THE WEST VIRGINIA STATE BAR
2018 REGIONAL MEETINGS
ONE DAY COURSES HELD DURING OCTOBER 2018
10:30 a.m. - 1:30 p.m.

AGENDA

The State Bar will have different instructors at the various locations. The order of presentations will also vary. Each session will be fifty minutes of instruction time. All sessions will qualify for 3 credit hours in ethics or law office management.

Current Developments: The Good, the Bad, and the Disbarred

Presenters: Counsel from the West Virginia Office of Disciplinary Counsel

A Guide to the CourtPlus Initiative

Presenters: Personnel from the Division of Circuit Clerk Services at the Supreme Court of Appeals

A Consumer Scams and Managing Your Law Office and Helping Clients

Presenters: Counsel from the Office of the West Virginia Attorney General – Consumer Protection Division

Joanne Vella Kirby is a Lawyer Disciplinary Counsel for the West Virginia Office of Disciplinary Counsel. An arm of the Supreme Court of Appeals of West Virginia, the Office of Disciplinary Counsel is primarily tasked with screening and investigating complaints made against lawyers who are licensed to practice law in West Virginia. The ODC is also responsible for prosecuting those lawyers who have either committed ethical misconduct or are suffering from a physical or mental condition which adversely affects their ability to serve the public. Prior to joining the ODC in 2012, Joanne was an attorney with the law firm Spilman Thomas & Battle, PLLC, an Assistant United States Attorney for the United States Attorney's Office for the Southern District of West Virginia, and a law clerk for the Honorable Elizabeth V. Hallanan, Senior United States District Judge for the Southern District of West Virginia. A native Bostonian, Joanne earned her JD from The George Washington University in 2001 and her BA from Villanova University in 1996.

Renee N. Frymyer is a Lawyer Disciplinary Counsel for the West Virginia Office of Lawyer Disciplinary Counsel. An arm of the Supreme Court of Appeals of West Virginia, the Office of Lawyer Disciplinary Counsel is primarily tasked with screening and investigating complaints made against lawyers who practice law in West Virginia. The ODC is also responsible for prosecuting those lawyers who have either committed ethical misconduct or are suffering from a physical or mental condition which adversely affects their ability to serve the public. Prior to joining the ODC in 2008, she was an Assistant Prosecuting Attorney for Marion County, West Virginia, worked in civil litigation in Pittsburgh, Pennsylvania, and was law clerk for the Honorable Jennifer Bailey, Circuit Court Judge for Kanawha County. Renee earned her JD from the West Virginia University College of Law in 2002.

Andrea J. Hinerman has served as Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel beginning January 26, 2004, and as Senior Lawyer Disciplinary Counsel since 2008. Prior to joining ODC, she served as a law clerk for the Honorable Irene C. Burger, when she was a Circuit Judge for Kanawha County from 1998 until 2000, and for the late Honorable Robert E. Maxwell, Senior District Court Judge for the United States District Court for the Northern District of West Virginia, from 2000 until 2002. From 2002 until 2004, she was private practice. She earned her J.D. degree from the West Virginia University College of Law in 1998.

Jessica H. Donahue Rhodes, Esquire, earned her Bachelor of Arts in Political Science from Marshall University in 2000 and her Doctor of Jurisprudence from West Virginia University College of Law in 2003. She served as a law clerk to the Honorable Circuit Court Judge David W. Nibert in Mason County, West Virginia from 2003 until August of 2005. After spending a few months at Legal Aid of West Virginia in Huntington, West Virginia, she returned to Mason County to serve as Assistant Prosecutor. In 2009, she accepted a position as Lawyer Disciplinary Counsel at the Office of Disciplinary Counsel in Charleston, West Virginia. As an arm of the Supreme Court of Appeals of West Virginia, the Office of Disciplinary Counsel is primarily tasked with screening and investigating complaints made against lawyers who practice law in West Virginia. The Office of Disciplinary Counsel is also responsible for prosecuting those lawyers who have either committed ethical misconduct or are suffering from a physical or mental conduction which adversely affects their ability to serve the public. The Office of Disciplinary

Counsel also provides informal ethics advice to attorneys and teaches classes on ethics to attorneys throughout the State of West Virginia.

Rachael L. Fletcher Cipoletti is Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel. She has been with the ODC since 2002 and became Chief Disciplinary Counsel in 2008. Rachael was previously a Violence against Women Act Attorney for Legal Aid of West Virginia. She graduated Magna Cum Laude with a Bachelor of Arts Degree in Psychology from West Virginia University and also earned her Juris Doctrate from WVU. Rachael is admitted to practice before the Supreme Court of Appeals of West Virginia, United States Southern District of West Virginia, United States Northern District of West Virginia, United States Court of Appeals for the Fourth Circuit and the Supreme Court of the United States of America. She is also a member of the American Bar Association, a member of the Center for Professional Responsibility, and a member of the National Organization of Bar Counsel.

CURRENT DEVELOPMENTS:
THE GOOD, THE BAD, AND THE DISBARRED

The West Virginia State Bar
Regional Meetings 2018

Office of Disciplinary Counsel
Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel
Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel
Renée N. Frymyer, Lawyer Disciplinary Counsel
Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel
Joanne M. Vella Kirby, Lawyer Disciplinary Counsel
City Center East, Suite 1200 C
4700 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 FAX

I. Informal Ethics Advice

a. Inquiries may be made by calling, writing, faxing, or emailing the ODC

b. Rule 2.15 of the Rules of Lawyer Disciplinary Procedure

II. Helpful Information

a. Website - www.wvodc.org - Rules of Professional Conduct, Rules of Lawyer Disciplinary Procedure, Legal Ethics Opinions, Supreme Court decisions, Staff contact information

b. @wv_odc is the official Twitter account of the WV ODC

c. *LEO 2018-01 Participation in Attorney-Client Matching Services*

d. LEO 2018-02 *Conflicts in a Public Defender's Office*

III. The Good.... Focus on Wellness.

a. “The practice of law remains one of the most stressful and psychologically challenging professions. Research conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs in 2016 demonstrated that attorneys continue to suffer disproportionally high rates of mental illness and substance abuse. Lawyers in private practice also confront very high levels of stress and exhaustion that accompany continuous conflict with peers, clients, and opposing counsel. The psychological toll of legal practice can be considerable, and can often lead to the development of psychological and physical problems. These problems can then lead to an impairment that can manifest as professional misconduct or incompetence.” https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx

b. The Hazelden study found that between 21 and 36 percent of practicing lawyers qualified as problem drinkers, and that 28 percent of lawyers suffered from depression. It also found that 23 percent of lawyers suffer from stress, and 19 percent of lawyers suffered from anxiety. The survey showed 17 percent of the 3,300 students surveyed experience some level of depression, and 14 percent experienced some level of severe anxiety. When it came to drinking, 22 percent of the law students reported binge drinking two or more times in the prior two weeks.

c. Rule 1.16 (a)(2) prohibits a lawyer representing or continuing to represent a client where “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.” Impaired lawyers have the same obligations under the Rules as other lawyers.

d. The West Virginia Supreme Court established a task force to address mental health and substance abuse problems among people working in the legal profession. Chief Justice Workman issued an order to establish the West Virginia Task Force on Lawyer Well-Being, an 18-member group charged with providing guidelines to implement recommendations from a national report to improve support mechanisms for people in the legal profession. The task force was created in response to a report released in August 2017 called "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change." West Virginia Supreme Court Justice Walker is the chairperson of the task force. The task force will make its first report to the state supreme court by Dec. 31, 2018.

https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf

e. In August of 2018, The West Virginia Task Force on Lawyer Well-Being began conducting an online survey of legal professionals in our state. The results will assist the Supreme Court of Appeals and the State Bar as we seek to better serve the legal community.
https://www.surveymonkey.com/r/6BKJ6L7

f. Well-Being Tool Kit FOR THE LEGAL PROFESSION

https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_Brafford_Tool%20Kit.authcheckdam.pdf

g. If you are concerned about yourself or about a partner, associate, colleague, bar applicant, law student or judge, help is available through The West Virginia Judicial & Lawyer Assistance Program. JLAP is a free & confidential service for attorneys, judges, bar applicants and law students, who may be struggling with issues such as aging, retirement, stress, anxiety, burnout, work/life

balance, depression, substance abuse, suicidal ideation, co-dependency, compulsive behavior, grief, trauma or any other mental/physical/emotional health disorders.
http://wvjlap.org/

IV. The Bad.. And the Disbarred

a. Competency, Neglect and Abandonment

* *In re Laetitia Black*, 240 So.3d 154 (Louisiana March 13, 2018): Attorney was suspended for one year, with six months deferred, for violating Rule 1.3, Rule 1.4, Rule 1.5(f)(5), Rule 1.16(d), 8.1(c), and 8.4(d). The case involved two counts, with the first involving a partition issue. Attorney was hired to partition a piece of estate property, but failed to file the petition after receiving payment. In the second matter, attorney failed to expedite the claim of a client, failed to communicate with the client, and billed for legal work that was not performed. Further, the attorney failed to cooperate with ODC in the investigation. Sanctions included one year of supervised practice, attending and completing the Ethics School, and making restitution.

