2; Delery Memo, supra note 15, at 1; ABA Standards, supra note 4, Standard 24-4.1.1.

46 For a useful analysis of ethical issues created by monitorships, see Root, supra note 5, (proposing creation of privilege protecting “monitor-client relationship”); Caelah Nelson, Note, Corporate Compliance Monitors Are Not Superheroes with Unrestrained Power: A Call for Increased Oversight and Ethical Reform, 27 GEO. J. LEGAL ETHICS 723 (2014).

47 ABA Standards, supra note 4, Standard 24-4.2.1.

48 Morford Memo, supra note 13, Principle 5 & comment; ABA Standards, supra note 4, Standard 24-4.3.1.

49 ABA Standards, supra note 4, Standard 24-4.3(4).

50 Id.


52 Id., ¶¶ 46–48, 53.

53 Cf. Root, supra note 5, at 524 (noting that “[c]orporate compliance monitors are everywhere”).
This article considers whether assistant attorneys general (AAsG) may use pretextual techniques in their criminal and civil investigations without violating the Rules of Professional Conduct. To help AAsG understand the issues and analyze whether specific investigative techniques are permissible, the article describes how developments in two states led to recent rule changes to explicitly address the issue and provides a framework of analysis for AAsG in states where current rules do not address the issue.

When the Problem Arises: Examples from Two States that Recently Confronted the Issue and Implemented Rule Changes to Address It

The Colorado experience

Last year, the Colorado attorney general abandoned all of her pending undercover investigations when the Colorado Office of Attorney Regulation Counsel (ARC) concluded that Colorado Rules of Professional Conduct 5.3 and 8.4(c) apply to government lawyers who supervise investigators engaged in lawful undercover activities (i.e., there is no “investigative exception”). The ARC’s determination was made in response to a complaint filed against a District Attorney’s Office that housed a child sex offender Internet investigations team. A convicted sex offender asserted that government lawyers are categorically forbidden from supervising or ratifying the conduct of undercover investigators. Applying the Colorado Supreme Court’s interpretation of relevant rules, the ARC agreed. To avoid an investigation and possible sanctions, the District Attorney’s Office agreed to dissolve its investigation unit. Fearing that an ethics complaint could be filed against any government lawyer who works closely with an undercover agent, the Colorado attorney general opted to abandon all undercover investigations until the state’s highest court clarified whether attorneys were ethically allowed to oversee non-lawyer investigators who use false identities or other tactics to catch lawbreakers.

The Colorado attorney general filed a petition with the Colorado Supreme Court seeking an interpretation of the relevant rules that would recognize that supervision of investigations does not violate the rules of professional conduct. The court
rejected the petition but simultaneously posted for public comment the following proposed amendment to Rule 8.4:

“It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities.”

After holding a public hearing, the court adopted the proposed change in its entirety on Sept. 28, 2017. With the new rule now in effect, the Colorado Attorney General's Office has resumed its undercover investigations. And, Colorado’s Standing Committee on the Rules of Professional Conduct has empaneled a subcommittee to consider drafting a comment offering some guidance on what constitutes “lawful investigative activities” under the amended Rule, and the Ethics Section of the Colorado Bar Association is contemplating drafting a formal ethics opinion on the same subject. At press time, no timetable had been set for either task.

The Oregon experience

In In re Gatti, the Oregon Supreme Court refused to recognize any sort of “investigatory exception” to the Oregon Rules of Professional Conduct. The court recognized that “there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices.” However, the Oregon rules provide that they “shall be binding upon all members of the bar” and the court’s case law “does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements.” Therefore, the court declined to adopt an exception and concluded it was “without authority to read into [the rule] an exception that the statute does not contain.”

Following this decision, Oregon added an explicit exception to Rule 8.4:

Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of
civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. “Covert activity,” as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. “Covert activity” may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.11

With these cases in the background, other states have similarly amended or added comments to relevant rules of professional conduct to make it clear that government attorneys’ oversight of pretextual investigative techniques is not a violation of ethics rules.

**When Rules Remain Silent: How Massachusetts Case Law Suggests a Framework for Analysis Where there is No “Investigative Exception” in the Relevant Rules**

Like many states, Massachusetts has not adopted an explicit “investigative exception” to Rule 8.4. The Massachusetts courts have, however, lightly touched on the question whether such an exception may be implied. Therefore, using the Massachusetts rule and case law as an example, we will suggest a framework of analysis that AAsG may use when they are asked to develop, participate in, or authorize a pretextual investigation and the applicable version of Rule 8.4 does not contain an “investigative exception.”12

The Massachusetts Rules of Professional Conduct prohibit attorneys from “knowingly” making “a false statement of material fact or law to a third person,” and define misconduct as “any conduct involving dishonesty, fraud, deceit or misrepresentation.”13 Because the rules prohibit all forms of false statements, deceit, and misrepresentations, “such conduct is . . . presumptively improper, unless a court has approved it (or would likely approve it).”14 The question therefore becomes what type of conduct will not violate the rules, or would likely be found not to violate the rules, under existing case law?

Although Massachusetts case law is sparse, it provides guidance for analyzing this question. It is . . . true that some degree of deception by attorneys, at least under some circumstances, is permissible in order to gather evidence for use in litigation. Such an investigative exception, however, is not set out in the rules themselves, but has been created by courts as a judicial gloss on those rules. Furthermore, and in any event, the SJC [Supreme Judicial Court] has made clear that any exceptions to the rules against deceit and misrepresentation by attorneys are limited in scope.15
The Massachusetts Supreme Judicial Court (the state’s highest court) in *In re Curry* and *In re Crossen*, considered and recognized an “investigative exception” to the rule prohibiting attorneys from engaging in deception in related cases involving disciplinary proceedings against two private attorneys, although it concluded the exception did not apply to the problematic facts of the cases before it. Suspecting a certain judge was biased against their clients, the attorneys hired investigators to pose as corporate executives and interview the judge’s law clerk for a fictitious job in the hope of eliciting damaging statements about the judge’s decision-making processes. When the interview did not produce the kind of evidence the attorneys were seeking, they told the law clerk about the ruse and threatened to release a recording of the interview and expose a false letter of support the clerk had submitted with his bar application. The SJC concluded that the interview ruse and subsequent threat were not the type of investigative conduct previously approved by courts and clearly violated the ethical rules. Both attorneys were disbarred.

In its analysis, the SJC distinguished between an investigation intended merely to “note or reproduce” the witness’s “unusual behavior” and a scheme designed to induce someone into doing something he or she would not otherwise do. “Testing” involves deception of a particular kind: investigators pose as members of the public interested in procuring housing or employment, in order to determine whether they are being treated differently based on their race or sex. Their aim is to reproduce an existing pattern of illegal conduct. Some private investigators whose aim is to uncover other civil wrongdoing, such as trademark infringement or breach of contract, similarly disguise their identity and purpose without running afoul of ethical rules.