* *Lawyer Disciplinary Board v. Kevin Duffy*, 239 W.Va. 481, 801 S.E.2d 496 (2017): Attorney was suspended after the Supreme Court held that attorney violated Rule 1.1, Rule 1.3, Rule 1.4(a), Rule 1.4(b), Rule 3.2, Rule 8.1(b), Rule 8.4(b), and Rule 8.4(d) by repeatedly failing to respond to lawful requests for information by the ODC, by failing to abide by his client's decisions concerning the objectives of representation and by failing to act with reasonable diligence and promptness relating to filing an appeal, and due to his conduct in pleading guilty to misdemeanor offenses of theft, operating a vehicle while intoxicated, and disorderly conduct. Attorney was suspended for twelve months, to be served retroactively from his prior suspension of June 2, 2016, and also has to petition for reinstatement and pay disciplinary costs.

* *In re Disciplinary Action Against Joseph Michael Capistrant*, 905 N.W.2d 617 (Minnesota January 10, 2018): Attorney was disbarred for violating Rule 1.3, Rule 1.4(a)(3), Rule 1.4(a)(4), Rule 1.15(a), Rule 8.1(b), and Rule 8.4(c). A client sought legal services from the attorney to handle his late son's probate matter and revise a trust

that had named the son as a beneficiary. The attorney met with the client only twice, and at the second meeting, the attorney presented a client with an invoice for $2,643 which itemized advances for future filing fees and related costs for the probate action as $547. The client paid the invoice, and then the attorney abandoned the case. The client's payment was not deposited into the trust account, communication with the client stopped, and the probate action was not filed. It took the client months to receive the file back from the attorney, and the attorney never refunded the $547 even though he had agreed to do so. The attorney also ignored the disciplinary proceedings.

* *Disciplinary Proceedings Against Brandon Buchanan*, 381 Wis.2d 64 (Wisconsin April 19, 2018): Attorney was suspended for sixty days for violating Rule 1.3, Rule 1.4(a)(3), Rule 1.4(a)(4), Rule 1.15(b)(4), Rule 1.16(d), and Rule 8.4(h). Attorney's license was administratively suspended because he failed to pay mandatory bar dues, failed to file a trust account certification, and failed to comply with continuing legal education requirements. The attorney was temporarily suspended for failing to respond to the disciplinary complaint. The underlying issues included taking an advance fee and filing fee in a bankruptcy case, and then failing to deposit the money into the trust account because he did not have one, along with failing to communicate with clients. While the attorney did perform some work, he failed to file the bankruptcy case, and then failed to provide the client file to new counsel. The attorney also did not refund the unearned portions of the fee and did not provide an accounting of his work to the clients. The attorney never responded to the ethics complaints filed against him, and did not respond to the show cause order regarding his failure to respond.

* *Disciplinary Proceedings Against Sarah Clemment*, 382 Wis.2d 324 (Wisconsin, June 15, 2018): Attorney was publically reprimanded after violating Rule 1.1, Rule 1.3, Rule 1.4(a)(2), Rule 1.5(g)(2), Rule 1.16(a)(1), and Rule 1.16(d). Attorney's client was charged with first degree murder, but she had never handled a homicide case or tried a jury case. Attorney was paid $5,000, but she deposited the fees into her business account. The various motions that she filed were dismissed or withdrawn after she failed to cite any case law, misunderstood the legal standard, and failed to cite any factual evidence. While the court urged her to associate with experienced counsel, she failed to do so. The attorney failed to file a witness list, and just relied on the right to call witnesses identified by the state even after the court reminded her that she had to place those witnesses on her witness list. Just two weeks before the trial, the State informed the court that the attorney had not reviewed any of the physical evidence despite numerous attempts by the state to allow such. The court also questioned the attorney about several common criminal phrases, such as impeachment by prior conviction and effect of arrest and conviction, the attorney could not answer the questions. The attorney was found to not be competent along with failure to be diligent and failure to communicate along with failing to refund the fees to the client.

* Matter of the Suspension of Desmond L. Maynard, 2018 WL 2938633 (Virgin Islands, June 8, 2018): Attorney was suspended for eighteen months for violating Rule 1.1, Rule 1.3, Rule 1.4, Rule 1.5(b), Rule 1.15, and Rule 8.1. The attorney represented an estate, which had contents of the estate left to two individuals, one of whom worked in the attorney's office as a janitor. The estate had a rough value of $485,000, through real property and securities along with some bank accounts and personal property. There was also an estimated $30,000 lawsuit recovery for

damages to the estate's real property sustained during Hurricane Hugo. The attorney settled the claim for $55,800, and it was ordered to be paid to the personal representatives of the estate. The attorney then filed an amended final accounting with the court, but the court issued an order directing him to correct certain deficiencies. The attorney did nothing with the case for three years, and the court entered another order to comply with the last order from three years ago. The attorney requested an additional thirty days to respond, which was granted, but he then did nothing on the case for another three years. When he filed the amended final adjudication for the estate, it differed from the original filing in several ways, including decreasing cost of household furnishings, decreasing costs of a savings account, and decreasing the amount of the settlement for the hurricane damage. The case did not move for another six years until the court entered a *sua sponte* final adjudication of the estate. Even with that final judgment, the matter remained dormant for another four years because the attorney did not liquidate or distribute the assets to the beneficiaries. A beneficiary reviewed the file in 2010, and discovered the final judgment from four years before, but many items in the initial final accounting were now lost, including a safe deposit box, savings account, and life insurance policy. The beneficiaries paid a new attorney $8,500 to handle the rest of the estate.

* *State ex rel. Counsel for Discipline of the Nebraska Supreme Court v. Jorgenson*, 298 Neb. 855 (Nebraska, February 2, 2018): The attorney was indefinitely suspended, for a minimum of two years, for violating Rule 1.1, Rule 1.3, Rule 3.4(c), Rule 8.1(b), Rule 8.4(a), and Rule 8.4(d). The attorney was appointed to represent an appellant before the Eighth Circuit Court of Appeals and failed to appear on the scheduled date for oral argument. In response to the rule to show cause, the attorney indicated that he was busy during that month due to a capital murder trial and his reliance on his staff to reschedule the date and meet the obligations to his other clients. The Eighth Circuit issued an Order that the misconduct would be grounds for suspension or disbarment, but he was not a member of that bar and therefore, if the attorney ever applied for membership, his application would need to be reviewed and approved by the chief judge of the Eighth Circuit. In another matter, a complaint was filed against the attorney and he failed to respond to the matter. The reason given by the attorney was his cell phone had become inoperable, resulting in lost text messages between him and the client who filed the complaint, and that his server account had been cancelled, causing the loss of the thousands of emails and his calendar. Further, the attorney felt his time should be spent getting caught up on other pending matters that had been on hold during the capital murder trial.

* *Matter of Russell W. Davisson*, 419 P.3d 599 (Kansas, June 15, 2018): The attorney was disbarred for violating Rule 1.3, Rule 1.4, and Rule 8.4. The attorney was hired in 2012

for a bankruptcy case, but did not speak to his clients after the initial consultation. The attorney ignored all attempts by his clients to communicate with him, but did manage to file a basic Chapter 13 petition. After numerous attempts to communicate with the attorney through telephone calls, the clients attempted to visit the attorney's office without success due to the attorney not being there or the office being locked. The clients ended up sliding a completed list of creditors under his office door, but the attorney did not communicate with them after they did so. The clients had to hire another attorney to complete the bankruptcy. The attorney failed to appear at the disciplinary hearing.

* *Matter of Crawford*, 232 N.J. 458 (New Jersey, March 20, 2018): The attorney was reprimanded for violating Rule 1.4(b), Rule 1.5(b), and Rule 8.4(d). The attorney represented a client in a bankruptcy proceeding, and failed to appear at the first meeting of the creditors despite being paid his fee in advance. The attorney then told his clients that the meeting had been adjourned, but the bankruptcy trustee proceeded with the hearing, with the attorney's client appearing *pro se*. The bankruptcy court issued a rule to show cause why the attorney should not be compelled to return the $1,000 paid by the client. The attorney was ordered to return the $1,000, but he failed to do so even after the client made numerous attempts to communicate with the attorney. When the attorney did make contact with the client, the attorney offered to refund the entire $1,000 if the client signed a release that waived any and all claims against the attorney for ethical violations. The client signed the release and the attorney refunded the money. In another matter, the attorney was retained by a client, but did not communicate the basis or rate of his fee in writing.

* *Lawyer Disciplinary Board v. David White*, Sup. Ct. Case No. 17-0121 (West Virginia, January 13, 2018,

unreported): Attorney was disbarred after violating Rule 1.1, Rule 1.3, Rule 1.4, Rule 1.5(b), Rule 1.15, Rule 1.16(d), Rule 3.2, Rule 3.4, Rule 5.5, Rule 8.1, and Rule 8.4 involving ten separate disciplinary complaints. The attorney failed to provide an adequate response to all of the ethics complaint, except for one, along with refusing to communicate with Disciplinary Counsel after the charges were filed against him. The charges included not putting the fee agreement in writing, failing to refund fees that he did not earn, failing to reasonably communicate with clients, failing to pursue a case for clients, failing to expedite litigation for a client, falsely informing a client about the status of a case, converting unearned fees to his own use, failing to comply with Supreme Court Orders, and practicing law after his license was administratively suspended. The multiple issues, especially with the conversion of client funds, showed attorney's lack of integrity and fitness to practice law. The attorney was also ordered to comply with the rules regarding notification to clients of his annulment, surrendering papers

and property of clients to a court appointed trustee, and to pay disciplinary costs.

b. Frivolous Claims, Filings or Vexatious Litigation

* *Matter of Genet McCann*, PR 16-0635 (Montana, June 6, 2018): After concluding that her representations and statements she made in court were false, misleading, uncivil and constituted violations of Montana Rules of Professional Conduct, 3.1, 3.3, 8.2, 8.4(c) and 8.4(d), the Commission recommended Ms. McCann's disbarment. Ms. McCann is one of eight children of Paul McCann, who passed away in 2013. Paul had a sizeable estate. Besides the eight children, Paul was also survived by a wife, who has Alzheimer's. Ms. McCann entered an appearance to represent the wife. However, Ms. McCann also represented one of her siblings to have the wife declared incompetent; thus, creating a conflict of interest. The probate judge removed Ms. McCann as attorney for the wife, appointed a different attorney as guardian for the mother, and another attorney as co-conservator of the estate of her father. Ms. McCann then made insulting, scurrilous, libelous, and outrageous allegations against the probate judge, falsely accusing him of showing partiality and bias, and falsely accused the other attorneys of multiplying the proceedings to run up the fees. Ms. McCann then did not show up for her disciplinary hearing which went forward in her absence. The Commission stated that:

> Genet McCann, in her conduct before the District Court and before this Commission, has consistently demonstrated that she lacks the judgment, analytical ability, professionalism, temperament and/or competency to practice law. A license to practice law is a true privilege. It is an opportunity to perform good, laudatory service. It is also in the hands of some attorneys a means by which to torment and inflict terrible, unnecessary emotional heartache and financial expense on persons whose only offense is to be opposite that attorney's position. That attorney is a scourge upon the public and the legal profession. Such is the case with Genet McCann. She is truly the poster child of not just a vexatious litigant, but a vexatious lawyer, unwilling or unable to see the outrageous nature of her conduct .... Simply put, in the view of the Commission, she is neither fit nor worthy to practice law.

The Court adopted the Commission's recommendation and she was disbarred.

In an unrelated disciplinary matter, Ms. McCann was also held in contempt for failure to cooperate with Disciplinary Counsel in its investigation of another attorney. In that matter, the Commission concluded:

> [Ms. McCann's] filings and action demonstrate a disturbing hubris, a troubling lack of professionalism, an inability to competently present legal arguments abased upon application of facts to law, and a disquieting lack of judgment. Her conduct marks her as a deeply disturbed person.

The Court agreed with the Commission's recommendation of a seven month suspension, to be served concurrent to the disbarment, and also ordered that she must demonstrate that she is psychologically capable to practice law to be readmitted. The Court further found that McCann had consumed an overwhelming amount of time of the Office of Disciplinary Counsel, the Commission, the U.S. District Court, the Ninth Circuit Court of Appeals, and the Montana Supreme Court and that "[h]er actions greatly exceed any bounds of reasonableness or moderation and reflect a disdain for the law and judicial process."

* *Attorney Grievance Commission of Maryland v. Stephen Howard Sacks*, No. 24-C-16-005698 (Md. April 20, 2018): Mr. Sacks was found to have violated Rules 1.3, 1.4(a)(2), 1.4(a)(3), 1.4(b), 1.5(a), 1.15(a), 1.15(c) 1.15(d), 1.15(3), 1.16(d), 3.1, 3.4(c), 3.4(d), 8.1(b), 8.4(b), 8.4(c), 8.4(d), 8.4(a) of the Maryland Rules of Professional Conduct and the Court of Appeals of Maryland ordered that Mr. Sacks be disbarred. Although Mr. Sacks had no prior attorney discipline, the Court found that due to the numerous incidences and wide range of misconduct, along with injury to clients, disbarment was necessary to protect the public. The misconduct stemmed from his representation of seven individual clients and his own initiation of eight frivolous actions and/or appeals against multiple parties. He was found to have fabricated five retainer agreements which he had attached to a Motion to Dismiss. He was also found to have charged his client unreasonable legal fees and failed to deposit the monies into an attorney client trust account, despite not having earned any of the fees. In regard to the frivolous actions, Mr. Sacks was found to have filed eight actions wherein he "intentionally perverted the Maryland Rules ... to attack opposing counsel and parties in an effort to pursue his personal vendetta." He also engaged in a pattern of abusive language toward witnesses and lawyers.

* *Grievance Administrator v. Michael E. Tindall*, Case No. 15-36-GA (Mich. ADB June 13, 2018): Mr. Tindall was found to have violated Rules 3.1, 8.4(a) and 8.4(b) of the Michigan Rules of Professional Conduct and he was disbarred. Mr. Tindall was found to have engaged in a pattern of aggressive and abuse litigation tactics. Mr. Tindall had secured a judgment for a client but the defendant then declared bankruptcy. Mr. Tindall filed a motion seeking the dismissal of the bankruptcy petition and alleged that the bankruptcy was a sham. Mr. Tindall also sought sanctions against various parties involved in the proceeding. The bankruptcy judge found that the petition was legitimate, holding that Mr. Tindall engaged in a "scorched earth collection action...." The Judge also found that Mr. Tindall's claims that the defendant engaged in fraud was "disingenuous at

best, and frivolous at worst" and that his motion for sanctions, which was withdrawn, was not based on any reasonable investigation and that it was inappropriate for him to sign the motion. Mr. Tindall appealed the decision to the Sixth Circuit but the appeal was dismissed for lack of jurisdiction. Several years later, Mr. Tindall filed a federal action relating to the same debt. The federal judge ruled that the complaint filed by Mr. Tindall lacked candor and that the lawyer's actions were "egregious and warrant the imposition of sanctions." The Court further found that Mr. Tindall had "knowingly pursued meritless claims, intentionally abused the judicial process, and needlessly multiplied the proceedings in this action," and that the lawyer had "engaged in overly aggressive tactics...."

* *In the matter of Michael E. Rychel*, D-125 (NJ Feb. 9, 2018): Mr. Rychel was issued a reprimand for violating Rule 3.2 of the New Jersey Rules of Professional Conduct. New Jersey Rule 3.2 provides that "[a] lawyer shall treat with courtesy and consideration all persons involved in the legal process." A disciplinary complaint was initiated after Mr. Rychel sent two emails to the Office of Attorney Ethics about grievances he had filed against a former employer. One email was sent to an investigator who worked for the Office of Attorney Ethics and the other was sent to the Director of the Office of Attorney Ethics. The first email included the following language:

> Do me a big favor and tell Director Centinaro, THANKS FOR THE BACK UP!!!!!!!!!!!!!!!!! I really appreciate his f*****g lack of concern. THIS IS A F*****G ATROCITY THAT **AN HONEST LAW ABIDING ATTORNEY SHOULD HAVE TO GO THROUGH THIS S**T!!!!! TELL CHARLES CENTINARO THAT I SAID TO GO F**K HIM SELF [sic]!!!!!! QUOTE ME IN YOUR REPORT!!!!! NO OFFENSE AGAINST YOU, I KNOW YOU'RE A DECENT HONEST GUY. mIKE RYCHEL**

The second email sent to Mr. Centinaro a few minutes later stated:

> Hey Charlie, here's an example of what you're [sic] f*****g AMBULANCE CHASING attorneys and their minions do to honest working attorneys who comport their conduct to the RPC's, 2C and the IRS code. Thanks so much for the back up [sic]. Look personally between me and you GO F**K **YOURSELF!** Mike Rychel

At his hearing, Mr. Rychel testified that the reason that he was so upset was based upon his perception of a system-wide corruption by ethics officials who handled his claims of wrongdoing against others. He was also troubled that his grievances had been dismissed. Mr. Rychel did stipulate to the misconduct and that his emails contained "emotive language which evidenced a clear lack of civility and courtesy, thus violating RPC 3.2."