The court concluded that the tactics in *Curry* and *Crossen* fell well outside of what was acceptable because: (1) the attorneys were engaged in a complex scheme of deception, not a straightforward effort to gather evidence; and (2) the attorneys’ conduct was highly intrusive—it was intended to obtain information concerning the confidential relationship between a judge and his law clerk, which in turn tended to harm the administration of justice. Applying the *Curry* and *Crossen* framework, recently a federal district court in *Leysock v. Forest Laboratories, Inc.*, considered whether a fictitious medical research survey fell within the “investigative exception.” The court first considered whether the conduct involved false statements or deceit and found “[t]here is no dispute that the investigative scheme devised by [the] attorneys . . . involved an elaborate series of falsehoods, misrepresentations, and deceptive conduct . . . and therefore falls as a facial matter within the express prohibitions of Rules 4.1(a) and 8.4(c).”

The court then turned to the question of whether the conduct of the attorneys “is subject to any investigative exception to those rules.” Although the rules on their face impose sweeping prohibitions, in fact they have been interpreted to contain narrowly defined exceptions that permit the gathering of evidence under certain circumstances. The first exception permits prosecutors and other government attorneys to conduct undercover criminal investigations, which typically require some level of deception or misrepresentation. The second exception permits civil attorneys to use investigators in certain circumstances to obtain information that would normally be available to any member of the public (such as a prospective renter or a consumer making a similar inquiry).

The court concluded that the conduct of the attorneys in *Leysock* “far exceeded the boundaries of any investigative exception to the ethical rules.” First, the scheme went well beyond concealment of identity and purpose in order to obtain evidence. “These were not inquiries . . . seeking information that would be readily available to any member of the public who was seeking the products or services in question . . . It was an elaborate scheme, involving a fake medical research study, intended to elicit information from practicing physicians about patients under their care.” Second, the scheme was highly intrusive as “it was intended to intrude into one of the most sensitive and private spheres of human conduct, the physician-patient relationship.” Despite the importance of protecting the confidentiality of patient medical information, which “was surely known,” the
attorneys “devised a fake ‘research study’ that was specifically intended to, and did, target confidential patient information” and “they then published that information.” Such a scheme is far closer to the conduct condemned in *Curry* and *Crossen* than the types of limited investigative misrepresentation that have been approved by the courts. As a result, the court struck the portions of the complaint that relied on evidence obtained in the medical research study ruse.

**Applying the Curry/Crossen Framework**

Based on *Curry* and *Crossen*, we can – as the *Leysock* court did – infer that Massachusetts recognizes an investigative exception to rules of professional conduct that would otherwise prohibit attorney involvement in pretextual investigations. Further, we can apply the framework that was developed through these cases to determine whether attorney involvement in a particular investigative technique falls within the exception. Specifically, AAsG should consider the following before developing, participating in, or authorizing any pretextual investigative techniques.

1. *Is this a criminal investigation?* If it is a constitutional and procedurally proper criminal investigation, then it falls within a recognized investigation exception and government attorneys can oversee lawful pretextual investigative techniques without violating the rules of professional conduct.

2. *Is this a civil investigation?* If yes, then consider the following factors to determine whether attorneys can oversee pretextual investigative techniques without violating the rules of professional conduct. Because no single factor is dispositive, attorneys considering civil investigations that involve pretextual techniques need to consider all factors and the use of any pretextual investigative technique should be reviewed and approved by a supervisor.

   a. *Is the investigation a straightforward effort to gather evidence?*

      i. Is the investigation designed to reproduce the subject's usual behavior or is it designed to "trick" the subject into doing something he or she would not otherwise do?

Techniques that reproduce a subject’s usual behavior are more likely to be acceptable. For example, investigators posing as members of the public interested in procuring housing to determine whether they are being treated differently based on their race or sex are attempting to reproduce the way a landlord typically reviews a rental application.

At the other extreme, the attorneys in *Curry* and *Crossen* created an elaborate ruse designed to trick the law clerk into talking about a judge's decision-making process, which he had never and would not otherwise have done.

   ii. Are the investigators gathering information that would be readily available to the public?

Techniques in which investigators pose as members of the public and ask for information anyone could obtain are more likely to be acceptable than schemes designed to obtain information that is generally not available to the public.

b. *How intrusive is the investigative technique?*

   The less intrusive the technique, the more likely it will be acceptable.

In *Curry*, *Crossen*, and *Leysock*, the investigative tactics were rejected in part because they intruded on protected relationships. The *Curry/Crossen* scheme was intended to obtain information concerning the confidential relationship between the judge and the law clerk. Similarly, in *Leysock*, the scheme “was intended to intrude into one of the most sensitive and private spheres of human conduct, the physician-patient relationship.”

c. *Are the targets of the investigative techniques the suspected wrongdoers?*

If the individuals contacted to gather information are the suspected wrongdoers, investigators must ensure that constitutional and procedural requirements are satisfied.

If the individuals contacted to gather information are not the suspected wrongdoers, investigators must be extremely cautious about the extent of the intrusion on the individuals (in addition to satisfying constitutional and procedural requirements).
d. Is there any other way to collect the evidence of wrongdoing?

The courts have looked at the necessity of using a pretextual technique to collect required evidence. Thus, a lawyer should determine and document the necessity of using a pretextual technique prior to employing it.38

e. Has the investigation been reviewed and approved by supervisors?

Given the rapidly developing but still sparse case law on attorney oversight of pretextual investigative techniques, each office should consider enacting a policy concerning whom should be consulted when such an investigation is being considered. For instance, in Massachusetts, a supervisor is consulted and, if that person has questions, a request for advice can go to the General Counsel’s Office.

Conclusion

Relevant case law is limited and, as the examples from Colorado and Oregon illustrate, the issue of attorney involvement in pretextual investigations continues to be a rapidly developing area of the law. As a result, AAsG should first check the language of their respective states’ rules to determine whether there is an explicit investigative exception to attorney involvement in pretextual investigations. If there is no explicit investigative exception in the respective state’s rules, AAsG may apply the framework above to carefully consider the use of any pretextual investigative technique and encourage their offices to establish protocols when a pretextual investigation is contemplated.39

Endnotes

1 See Haven Realty Corp. v. Coleman, 455 U.S. 363 (1982) (black “tester” had standing to sue under the Fair Housing Act where she was informed that apartments were not available while white “testers” were informed that apartments were available); Wharton v. Knepel, 562 F.2d 550 (8th Cir. 1977) (use of housing testers is commonplace and their evidence in housing cases has been uniformly accepted); Hamilton v. Miller, 477 F.2d 908, 909 n. 1 (10th Cir. 1973) (“it would be difficult indeed to prove discrimination in housing without [the tester’s] means of gathering evidence”); Leysock v. Forest Laboratories, Inc., 2017 WL 1591833 at *6 (D. Mass April 28, 2017) (Saylor IV, J.), appeal dismissed, 2017 WL 5712654 (1st Cir. Aug. 31, 2017) (criminal investigations typically require some level of deception or misrepresentation); Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 124 (S.D.N.Y. 1999) (“enforcement of the trademark laws to prevent consumer confusion is an important policy objective, and undercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof”).

2 See, e.g., Apple Corps v. International Collectors Soc’y, 15 F. Supp. 2d 456, 475 (D. N.J. 1998) (“The prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”).

3 Colorado Rule of Professional Conduct 5.3 requires lawyers with supervisory authority over nonlawyers to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer” and holds the lawyer responsible for conduct “that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.”

4 At the time, Colorado Rule of Professional Conduct 8.4(c) provided that it was professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

5 See In re: Pautler, 47 P.3d 1175 (Co. 2002) (Rule 8.4 prohibits prosecutors from using deception); People v. Reichman, 819 P.2d 1035 (Co. 1991) (Rule 8.4 applies a fortiori to prosecutors).

6 Colo. R. Prof. C. 8.4 (proposed changes in italics).


8 Id. at 532.

9 Id. (emphasis in original).

10 Id. at 533.

11 Or. R. Prof. C. 8.4(b).

12 These states include Alabama, Alaska, Florida, Iowa, Michigan, Missouri, North Dakota, Ohio, Oregon, South Carolina, Tennessee, Virginia, Wisconsin, and Wyoming, as well as the District of Columbia.

13 Mass. R. Prof. C. 8.4 which provides:

It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or through the acts of another; . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; . . . or (h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

14 Leysock v. Forest Laboratories, Inc., No. 12-11354-FDS, 2017 WL 1591833 at *8 (D. Mass. Apr. 28, 2017). The rules apply to attorneys who use pretextual techniques themselves as well as to attorneys who supervise investigators or others who do so. See Mass. R. Prof. C. 5.3 (requiring lawyers with supervisory authority over nonlawyers to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer” and holding the lawyer responsible for conduct “that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer”).

15 Id. at *7.
18 Curry, 450 Mass. at 510-17; Crossen, 450 Mass. at 540-41
19 Curry, 450 Mass. at 513; Crossen, 450 Mass. at 548-49.
20 Curry, 450 Mass. at 521-25; Crossen, 450 Mass. at 562, 568
21 Curry, 450 Mass. at 523 (emphasis added).
22 Curry, 450 Mass. at 526 (expressing concern about “efforts
   to pierce the confidential communications of former law clerk
   and a judge in a pending matter”); Crossen, 450 Mass. at 559-60
   & n.38 (same).
23 Leysock, 2017 WL 1591833 at *6-12.
24 Id. at *8.
25 Id.
26 Id. at *6.
27 Id. at *8.
28 Id. at *9.
29 Id. at *10.
30 Id. at *10-11 (emphasis in original).
31 Id. at *11.
32 See id. at *6 (“The first exception . . . permits prosecutors
   and other government attorneys to conduct undercover criminal
   investigations, which typically require some level of deception or
   misrepresentation.”); Curry, 450 Mass. at 524 (“prosecutors are
   subject to a variety of powerful procedural and constitutional
   constraints on misleading and deceptive conduct to which private
   attorneys are not subject”).
33 See, e.g., Curry, 450 Mass. at 524 (referring to conduct as an
   “elaborate fraudulent scheme,” and noting that “[t]his coercive
   and deceptive process was designed to trick the law clerk, not to
   note or reproduce his usual behavior”).
34 See Leysock, 2017 WL 1591833 at *9 (finding the investigation
   fell outside of the exception in part because the information that
   was gathered was not readily available to the public).
35 Curry, 450 Mass. at 526 (expressing concern about the “efforts
   to pierce the confidential communications of former law clerk
   and a judge in a pending matter”); Crossen, 450 Mass. at 559-60
   & n.38 (same).
37 See, e.g., id. at *11 (noting that the targets of the deceptive
   conduct were not the suspected wrongdoers but were “wholly
   innocent physicians who are neither accused nor suspected of
   participating in the alleged scheme”).
38 See id. at *10 (“To the extent that ethical rules tolerate any level
   of misrepresentation or deceit as to identity and purpose, it is
   justified on the ground that such conduct is sometimes necessary
   in order to collect evidence of wrongdoing.”).
39 A case in Pennsylvania will be worth watching. Bar authorities
   have agreed to hear an ethics complaint against a district attorney
   who created a fake Facebook profile and told subordinates to
   use it to “friend” defendants and witnesses. Samson Habte,
"Catfishing Brings Trouble for Pa. Prosecutor and N.Y. Lawyer,
BNA (Sept. 19, 2017), https://www.bna.com/catfishing-brings-
trouble-n57982088205/. The hearing was originally scheduled
for November but at press time had been postponed.
Social Media is the New Town Square: The Difficulty in Blocking Access to Public Official Accounts*

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Social media has allowed for interaction among people on a scale never before seen. Recognizing the benefit of the direct engagement afforded by social media, government has flocked to it. For example, a state attorney general can tweet out a consumer alert regarding an e-mail scam, the U.S. Department of Homeland Security can offer details about evacuation plans, and elected officials can informally poll constituents on policy issues. But this direct access sometimes carries a cost.

Abraham Lincoln may have presciently been contemplating the creation of Twitter when he observed; “Better to remain silent and be thought a fool, than to speak and remove all doubt.” Recently, the “tweets” of elected officials nationally and locally have garnered significant attention. Even more interestingly, followers of elected and high-profile public employees have complained about being blocked from their social media. Elected officials claim that they are within their rights to block access to their Twitter feeds. Constituents counter that such action violates the First Amendment. Courts are being asked to weigh in on this issue.

Thus far, one court, in Davison v. Loudoun County Board of Supervisors, found that a county commissioner blocking a constituent from her Facebook page raised a claim of a First Amendment violation that survived summary judgment. But more decisions in this area are on the way. And cases that have been filed have been settled adversely to the governmental entity. Recently, President Trump was sued over his policy of blocking followers. Officials will naturally want to protect their social media accounts, but, as public officials, there are legal limitations as to how they can protect them.

In Idaho, government entities have Twitter, Facebook, Instagram, and other social media presences in an effort to bring their message directly to their constituents. And for good reason, social media platforms enable governments, corporations, leaders, and anyone else to tell their story in their own words. For example, at the state level, there are social media accounts for the state of Idaho, the constitutional officers, and the congressional delegation.