However, at the hearing, he testified that he had no remorse in telling the Director to "go f**k himself" and that he was "proud of it."

* *Chief Disciplinary Counsel v. Zbigniew Rozbicki*, SC 19796 (Conn. September 5, 2017): Mr. Rozbicki was found to have violated Rule 3.1, 8.2(a) and 8.4(4) of the Connecticut Rules of Professional Conduct and he was suspended for four years. Mr. Rozbicki filed a motion to stay certain orders in probate matter which was denied. In response, Mr. Rozbicki filed a motion to disqualify the judge, accusing him of failing "to adhere to basic principles of judicial impartiality" and averred that the judge was attempting to be an advocate in the case. In another matter, Mr. Rozbicki moved to disqualify the opposing attorney, and filed motions to disqualify the presiding judge for bias. The judges and opposing counsel filed the grievances against Mr. Rozbicki. The Grievance Committee found that his accusations were improper and baseless and that they lacked any good faith or evidence.

* *Grievance Administrator v. Lyle Dickson*, P 55424, Case No. 15-23-GA (Mich. ADB Sept. 19, 2017): Mr. Dickson was denied admission for a Michigan National Guard JAG commission after an investigation revealed he made inappropriate comments and sexually harassed staff at a health center where he had his physical. In response to this denial, Mr. Dickson began sending threatening correspondence and filing frivolous lawsuits against members of the Michigan National Guard and staff. This period of harassment consisted for over five years, and included "any and all individuals involved in the decision to deny his JAG application." The Hearing Panel recommended a reprimand, but the ADB disagreed and suspended Mr. Dickson for 180 days, finding his conduct to be frivolous, harassing, and retaliatory.

* *State ex rel. Counsel for Discipline v. William E. Gast*, 298 Neb. 203 (Nebraska Nov. 9, 2017): Mr. Gast was suspended for engaging in the unauthorized practice of law and for filing several frivolous pleadings. Mr. Gast's license was suspended in June of 2015 after he failed to report his MCLE requirements and pay his dues. In January of 2016, he finally reported his MCLE and paid his dues and was reinstated. However, during the six month period of the administrative suspension, he continued to represent a certain client. When opposing counsel discovered the administrative suspension, he informed Mr. Gast that he would report the misconduct if Mr. Gast did not. Mr. Gast then self-reported. In September of 2016, the Relator sent a reply e-mail to Mr. Gast asking for additional information within 15 days. Mr. Gast replied in November that he would send a reply ASAP, but failed to do so. In February of 2017, his license was suspended until further order. Later, in May of 2017, he was disciplined for making baseless allegations against a presiding judge in another disciplinary case. Mr. Gast declined to file a brief, or engage in the disciplinary process and the Court subsequently found that he had committed all of the

alleged misconduct and suspended him for an additional year, to run consecutively with the suspension previously imposed.

c. Fraud, Deceit, Dishonesty, Misrepresentation

* *In the Matter of Theodore R. Hoefle*, No. 22228 (Kansas Jan. 16, 2018): Mr. Hoefle consented to disbarment in Kansas while a complaint was pending against him alleging he violated Rule 8.4 (misconduct) for failing to correct a false insurance claim and failing to correct false information in a police report. The Kansas proceeding was a reciprocal proceeding arising out of Mr. Hoefle's sanction in Missouri. Mr. Hoefle was displeased when a partner in his law firm, junior to him, was named co-managing partner. Feeling slighted, Mr. Hoefle reported to the firm and to the local Missouri police department that the law firm had been burglarized and that several items were stolen, including a computer, two computer monitors, a scanner, a briefcase and an iPad. The law firm submitted claims for stolen property, including the iPad. In the interim, Mr. Hoefle purchased additional iPads, for which the law firm reimbursed him. Shortly thereafter, the law firm discovered that several of Mr. Hoefle's files were being deleted. When confronted by the law firm about the computer problems, Mr. Hoefle was unable to offer a credible explanation, and was terminated. As requested upon his termination, Mr. Hoefle returned the law firm's property, including the iPad that he had originally reported as stolen after the alleged break-in. Mr. Hoefle was subsequently disciplined.

* *Matter of Carllene M. Placide*, No. 201, 639-1 (Washington, April 12, 2018): Ms. Placide was disbarred for violating Rule 8.4(c) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation). At the time Ms. Placide joined her law firm as a non-equity partner, she had clients who hired and paid her personally. Despite the fact that the law firm had a policy that any client fees earned belonged to the law firm, Ms. Placide failed to share her earned fees with the law firm, and deposited the fees into her personal bank account. Pursuant to an investigation, the law firm discovered that Ms. Placide earned $56,700 "off the books," and that she lied during the investigation. After she was terminated by the law firm, she moved to another law firm, where she engaged in the same misconduct. Ms. Placide was subsequently disciplined after the court determined that her conduct amounted to theft.

* *Board of Professional Responsibility v. Traci E. Mears*, 20185 WV 58 (Wyoming, June 5, 2018): Ms. Mears was suspended for nine months for providing false information to disciplinary authorities in violation of Rules 8.1 (bar admission and disciplinary matters) and 8.4 (misconduct). A former client of Ms. Mears's filed a disciplinary complaint against her for borrowing money from the client, which she allegedly failed to repay, in violation of Rule 1.8. In response to the complaint, Ms. Mears denied the existence of an

attorney-client relationship and claimed that the "client" was a friend for whom she had reviewed a contract, and that the money she received from him was not a loan, but rather payment from the friend after his dog injured her dog, which resulted in veterinary bills and damage to her home. After an investigation, it was determined that Ms. Mears did not violate Rule 1.8, but that she did violate Rules 8.1 and 8.4 by submitting false information about the alleged veterinary and repair bills and for lying to disciplinary authority.

d. Judicial Misconduct and Discipline

* *In the Matter of Judge G. Tony Atwal*, Second District Judge, File Nos. 18-01, 18-09, 18-10 (Minn. Board on Judicial Standards May 30, 2018): Judge Atwal was publically reprimanded after receiving his second drinking-and-driving related offense. Judge Atwal was found to have abused the prestige of his office when he told an arresting police officer who he was, that he was a judge and requested several times that the officer release him from custody. Judge Atwal's blood alcohol content registered as .17 at 2:34 a.m., his speech was slightly slurred and his eyes were bloodshot and glassy. Judge Atwal was sentenced to 365 days imprisonment, with 345 days stayed, and two years of supervised conditional probation.

* *In re Vance D. Day*, 362 OR 547 (Oregon, March 15, 2018): Judge Day was suspended from the bench for three years after making false statements and engaging in inappropriate contacts with a Navy Seal, over whose case Judge Day was presiding in Veteran's Court. The Navy Seal was under probation and prohibited from handling firearms. Judge Day had many out of court contacts with the Navy Seal, including inviting him to the Judge's home where he allowed the Navy Seal to handle a firearm, despite knowing doing so was a potential probation violation. After the Navy Seal filed a disciplinary complaint, Judge Day gave several false statements. Although Judge Day was ultimately only disciplined for his conduct in the matter with the Navy Seal, he also had disciplinary complaints filed against him for accosting a referee at his son's soccer game and trying to use his position to intimidate the referee, and for having his court staff screen wedding requests from same-sex couples so that he could avoid marrying them.

* *Matter of Robert C. Myers*, PR17-0026 (Montana, December 28, 2017): Mr. Myers was disbarred for his conduct during his candidacy for election as district court judge in Ravalli County, Montana. His opponent, the incumbent and presiding Judge Langton, had ruled against Mr. Myers's clients in the past when they appeared in his court, and Mr. Myers decided to wage a nasty campaign against Judge Langton. Mr. Myers sent out a mailer that accused Judge Langton of engaging in three was sex acts with his live-in girlfriend and a victim of a crime in a case pending before him. Mr. Myers also ran a radio advertisement that contained a statement of one of his former clients that accused

Judge Langton of committing a fraud on the court and secretly engaging in *ex parte* communications with opposing counsel. Finally, Mr. Myers ran a radio advertisement that contained the following message:

> Liquor Langton, Liquor Langton.
> He is the coke snorting, meth buying, drunken judge.
> Has a 13 year-old bring him drugs.
> First he blew a .19 and acted like it was no crime.
> Broke probation and he never served time.
>
> Liquor Langton, Liquor Langton, Liquor Langton.
> What kind of man buys meth from a 13 year-old child?
> What kind of man enforces the law on others but not on himself?
> You don't have to support Jeff Langton's hypocrisy.
> Let's do what's right and vote Robert Myers for judge.
>
> I'm Robert Myers and my campaign paid for this message.

Mr. Myers's petition for rehearing was denied, and he lost the election.

* *Office of Disciplinary Counsel v. Paul Michael Pozonsky*, No. 123 DB 2015 (Penn. Jan. 18, 2018): Judge Pozonsky was disbarred for exploiting his position as a commissioned judge in the Court of Common Pleas of Washington County to steal powdered cocaine that was the principle evidence in criminal or delinquency hearings that were held in his courtroom. For a period of almost eighteen months, Judge Pozonsky ordered both state troopers and his law clerk to bring evidence, in the form of cocaine, to his courtroom, where he stored the evidence in a locker in his chambers. Judge Pozonsky then surreptitiously and regularly removed quantities of the cocaine from the evidence locker, used it at his home, and attempted to conceal his theft by replacing the stolen cocaine with baking powder. Judge Pozonsky was disbarred for his conduct.

* *Attorney Grievance Committee v. Victor G. Sison*, 161 A.D.3d 24 (NY March 29, 2018): Judge Sison, a part-time Municipal Judge in Jersey City, New Jersey, was suspended for three months in a reciprocal proceeding in New York, which arose out of a disciplinary proceeding in New Jersey. While serving as a part-time Municipal Judge, Judge Sison submitted parking and traffic tickets issued to him and his family members to his judicial colleagues for improper adjudication. Judge Sison was disciplined for his conduct.

e. Prosecutor Misconduct

* *Lawyer Disciplinary Board v. Kelly Hamon McLaughlin*, No. 16-0957 (W.Va. August 30, 2017): Ms. McLaughlin was suspended for three years and was ordered to never seek to hold the position of a prosecuting attorney, whether by appointment or election, for violating Rules 1.7(b) (conflict of interest current clients) and 8.4(d) (engage in conduct that is prejudicial to the administration of justice). Ms. McLaughlin's conduct involved her failure to disclose a conflict of interest and seek a special prosecutor with regard to a criminal investigation that involved her father-in-law as an alleged perpetrator.

* *Lawyer Disciplinary Board v. Erin K. Reisenweber*, No. 17-0500 (W.Va. April 4, 2018): Ms. Reisenweber, an Assistant United States Attorney, was reprimanded for violating Rules 1.4(b) (communication), 1.7(b) (conflict of interest current clients) and 8.4(d) (engage in conduct that is prejudicial to the administration of justice). Ms. Reisenweber's conduct involved her failure to disclose an intimate relationship she had with the investigating agent on one of her cases.

* *Matter of Laura L. Roubicek*, PDJ-2017-9078 (Arizona, December 14, 2017): Ms. Roubicek was admonished for her failure to disclose exculpatory evidence against a criminal defendant in a case in which she was a prosecutor with the Pima County Attorney's Office. Ms. Roubicek was present at a "free talk" wherein a criminal defendant provided information that was exculpatory as to one of his co-defendants. In lieu of providing the exculpatory information to the pertinent co-defendant's attorney, Ms. Roubicek amended several charges that were pending against the co-defendant, based on the information she learned during the "free talk." She later disclosed the fact that she had learned such information, but not until several months later, shortly before trial. The criminal charges were dismissed against the co-defendant for violation of the requirement to disclose exculpatory material pursuant to *Brady v. Maryland*. After listening to testimony at her disciplinary proceeding that she was inexperienced and unaware of the requirements pursuant to *Brady*, the court admonished Ms. Roubicek instead of suspending her, as was recommended by disciplinary authority.

f. Sexual Misconduct, Behavioral Issues and Criminal Conduct

* *Lawyer Disciplinary Board vs. Sarah Campbell*, No. 16-1036 (November 17, 2017): The Supreme Court of Appeals of West Virginia admonished Ms. Campbell for her violation of Rules 4.1 and 8.4(c) of the RPC. Ms. Campbell was further ordered to pay costs of the proceeding. Although charged with a violation of Rule 1.8(j) of the RPC, which prohibits sexual relations with a client, the Supreme Court majority found that Ms. Campbell's sexual relationship with her client predated the client-lawyer relationship, and concluded that "for purposes of Rule 1.8(j), a longstanding and continuous, albeit

intermittent sexual relationship, though dormant at the commencement of an attorney-client relationship, is a pre-existing relationship."

* *Lawyer Disciplinary Board vs. Benjamin F. White*, No. 16-1003 (March 15, 2018): The Supreme Court of Appeals of West Virginia annulled Mr. White's license pursuant to his violations of Rule 1.7(a)(2), Rule 1.8(e), Rule 1.8(j), Rule 1.5(b), and Rule 8.4(d) of the RPC. The Court further found that there were no mitigating factors present, but found several aggravating factors, including past discipline by the Court, the vulnerability of the victim, and disregarding the Court's order to file a responsive brief. The Court also ordered Mr. White to pay the costs of the proceedings. Mr. White was found to have convinced a woman to fire her public defender and hire him as counsel after she was charged with one count of felony child neglect. Mr. White never discussed (or documented) his fee arrangement with this individual and immediately pursued an intimate relationship with her, which included taking her on out-of-town trips, providing her with alcohol and drugs while she was on court-supervised probation, and engaging in sexual relations.

**In the Matter of Daniel Hart Phillips*, No. 118,210 (Kansas, January 12, 2018): Mr. Phillips was suspended for a minimum of one year and will not be allowed to practice until after a reinstatement hearing. A prospective client called Phillips seeking representation. During the phone call, Mr. Phillips called the prospective client "baby," which made her feel uncomfortable and caused her to record the remainder of the conversation. After scheduling an appointment and explaining to her where his office was, Mr. Phillips concluded the conversation by telling her "... and don't wear any under panties." The woman did not attend the meeting and ignored phone calls to confirm the appointment. The record showed that Mr. Phillips began counseling after this event and he testified about how, on the day he made his odd statements, he ran into a former client who offered him sexual favors for legal services which triggered thoughts of his ex-wife who was addicted to drugs. Mr. Phillips claimed that the thoughts of his ex-wife caused his frame of mind to change, and he spoke to the prospective client directly after this interaction, without having the opportunity to clear his mind of sexual thoughts. He also stated that he was being sarcastic when he told her not to wear underpants. Mr. Phillips was found to have violated KRPC 8.4(g) (engaging in conduct adversely reflecting on a lawyer's fitness to practice law).

* *Fla. Bar v. Robert Joseph Ratiner*, No. SC13-539 (Florida, February 22, 2018). Mr. Ratiner was disciplined after engaging in conduct intended to disrupt a tribunal. During a post-trial hearing, he was overheard saying "lies." The judge presiding over the hearing in the underlying matter testified in the disciplinary matter that she heard Mr. Ratiner utter those words, although he denied it. Mr. Ratiner also repeatedly kicked counsel table loudly during testimony of a witness in post-trial proceedings, causing the judge to call a sidebar after the second incident. Witnesses in the disciplinary proceedings additionally testified that Mr. Ratiner exceeded the agreed upon time for closing arguments telling the judge he would take whatever time he needed, wrinkled and threw documents on counsel's table, would not obey court orders, acted as a bully, tried to intimidate witnesses and was generally disrespectful to the Court. The Florida Supreme Court found disbarment the appropriate sanction, citing to two additional disciplinary matters in which the lawyer engaged in similar misconduct.