But, as public figures, what are the ramifications of a social media presence? Can government block followers on Twitter or comments on its Facebook page? This article provides a brief overview of the Internet as a public forum, criteria for determining whether a social media account has “under the color of law” status, and providing some practical alternatives to protect elected and public employee social media accounts.

Social Media = Limited Public Forum

Traditionally a public forum was a place such as a park, town square, street, or sidewalk where citizens have assembled, discussed public questions, and facilitated communication. Within these areas, government can prohibit activity only when necessary to serve a compelling state interest that is narrowly tailored or may enact regulations of the time, place, and manner of expression which are content neutral and leave open alternative channels of communication. Importantly, a public forum is not limited to a physical space; it can be metaphysical space as well. This concept of “space” means that a forum can take on many forms including the Internet.

The Fourth Circuit has acknowledged this development by comparing Facebook comments with writing a letter to the newspaper. Posting a Facebook comment shows intent to engage in public debate, publicly comment on an issue, or advance political and social views. This means that, if a public official, public employee, or a public entity creates social media presence designed to interact with the public, that presence will most likely be viewed as a limited public forum.
Recently the U.S. Supreme Court signaled its agreement with the legal premise that the Internet is a public forum. In recognizing the past difficulty in identifying the most important places for the exchange of views, the Court expressly acknowledged that the Internet in general and social media in particular made the answer clear. The significance of social media was also directly acknowledged through the Court’s recognition of Facebook as a means to debate religion and politics and Twitter as a means for constituents to petition elected representatives and otherwise directly engage with them. Social media provides platforms through which users can engage in protected First Amendment activity.

The Packingham’s majority’s declaration that social media was clearly the public forum of the present was not unanimous. Justice Alito, joined by Chief Justice Roberts and Justice Thomas, labeled equating of the Internet with public streets and parks as “undisciplined dicta.” The concurrence would have cabined the analysis to whether it embodied content neutral regulation of the place where speech may occur and concurred in the judgment “[b]ecause of the law’s extraordinary breadth.”

**Personal or Official?**

It appears clear that social media which both distributes information to constituents and receives information from constituents will most likely be considered a limited public forum under the First Amendment. Will that same conclusion be reached for personal social media accounts of public officials? This question is significant because it may limit an official’s ability to block a follower or commenter from a social media page. The social media account may be subject to the public records law.

At the outset, an otherwise publicly elected official or public employee is permitted to have a private presence. The challenge for public officials is that, based upon their personal persona, their “officialdom” does not simply peel off upon going home for the evening. This can be even more challenging within social media because it is incredibly easy to mix personal and official exchanges through these platforms. Even more problematic: A public official may painstakingly separate his or her official presence from his or her private presence but friends, family, and constituents will not. How then can we effectively advise public clients?

This difficulty is compounded if a governmental entity and its attorney are unaware of the social media presences of elected officials or public employees. For example, a public employee may have a social media presence that is not sanctioned or even known of by the entity but, based upon a legal analysis, is operating under color of law. Attorneys and governmental entities should monitor closely all of its official social media presence and establish policies that inform all employees against establishing a presence in the entity’s name without prior approval.

**Under Color of Law or Official Action**

The most likely way that a social media account will undergo judicial scrutiny is through a 42 U.S.C. § 1983 claim. This federal action requires the showing of two things: (1) a person subjected the plaintiff to conduct that occurred under color of law; and (2) this conduct deprived the plaintiff of a right under the U.S. Constitution or federal law. This means that the most direct route to challenging an official blocking or deleting social media posts of a citizen will generally allege that the official acted under the color of law to deny the First Amendment rights of the citizen.

To effectively advise clients with regard to the creation of a social media account as the governor, legislative representative, or mayor, an attorney must evaluate whether the account and its administration are considered official acts under color of law. Importantly, the absence of a statute, rule, or policy does not establish that an official is not acting under the color of law. Custom or usage can equal the force of law for section 1983 purposes. Recognizing the difficulty of separating public and official personas, the presumption is likely that such private accounts have a sufficiently close nexus to the public official that the account is an act under the color of law. Importantly, there are a number of factors to evaluate whether the nexus is close enough. Within the social media realm, the following factors were evaluated by the judge in Davison in finding that the account was maintained under the color of law:

**What is the impetus to create the account?**

Was the social media account created because of the public official’s position or to highlight the public official’s position? Often a prime motivation for creating a social media presence is the campaign for office. However, clients will have campaign accounts that began as nonpublic accounts that they continue after the election. This continuation can result in
converting a nonpublic account into limited public forum. These factors will contribute to the closeness of the nexus. Similarly, if an official were to create an account named, “MayorJohnDoe” as opposed to simply “JohnDoe,” postings on the account may well be considered to be the official position of the account holder not the musings of the office holder in her/his private capacity.

**Who “owns” the account?**

Once the official leaves the office, will the account revert to the entity or will it remain the public official’s account but in private hands? Another evaluation point is the e-mail address used to sign up for the account. Has the official used a government account or a personal e-mail address?

**Are publicly-owned resources used to update and maintain the account?**

Many elected officials use a communications officer or an assistant to update and maintain these types of social media accounts. These employees are typically public employees of the governmental entity. Officials also have publicly-owned computers, tablet, and mobile devices that can be used to update and maintain social media accounts. To the extent that they are so used, that use will provide strong support for the account’s official status.

**What is the purpose of the account?**

Often public officials want to create these accounts as a means to communicate with and hear from constituents. This could also mean that constituent interaction will be intertwined with official action through requests for assistance, idea sharing, informal polling, solicitations for government positions, promotion of official events, and invitations to attend government events. Some social media platforms allow the account creator to designate the type of page it is. For example, Facebook allows a user to identify a page as “government” or “politician.”

A personal account likely should have limited access to the public. In other words, an official with a personal account should approve all friends and followers. A public page would have open access, while a personal page would likely contain “protected tweets” or privacy settings that limit who can view the posts, comments, and newsfeed of the official or employee. In evaluating these factors, the more open the account is, the more difficult it will be to defend it as personal as opposed to a limited public forum.
Is the account swathed in the trappings of office?
Already mentioned above is the use of the official’s title in the account name, but attorneys should also be aware of accounts that use official seals, links to the government websites, and how the page is categorized.

What is the content of posts?
If an official’s posts are predominantly official business in nature, with intermittent more personal posts, then the balance is going to tip towards activity under the authority vested in the position by the entity.

Recognizing that virtually no elected official or public employee is going to have a statutorily assigned responsibility to maintain a social media presence, this series of inquiries enables an attorney to evaluate a client’s social media presence to determine if the First Amendment is going to apply. Details matter. Therefore, if an elected official wants to have a private social media presence, then titles should be avoided, public policy discussions should not be the focus of the interaction, and the privacy settings should be applied to limit access to the official’s personal group of friends. Otherwise, it is may be difficult to argue that the official has not created a limited public forum through her/his social media presence.