* *Office of Disciplinary Counsel v. Jeffrey T. Toman*, No. 113 DB 2017 (Pennsylvania, March 26, 2018). Mr. Toman was suspended for three years on consent following a plea of nolo contendere to the offense of Corruption of Minors. Mr. Toman's criminal conduct began after he obtained the phone number of a client's minor daughter. Mr. Toman began sending inappropriate text messages to the minor asking her whether she had a boyfriend and if she was a virgin. Mr. Tomanthen sent her pictures of his genitals and asked her to "send him pictures of her in her bra and panties." The inappropriate contact continued for several months. The minor's mother ultimately confronted her daughter "after getting mother's intuition and observing how Respondent looked at the child when they were in the same room." Mr. Toman was charged with three third-degree felonies for unlawful contact with a minor, dissemination of explicit sexual material to a minor, and criminal use of a communication facility. Mr. Toman was also charged with one misdemeanor, corruption of a minor. The circumstances warranting significant attorney discipline come from the finding that he manipulated his attorney-client relationship in order to support contacting his client's minor daughter. In mitigation, the disciplinary authority considered the fact that Mr. Toman was ultimately convicted of only a single first-degree misdemeanor offense and accepted prison time as part of his sentence. Mr. Toman's law license was suspended for three years because he did not have any history of prior discipline and did not have physical contact with the minor.

* *Grievance Administrator v. Andrew L. Shirvell*, Case No. 15-49-GA (Michigan ADB, May 8, 2018). In 2010, Christopher Armstrong was elected Student Council President at the University of Michigan in Ann Arbor. Mr. Shirvell, who was a 2002 graduate of the University, worked as an Assistant Attorney General for the State of Michigan. Mr. Shirvell learned via an online newspaper report of Mr. Armstrong's election and also learned that Mr. Armstrong was openly gay. Mr. Shirvell began posting on his Facebook page about Mr. Armstrong, whom he had never met. Among other comments, Mr. Shirvell called Mr. Armstrong "dangerous" and a "radical homosexual activist." Mr. Shirvell also set up a Facebook "fan page," entitled "Michigan Alumni and Others Against Chris Armstrong's Radical MSA Agenda," and took to his personal Facebook page to express outrage when this "fan page" was deleted. He wrote: "I will not be SILENCED by the likes of Armstrong. You're going down fruity-pebbles." Mr. Shirvell then established a blog entitled "Chris Armstrong Watch," which discussed Mr. Armstrong's "character and his agenda and other items." The blog featured a picture of Mr. Armstrong's face next to a swastika. Next, Mr. Shirvell appeared on television regarding Mr. Armstrong. In one interview he said that Mr. Armstrong held the position of student body president "to promote special rights for homosexuals at the cost of...heterosexual students." He later appeared on CNN with Anderson Cooper, standing by his internet posts, where he called Mr. Armstrong a bigot, and on the Daily Show, calling Mr. Armstrong a "gay Nazi." In addition to broadcasting his views, Mr. Shirvell found where Mr. Armstrong lived and made an appearance at a party there, marching up and down the street outside protesting. Mr. Shirvell later followed Mr. Armstrong to two campus events in the space of a day, holding a sign that branded Mr. Armstrong a racist liar and advertised the Chris Armstrong Watch blog. After Mr. Shirvell was warned by police, the University issued a trespass warning banning him from the campus and later allowing him on campus but banning any interaction with Armstrong. Mr. Armstrong sued Mr. Shirvell in Michigan State Court for defamation, intentional infliction of emotional distress, abuse of process, false light, intrusion and stalking. The case was removed to federal court, where a jury found Mr. Shirvell liable on all accounts and awarded Armstrong $4.5 million in total damages. For his actions, Mr. Shirvell was ordered to be disbarred by a hearing panel, whose decision has now been affirmed by the Attorney Discipline Board. Mr. Shirvell said he was exercising free-speech rights; but, the Attorney Discipline Board said the attacks against Mr. Armstrong were "hostile and vindictive" and that Mr. Shirvell "demonstrated an egregious failure of professional judgment and character."

* *Eric Conn v. Kentucky Bar Association*, 538 S.W.3d 290 (Kentucky, February 15, 2018). Mr. Conn was permanently disbarred in Kentucky based on a federal felony conviction and a state misdemeanor conviction. Mr. Conn fled the country ahead of his sentencing hearing and was apprehended months later in a Pizza Hut in Honduras. Mr. Conn was sentenced in absentia to 12 years in prison. The federal charges involved paying a Social Security Administration Administrative Law Judge to make findings that Mr. Conn's clients were disabled. The government estimated the fraud resulted in $550 million in benefits. The state misdemeanor charge was based on campaign donations Mr. Conn attempted to make to a Kentucky Supreme Court Justice through several of his employees. (The ALJ involved was David B. Daugherty, a former West Virginia lawyer who was disbarred in West Virginia in 2014. He was sentenced to four years in prison for taking more than $600,000 in bribes from Mr. Conn.)

Julia Elliott is an IT Compliance Specialist for the Supreme Court of Appeals of West Virginia. She holds a degree in Cyber Crime and Information Systems Security from CPCC in Charlotte NC. She is currently enrolled in the Regents Program at Marshall University where her focus will be Digital Forensics and Information Assurance. She holds a current CompTIA Sec+ certification and is an active member of Information Systems Security Association, International (ISSA) and The National Society of Leadership and Success.

JAVS Evidence Carts

Presenter:

Julia M. Elliott
IT Compliance Specialist
Supreme Court of Appeals of West Virginia

Overview

This overview reviews the proper procedure for media player installation and use of appropriate hardware adapters depending on your system.

Playback of Media

When using your device in conjunction with the JAVS unit it is important to have a compatible media player.

- Prior to connecting your device to the JAVS unit, ensure all media will play on your device. Note that older systems might have problems with playback or issues with larger video, audio and graphic files.
- Proper hardware adapters are essential to successfully using your device with the JAVS unit.

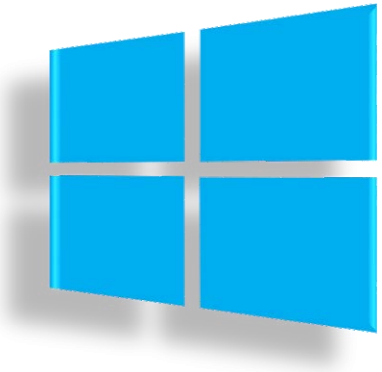
Playback of Media

VLC software is recommended for media playback.

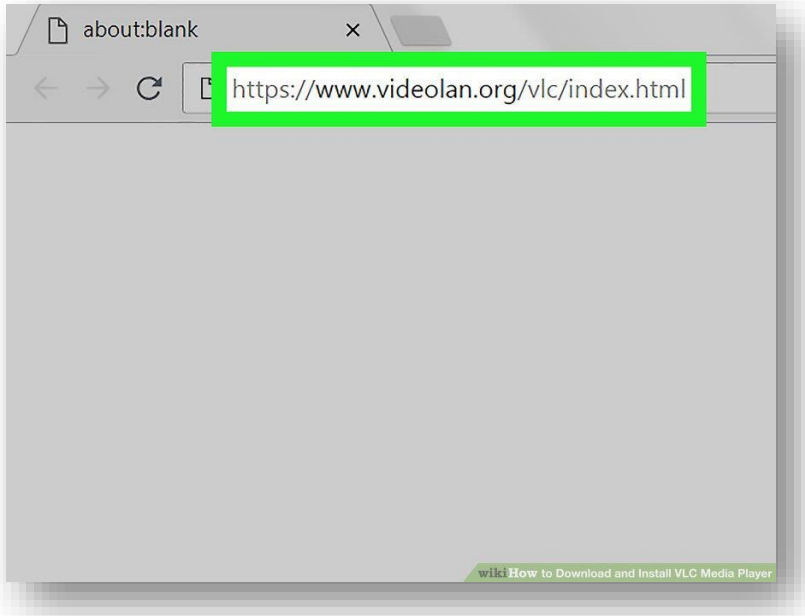
VLC is a free and open source cross-platform multimedia player and framework that plays most multimedia files as well as DVDs, Audio CDs, VCDs, and various streaming protocols.

- **Plays everything** - Files, Discs, Webcams, Devices and Streams.
- **Plays most codecs with no codec packs needed** - MPEG-2, MPEG-4, H.264, MKV, WebM, WMV, MP3…
- **Runs on all platforms** - Windows, Linux, Mac OS X, Unix, iOS, Android …
- **Completely Free** - no spyware, no ads and no user tracking.

Download & Installation of VLC Media Player on both Windows and Mac computers.



Windows Download & Installation of VLC



Step 01

Open the VLC website.

Go to https://www.videolan.org/vlc/index.html in your computer's web browser.

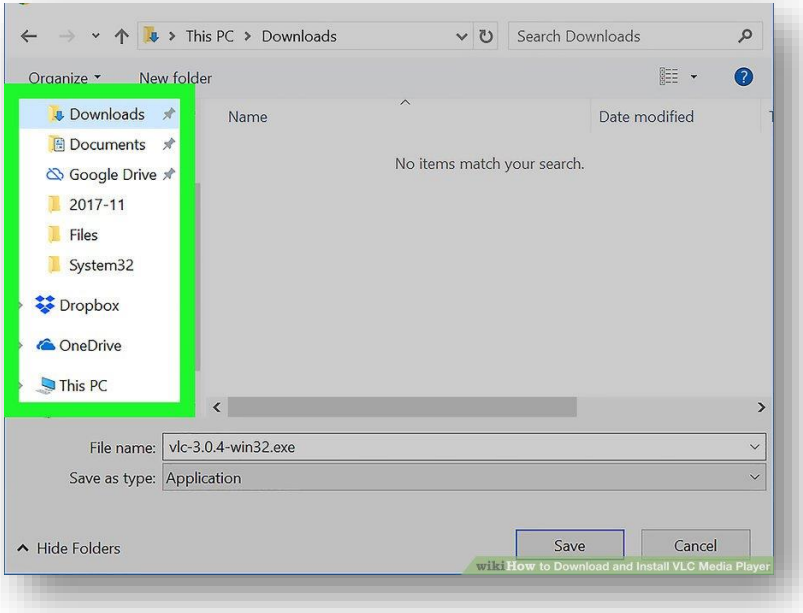
Windows Download & Installation of VLC

Step 02

Click **Download VLC**.

It's an orange button on the right side of the page.

Windows Download & Installation of VLC



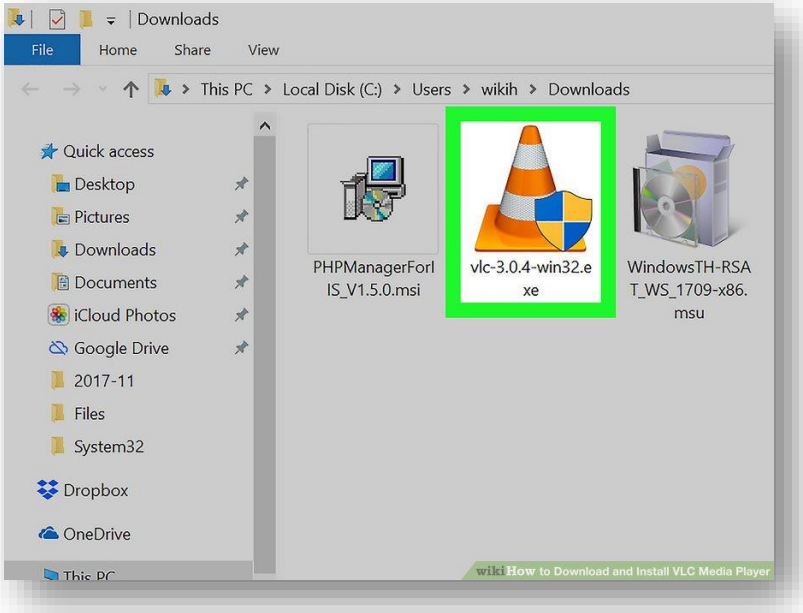
Step 03

Select a download location if prompted.

Doing so will allow the VLC setup file to download onto your computer.

- The VLC file will download automatically, so if you aren't prompted for a download location, skip this step.

Windows Download & Installation of VLC

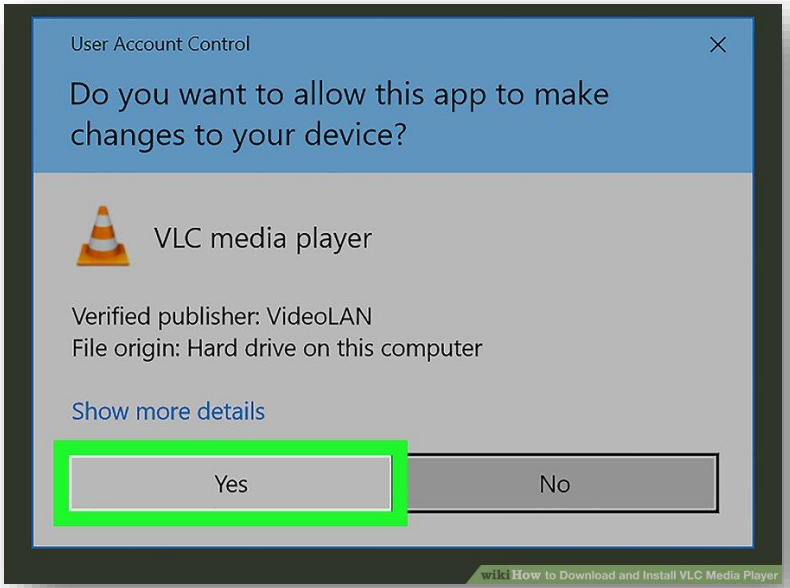


Step 04

Double-click the downloaded VLC setup file.

You'll find it in the default downloads location for your browser.

Windows Download & Installation of VLC

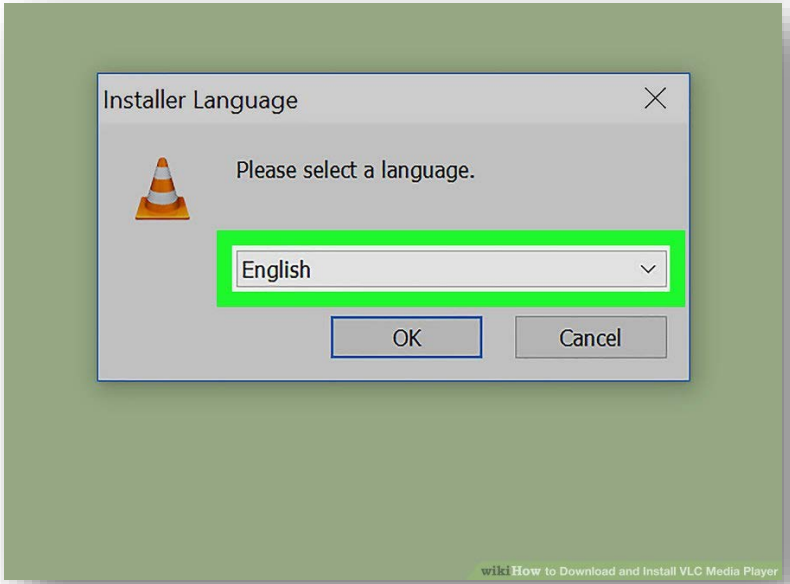


Step 05

Click Yes when prompted.

Doing so opens the installation window.

Windows Download & Installation of VLC

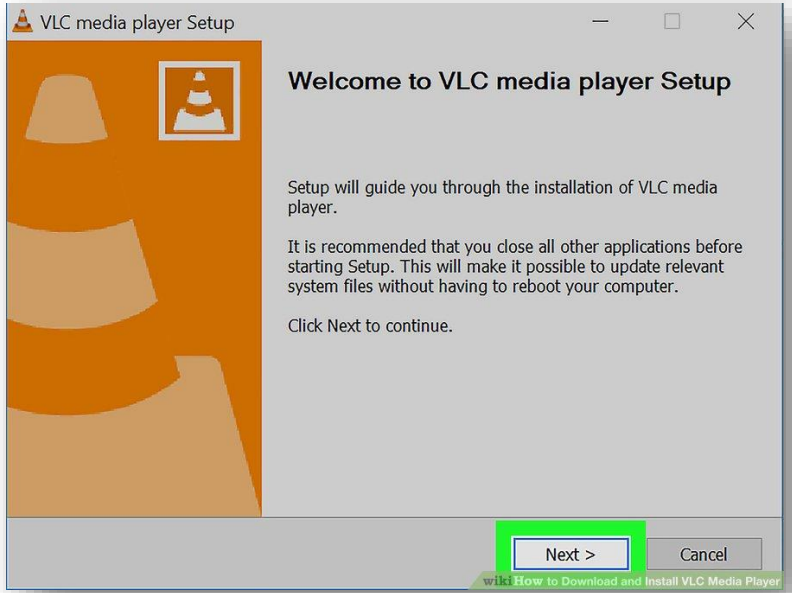


Step 06

Select a language.

When asked, click the language drop-down box and select the language you want to use for VLC Media Player, then click **OK** to proceed.