Alternative Channels for Communication
Within forum analysis, a possible defense for public entities lies within an ample alternative channel for communication. Social media provides an interesting subject for analysis as an ample alternative forum for communication because everyone can open an account to post their views. The sole restriction is access to the official’s social media page for posting. The entirety of the Internet remains open as an alternative. This is distinguishable from a measure that prohibits “For Sale” signs within real estate but would have permitted leaflets, sound trucks, and newspaper listings. The cost to open a Twitter or Facebook account thus far is “free.” Blocking access to one account does not impose any increased cost, nor does it foreclose the use of the medium. Given the ease with which social media accounts can be created and populated, there seems to be ample “alternative channel of communication” defense available.

Eyes Wide Open Advice
The first recommendation to a client is to be aware that, based on the client’s public position, any social media presence will carry with it a high degree of interest. This means that a private presence will be difficult to maintain and will require maintenance. As the friend and follower circle expands, the effect may be to convert a personal account into a public one. Management and discipline are essential to maintain a personal account.

Don’t Take the Bait
Within the social media space operates a class of participants who simply exist to create controversy. These folks are more commonly referred to as “trolls.” Others delight in criticizing government, while still others are begging for attention in whatever form it takes. The best advice you can offer your clients in these types of situations is not to take the bait and refrain from engaging. A good example is found in Davison v. Plowman. (Yes, same Davison as the Loudon County case, which serves as yet another caution regarding engagement!) In this case the defendant, a district attorney in Virginia, started an initiative through his Facebook page to enhance the public’s understanding of criminal justice. In response to one of his postings, Mr. Davison left a comment that criticized the office and then dared the district attorney to delete his post so they could sort it out in front of a federal judge. The trolled official took the bait, deleted the post, blocked Mr. Davison, and then ignored repeated requests by him to have his access restored. Not surprisingly, the federal district court found that the Facebook page was a limited public forum under the First Amendment. Importantly for those advising public entities, the court tacitly recognized that the district attorney had the ability to regulate the space and noted that Mr. Davison perhaps could have been blocked for repeated clearly off-topic postings in violation of the social media policy. This means that, although a limited public forum exists, it can still be regulated (as discussed immediately below).

Being Unable to Block Does Not Mean Unregulated
Because an official social media presence is considered a limited public forum, it can be regulated. For example, if you have a policy that prohibits obscene, threatening, commercial, repetitive, and clearly off-topic postings, then that content can be removed. Removal of content that violates the terms and conditions of the social media platform or these provisions can likely survive a judicial challenge. If a client removes content based on its policy and along these parameters, that content should be printed out
and identified with respect to what portion of the policy it violates.

Recognize that deleting a comment for violation of a policy will likely be more easily defensed than a wholesale block. If your client wants to have a block option, then one system may be a “three strikes” system. For example, the Police Department in Beech Grove, Ind., agreed to no longer block users who violated its policy unless they had received three warnings.29 A policy such as this provides an attorney with a well-documented defensible record of the entity’s policy and compliance with the policy. Printing out removed comments and warnings should provide attorneys and entities with a time date stamped record that can be easily reviewed if challenged.

**The Technology Can Be Your Friend**

Mishaps aside, the technology can be an asset. This article demonstrates the legal difficulty of blocking someone from a social media feed. But you may be able to offer your client relief without blocking the participant.

Facebook and Twitter offer a feature called “muting” or “hiding.” Within Twitter, muting allows your client to remove an account’s Tweets from their timeline without unfollowing or blocking that account. A muted account in Twitter will not know that it has been muted. Similarly Facebook allows users to hide posts, feeds, and messages through a series of settings that do not equate to blocking or unfriending that follower. Users can still see all of their posts and the offender will not know that he or she has been muted.

**Help Your Clients Say Yes to Social Media**

Social media is both a tremendous opportunity and a burden for public clients. Social media provides government and public officials the ability to strike some balance with media coverage by telling their side of the story. Social media also helps to create an engaged and informed citizenry. Although participating requires some thick skin, a lot of patience, and knowledge of the platforms, the benefits of social media done well allow government the ability to communicate directly with individual citizens on a level never before imagined. Many users understand the impact of a warning and will alter their conduct to continue participating rather than risk being blocked. A well-managed social media account along with a well-written and enforced social media policy will reduce your client’s headaches.

**Quick Checklist**

1. Government Social Media Presence is likely a limited public forum
   a. If it is an individual official or employee’s account is it under color of law?
   b. Individual/ personal social media accounts should not bear trappings of office etc.
2. Social media policy in place limiting obscene, off-topic, spam, repetitive, and off-topic posts.
3. Specific deletions as opposed to wholesale blocking based on the above limitations.
4. A warning system that informs offenders of their conduct and allows them to remedy prior to a wholesale block.
5. Identify technology measures less than blocking, such as muting, and when to deploy.
6. Report conduct to the social media platform that violates terms and conditions.

Working through the checklist outlined above, familiarizing yourself and your client with the technology, and understanding the rules of the information superhighway will enable you to advise clients so that they can reap the benefits of social media’s direct engagement.

**Endnotes**

*A version of this article was first published in the October 2017 issue of the Advocate, a publication of the Idaho State Bar. Reprinted with permission. The author extends thanks to Clay Smith, Colleen Zahn, Brett DeLange, Matt Wilde, and Scott Graf for their invaluable editing and insights on this article.*
This statement is most often attributed to either Abraham Lincoln or Mark Twain. But, according to the Yale Book of Quotations, the evidence that either of them said it is rather thin. The most likely origination is from a book published in 1907 entitled Mrs. Goose, Her Book by Maurice Switzer. Perhaps the earliest take on fools and silence is found in Proverbs 17:28 (New International Version).


4 For purposes of this article, Twitter and Facebook are the focus, but the analysis applies across the spectrum of social media. As the medium evolves the analysis has to evolve with new iterations of social media platforms.

5 See https://www.idaho.gov/social-media/.


7 Id.


9 Liverman v. City of Petersburg, 844 F.3d 400, 410 (4th Cir., 2016)

10 Id. See also Grutzmacher v. Howard County, 851 F.3d 332 (4th Cir. 2017) (Employer’s interest in efficiency and preventing workplace disruption outweighed employee’s speech interest in social media).

11 Rosenberger at 829-30.


13 Id.

14 Id.

15 Id. (Alito, J., concurring).

16 This is admittedly a simplified description of a section 1983 claim. It is intended solely to establish the analysis of a social media account. There are lots of twists and turns to section 1983 law and volumes dedicated to it.

17 Davison, supra note 2 at 610-12.

18 This also means that clients and attorneys will need to be mindful of the application of the Public Records and Open Meetings laws within these spaces.


20 Referring to the Davison case, it does not appear that this defense was advanced. The decision has been appealed, and it will be interesting to see if it pops up. Given the almost unlimited access and availability of social media, at a minimum the potential of this defense is an interesting one.


23 Id. at 1.

24 Id.

25 Id. at 2.

26 Id. at 4.

27 Id.


Recent Powers and Duties Decisions

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District of Columbia—Attorney General Has Common Law Authority to Bring Parens Patriae Action. The D.C. attorney general’s *parens patriae* authority was affirmed in an important recent decision. The attorney general brought an action against an oil company and several petroleum distributors, alleging violations of the city’s Retail Service Station Act (RSSA). The defendants moved to dismiss the complaint. They argued that the statute contemplates only private enforcement of its provisions and that the District failed to assert a quasi-sovereign interest (as required by *Alfred L. Snapp & Son, Inc. v. Puerto Rico*) to support assertions of *parens patriae* standing. The lower court agreed and dismissed the claims and the attorney general appealed.

The appellate court first addressed the question of standing. The court noted that the U.S. Supreme Court’s decision in *Alfred L. Snapp* addressed the requirements for *parens patriae* standing in federal court, but did not establish requirements for *parens* standing when a state brings suit in its own courts to enforce its own laws. In addition, the court found that the District’s interest, in this case, is not quasi-sovereign, but sovereign — the District’s power to create and enforce its own legal code. (The court noted that its conclusion that the District’s interest here was sovereign did not mean that the District’s interest in “fostering a competitive gasoline market for the benefit of consumers” is not an appropriate quasi-sovereign interest.) The court therefore reversed the trial court and held that the attorney general had standing to bring these claims.

With regard to the question of statutory authority to bring these claims, the defendants argued, and the trial court agreed, that only the affected retail service stations had a right to enforce the relevant provisions of the RSSA. The appellate court rejected this argument on several grounds. First, the court analyzed the statutory basis for the attorney general’s powers and determined that the statutory intent was that the attorney general “have broad power to exercise all such authority as the public interest requires and wide discretion in determining what litigation to pursue to uphold the public interest” unless those powers were explicitly limited by statute. The trial court thus erred in finding no authority for the attorney general simply because the RSSA did not give the attorney general explicit enforcement authority. The attorney general’s ability to act “pursuant to his statutory authority and duty to uphold the public interest” is not dependent on the inclusion in a statute of an explicit right of action. Second, the RSSA itself

[D]oes not contain the clear expression of a legislative intent to curtail the Attorney General’s enforcement powers. Such a clear expression would be necessary for us to conclude that the independent Attorney General is foreclosed by the RSSA from exercising his statutorily recognized common-law power to sue, in pursuit of what he believes the public interest requires, to enforce the RSSA marketing-agreement provisions that the Council determined were both necessary to foster a competitive gasoline market for the benefit of consumers and “in the interests of the public health, safety, and welfare.”


Louisiana—Eleventh Amendment Bars Inclusion of State in Private Antitrust Settlement. Private purchasers of the prescription drug Flonase filed an antitrust suit against GSK, the manufacturer. The parties reached a settlement in 2013, and notice of the settlement was sent to class members. Although the state of Louisiana was a class member, it received instead the required notice under the Class Action Fairness Act (CAFA). The settlement prohibited class members from bringing released claims against GSK in any court. The Louisiana attorney general filed suit against GSK in state court on similar antitrust claims and GSK sought to enjoin the suit on the grounds that Louisiana did not opt-out of the settlement class and is bound by the settlement. The federal district court dismissed GSK’s claims, holding that, under the Eleventh Amendment, “a State retains the autonomy to choose ‘not merely whether it may be sued, but
where it may be sued.’” The court determined that it could not enjoin the state unless it had waived its sovereign immunity and held that receipt of the CAFA notice was not sufficient to show such a waiver. GSK appealed.

The Third Circuit affirmed the district court’s dismissal of GSK’s claims. The court held that the key question was whether the district court exercised jurisdiction over Louisiana in the original, settled suit. Since Louisiana had not waived its sovereign immunity, the district court lacked jurisdiction.

The court first explained that Supreme Court precedent holds that the Eleventh Amendment applies to a motion to enjoin a state from suing in its own court. The settlement in this case asked the court to order that all members of the settlement class be permanently enjoined from bringing any of the released claims in any state or federal court. Louisiana was ostensibly part of that class, so the settlement sought to enjoin Louisiana from suing in its own court. Thus, the Eleventh Amendment applies. That this occurred in the form of a court-approved settlement, rather than in a motion for injunction, is immaterial to the Eleventh Amendment question.

Turning to the question of waiver, the court held that receiving a CAFA notice and failing to oppose the settlement based on that notice was not a waiver. Louisiana did not clearly indicate its intent to waive its sovereign immunity — it did not act at all. The court upheld the district court’s refusal to enjoin the state’s action.


Maine—Attorney General Not Required to Pay for Governor’s Counsel in Amicus Effort. President Trump issued two Executive Orders concerning immigration, each of which was challenged in court. The Maine attorney general filed an amicus brief supporting the challenge. Wanting to file an amicus brief in support of the orders, the Maine governor requested that the attorney general represent him in that effort or authorize him to retain outside counsel at the attorney general’s expense. The attorney general declined to represent the governor, but authorized him to retain outside counsel at his own expense, provided that counsel was licensed to practice in Maine. The governor sued, seeking an order that the attorney general may not place any limitations on the scope of the counsel’s representation of the governor and that the costs of the outside counsel must be paid from the attorney general’s budget. The attorney general moved to dismiss the complaint.

The court dismissed the governor’s suit on two grounds. First, the attorney general argued, and the court agreed, that the attorney general’s refusal to represent the governor, conveyed in a letter dated March 15, 2017, was an administrative decision and should have been appealed through the administrative appeals process under Maine rules of civil procedure. Because the governor did not file an appeal within 30 days of receiving the attorney general’s decision, the appeal is time-barred under state law.

Second, the court agreed with the attorney general that the case should be dismissed on grounds of mootness. The cases in which the governor sought to file amicus briefs had been decided, certiorari had been granted in the consolidated cases by the Supreme Court, and the cases had been dismissed on grounds of mootness. The governor argued that the issue is capable of repetition but evading review. The court agreed with the attorney general that, if the situation arises again, the governor will have sufficient time to challenge the attorney general’s decision, so the case will not “evade review” and the exception to the mootness doctrine does not apply.

Finally, the court held that the separation of powers doctrine prohibits the court from granting the governor’s requested relief. The Maine constitution includes a separation of powers clause. The court concluded that:

Appropriation and budgeting are powers given exclusively to the legislative branch by the Maine Constitution. If the Court were to put requirements on the legislatively appropriated budget of the Office of the Attorney General, the Court would essentially be appropriating funds from the Office of the Attorney General and redistributing them to the Executive Branch. Had the Legislature intended to provide funds for the Governor to conduct the litigation he is clearly permitted to conduct in these cases, given the Attorney General’s position, it could have done so. Going forward, it is well within the Legislature’s power to do just that.

North Dakota—Appeal Not Perfected When Notice of Appeal Filed on Attorney General, Not State Agency. A Medicaid provider was found by the North Dakota Department of Human Services to have overbilled the program. The provider filed a notice of appeal with the district court and served its notice on an assistant attorney general in the Attorney General’s Office. The Department moved to dismiss, arguing that service had been improper, but the district court denied the motion. The Department appealed.

North Dakota law provides that “An appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before the administrative agency . . . .” The provider argued that its service was proper because it served an assistant attorney general and the Attorney General’s Office represents administrative agencies in appeals before the district court. In a prior case, the court had held that service on the attorney general was proper because service was made on an assistant attorney general who had represented the agency in an administrative proceeding. In this case, however, the Department was not represented by an attorney in the proceedings below, so service of process on the assistant attorney general was not effective. The court concluded, “Furthermore, the statutory requirement to serve both the agency and the attorney general would be rendered inoperative or superfluous if [North Dakota procedural rules] permit service of a notice of appeal on an agency by serving the attorney general or any assistant attorney general in all appeals from agency orders.”


Endnote

1 458 U.S. 592 (1982).
Prosecuting Drug Overdose Cases: A Paradigm Shift

MARK M. NEIL, NAGTRI PROGRAM COUNSEL

A death caused by a drug overdose, such as one from heroin or fentanyl, is rarely a solitary event. It affects far more than the individual or his or her loved ones. It extends to strangers, the emergency medical personnel who were called to try to save them and the law enforcement officers who investigate their death. It impacts their employers and co-workers. It touches the community at large.

Drug overdose deaths in the United States claimed over 64,000 Americans in 2016 and the number keeps rising. Drug overdoses are now the leading cause of injury death in the country and, while prescription drugs are primarily responsible for the rapidly growing number of overdose deaths, illicit opioid drugs such as heroin and fentanyl are significant contributors to the problem. Fentanyl and fentanyl analogues accounted for over 20,000 deaths in 2016, while heroin accounted for over 15,000, making them the two leading causes of drug overdose deaths.

For many years, law enforcement approached death caused by a drug overdose as accidental, or perhaps more descriptively stated, often as a death by misadventure – one primarily attributed as an unintentional accident involving no violation of law or criminal negligence. Adopting this point of view, there was no crime involved in the death. Law enforcement’s role was to oversee the removal of the deceased’s body by the ambulance crew or coroner’s office, notify the next of kin, and do the required paperwork before moving on to their next call.

But things have started to change. Heroin, once thought to be passé as a recreational drug of choice, has come back more prevalent than ever. The previous heroin epidemic, from 1970 until 1978, was primarily an urban crime problem. This new epidemic is different; heroin is easier to get, cheaper, and more potent. And the demographics have changed; there is a wider distribution throughout urban, suburban, and rural areas. With that has come an increase in use. The number of Americans using heroin has grown 500 percent within the past decade.

Non-medical use of prescription opioids is seen as one of the primary forces in this increase. In addition to heroin, other drugs such as fentanyl, a synthetic opioid, with a potency 50 to 100 times greater than that of morphine and 25 to 50 times greater than that of heroin, entered the scene and has established an ever-increasing share of the illicit drug market. Mixed with heroin or sold as counterfeit heroin or other drugs, fentanyl is even cheaper and, thus, more attractive to drug dealers. In addition to being substituted for heroin, hundreds of thousands of counterfeit prescription pills containing deadly amounts of fentanyl have exacerbated the crisis.

How, then, does the country respond to such a crisis? There is no one answer or silver bullet to address the problem but, rather, a litany of responses: public health intervention and treatment; education of the medical community, both practitioners and patients; education of the general public; and finally, law enforcement and prosecution, the topic of this article.

For many years, most prosecutors charged only those drug-related deaths involving rival drug gang fights as being homicides. But the focus has now broadened to also examine overdose deaths as prosecutable homicides against those who sold and distributed the drugs causing the overdose. It is important to emphasize that not every death because of a drug overdose is a criminal matter. Some are suicides, and some are simply accidents. But some deaths, legally and ethically, may rise to the level of criminal homicide. These homicides may not be easily discovered, investigated, prosecuted or proven, but they still deserve attention. For that to happen, a paradigm shift in thinking by law enforcement officers and prosecutors is required, away from attitudes focusing on accident to thinking and treating overdoses as homicides.

In order to make that shift, it is important to understand and appreciate the variety of approaches...
available within existing statutory schemes and case law. While a handful of states have no statutory or case law basis for treating overdose deaths as homicides, the majority already had or have adopted a wide variety of legal theories useful in addressing these cases. Two basic options highlight the differing approaches: use of the existing statutory structure, often referred to as the felony murder rule, and creation of a specific offense of death resulting from the distribution of controlled substances.

What might be characterized as the traditional approach to the matter may be found in those states that have included overdose deaths within their murder statute. Arizona and Oklahoma, among others, list drug offenses as crimes which, when a death occurs during the commission of that offense, is treated as murder. A significant number of states enumerate drug offenses within their murder statutes and, while the laws have been on the books for a considerable time, they are only now being considered for use in overdose cases.

A felony murder statute allows the prosecutor to charge an offense which requires no specific mental state other than that required for the enumerated offense; the law may specifically state that no proof of intent to cause the death is required. In general, proof of the underlying offense and the cause of death will be sufficient to obtain a conviction under this approach. Additional elements, such as proof that the underlying felony must be inherently dangerous to human life, or proof of recklessness in both causation and appreciation or awareness of the risk, may be required in some states.

Where these various felony murder states differ is in their classifications for punishment for the offense. The possibilities range from first degree or capital murder, second degree murder, manslaughter, involuntary manslaughter, and even negligent homicide. They may also limit the application of the statute. For example, Florida’s statute applies only to distribution by an adult, while Colorado’s statute applies only to distribution to a minor on school grounds.

Those states punishing drug dealing resulting in death as a specific offense have adopted a variety of approaches as well. These “drug-induced homicide” statutes are crafted as stand-alone felonies rather than being included in existing murder or other statutes. Again, as with the felony murder alternatives, the treatment of punishment and application may vary. New Hampshire and New Jersey both define the offense as being one of strict liability. Both statutes, mirroring one another, apply to methamphetamine, lysergic acid, diethylamide phenycyclidine (PCP), or any other Schedule I and II controlled substances and provides that any person who manufactures, sells, or dispenses the substances in violation of law is strictly liable for a death resulting from their use.

The varieties of these statutes are numerous and diverse. Pennsylvania’s statute applies to any controlled substance and provides that the delivery must be done intentionally. Delaware has imposed a minimum weight threshold to its statute, requiring, for example, that there be delivery of at least one gram or more of heroin. Michigan’s law covers Schedule I and II controlled substances, but specifically excludes marijuana. A recent amendment to the Illinois law allows for prosecution for a death within the state caused by a drug that was delivered outside the state in violation of the law of that other jurisdiction.

For those states, such as California, which have no felony murder or drug-induced homicide statute that would apply to overdose situations, prosecutors are left to cobble together a criminal liability theory using a second degree murder or manslaughter charge with a negligence or reckless element. California might make use of its involuntary manslaughter statute. New York might make use of its statutes regarding criminally negligent homicide (criminal negligence standard) or manslaughter in the second degree (reckless standard). A bill to amend Ohio’s involuntary manslaughter statute to include causing or contributing to the death of a person as a result of the sale, delivery, or administration of a controlled substance and making it a strict liability offense was introduced but has languished since 2016.

Regardless of the criminal statute scheme, one element is the lynchpin to the crime: causation. Whether a felony murder, strict liability, or reckless or negligent theory, causation raises perhaps the most difficult issues in proving these cases.

Overdose cases have a number of matters that may cause the prosecutor some concern, from lack of sympathy for the victim to proving who provided the drugs. On top of these, many of the victims in overdose death cases are polysubstance abusers, injecting or ingesting a wide variety of both legal and illegal substances. Further, because of their drug addictions, their overall general health may be compromised, making them susceptible to diseases.
and conditions which might impact the situation leading to their deaths. It becomes imperative for the prosecutor to understand what is needed to prove regarding causation.

States have enumerated a variety of different legal standards for causation of death; “direct result,” “caused by,” “proximately caused,” and “results from” being the more common. Also included are “recklessly causes” and “more likely than not.” Each standard has its own legal ramification. It is important to note, however, that the analysis of proximate causation in tort law is quite different from that analysis applied in criminal law. Mere negligence may suffice in a personal injury case, but not in a criminal matter where gross or wanton disregard is needed to show criminal negligence.

In those states making use of a result-oriented scheme, states may follow the reasoning set forth in the leading federal case on the issue, *Burrage v United States*.29 Burrage was prosecuted under the provisions of 21 U. S. C. § 841(b) (1) (C) which provides for punishment in the event that “death or serious bodily injury result[ed] from the use of [the drug].” In *Burrage*, long-time drug user Banka died following an extended binge that included using heroin purchased from Burrage. At trial, medical experts testified that Banka might have died even if he had not taken the heroin Burrage provided. Denying a motion for judgment of acquittal, the trial court instructed the jury that the government only had to prove that heroin was a contributing cause of death. The U.S. Supreme Court looked at both actual and proximate cause, holding that, at least where the use of the drug distributed by Burrage was not an independently sufficient cause of the victim’s death, he could not be held liable unless such use is a “but-for” cause of death. Thus, under *Burrage*, a particular drug causing a contributory effect to death is not sufficient to create criminal liability.

This narrow approach to causation makes it especially important that the medical examiner and toxicologist both be consulted prior to initiating a prosecution. Beyond the issue of whether the death is an accident versus a homicide, the medical examiner and toxicologist must understand the legal requirements and what ultimately may be asked of them during testimony in homicide prosecutions such as these. The prosecutor must also understand the distinctions and potential nuances in the medical examiner’s stated cause of death.

Even under a felony murder scheme, often seen as a strict liability situation, causation may still be required. For example, the sole act of selling heroin to a purchaser, who, voluntarily and out of the presence and without the assistance of the seller, subsequently injected heroin and died as a result, may be insufficient to invoke the felony murder rule. In order to convict of felony-murder, it may be necessary in some jurisdictions to show that the conduct causing the death was done while in the commission of a felony or in furtherance of the design to commit the felony.30 Thus, if the commission of the felony is completed upon the sale, a felony murder charge cannot stand. Nor may the result causation element be ignored even in the strict liability situations. These statutes may still contain a result oriented causation requirement.31

Thus, even when not specifically enumerated in the statute, causation remains an essential element. For example, where manufacturing or delivering a controlled substance is the underlying felony relied upon in a felony murder prosecution, the state might still be required to prove (1) the commission or attempt to commit the felony; (2) the defendant’s participation in such felony; and (3) the death of the victim as a result of injuries received during the course of the commission or attempt.32 Furthermore, the cause of death might not necessarily be the sole cause of death.33 And where the medical examiner has found that the ingestion of the drug was not the sole cause of death, the prosecutor will face an additional legal hurdle. Thus, in order to make the shift to treating overdose deaths as homicides, it is imperative that investigators and prosecutors find not only the correct legal scheme under which to proceed, but also be mindful of the causation element embedded in a statute or required by a jurisdiction’s case law.

Prosecuting overdose deaths as homicides will not be the silver bullet to the public health crisis this nation faces. However, it is one tool in the law enforcement arsenal which, if used appropriately, can assist locally in focusing on the drug dealers who take advantage of those who have become addicted to opioids.
NAGTRI currently provides training on treating overdose deaths as homicides through its Overdose Death Investigation and Prosecution course. This one-day course examines the myriad issues surrounding the investigation and prosecution of death cases resulting from overdoses of heroin and fentanyl. The course is designed for law enforcement officers and prosecutors and covers basic drug overdose death investigation techniques and covers legal requirements and issues involved in drug overdose death investigations.

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Endnotes

8 The offense of trafficking a controlled substance by possession with intent to distribute cannot be the predicate felony to a felony murder conviction because it is not an inherently dangerous crime. State v. Bankert, 117 N.M. 614, 975 P.2d 370 (1994).
10 ALASKA STAT. § 11.41.120.
11 MINN. STAT. § 609.195.
12 GA. CODE ANN. § 16-5-1.
13 IOWA CODE § 707.5.
14 See, e.g., ARIZ. REV. STAT. § 13-1105, GA. CODE ANN. § 16-5-1.
16 MASS. GEN. LAWS ANN. CH. 265, § 13.
17 NEV. REV. STAT. § 200.070.
18 MONT. CODE ANN. § 45-5-104.
19 FLA. STAT. § 782.04(1a)3.
20 COLO. REV. STAT. § 18-3-102(e).
22 Tit. 18 Pa. CONS. STAT. ANN. § 2506.
23 DEL. CODE ANN. tit 16 § 4752B.
24 MICH. COMP. LAWS ANN. § 750.317a.
25 720 ILL. COMP. STAT. 5/9–3.3.
26 CAL. PENAL CODE § 192.
27 N.Y. PENAL LAW §§ 125.10, 125.15.
28 H.B. 141, 132nd General Assembly.
32 See., e.g., State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983)
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