Windows Download & Installation of VLC

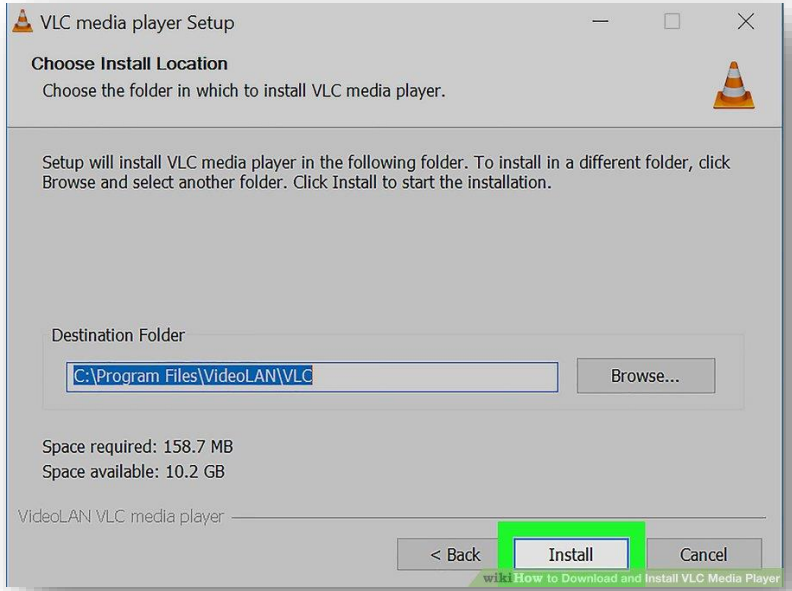


Step 07

Click Next three times.

This will take you to the installation page.

Windows Download & Installation of VLC

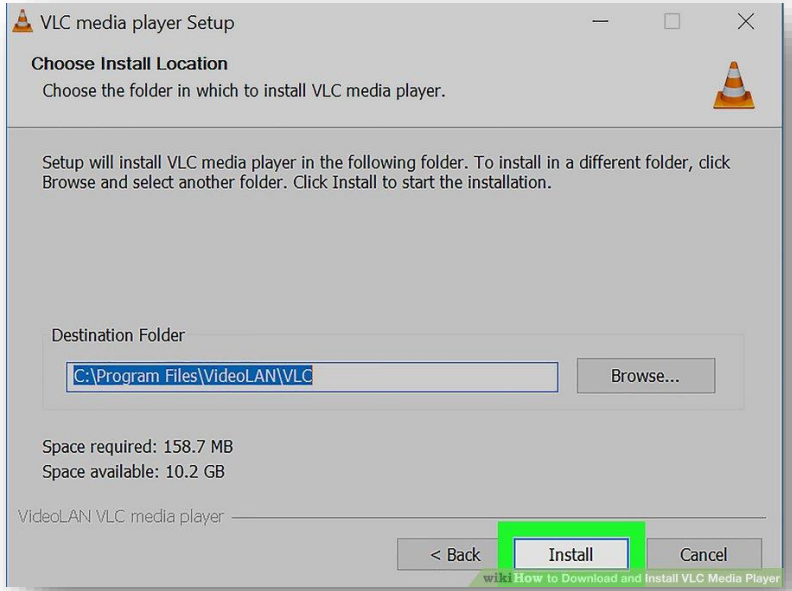


Step 08

Click Install.

It's at the bottom of the page. Doing so installs VLC Media Player on your computer.

Windows Download & Installation of VLC



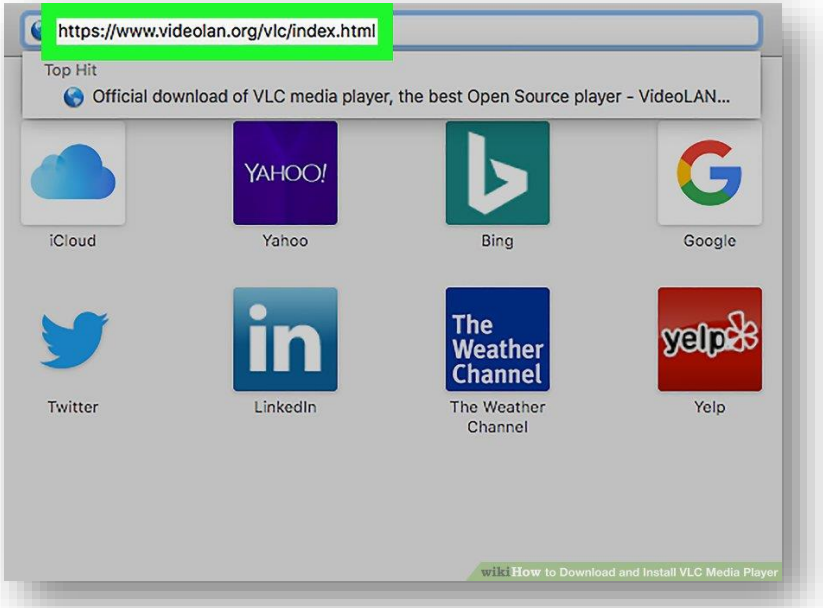
Step 09

Run VLC Media Player.

Immediately after installing VLC, you can run it by making sure the "Run VLC media player" box is checked and clicking **Finish**.

- When you want to run VLC in the future, you'll double-click the VLC app icon on your desktop or select it from Start.

Mac Download & Installation of VLC

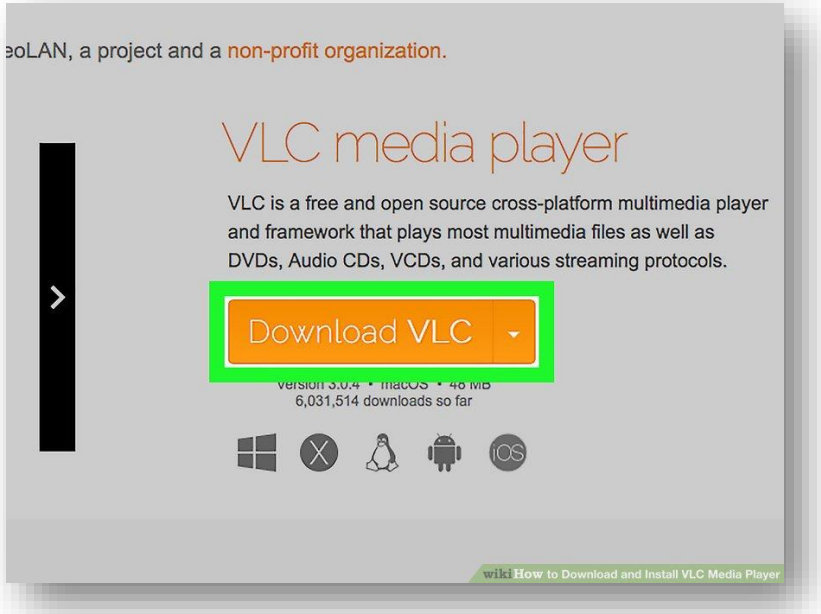


Step 01

Open the VLC website.

Go to https://www.videolan.org/vlc/index.html in your computer's web browser.

Mac Download & Installation of VLC

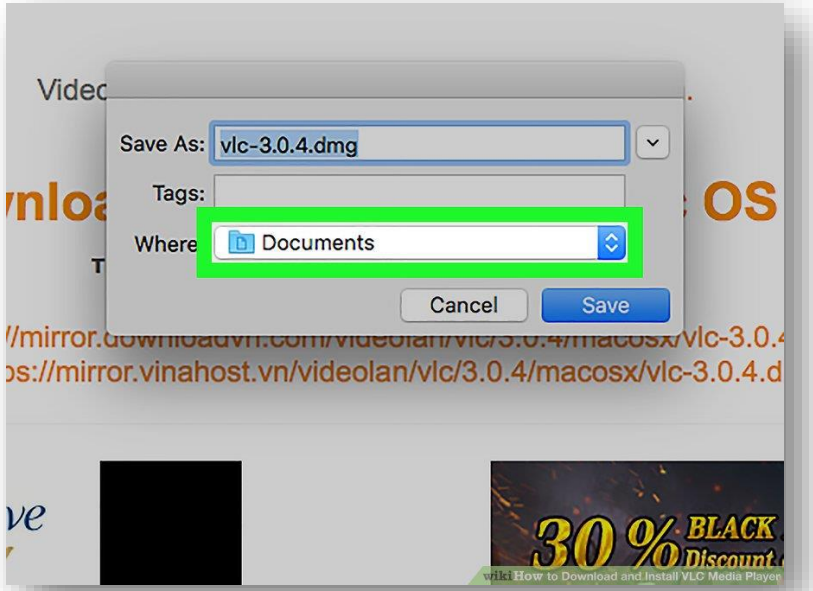


Step 02

Click **Download VLC**.

It's an orange button on the right side of the page.

Mac Download & Installation of VLC



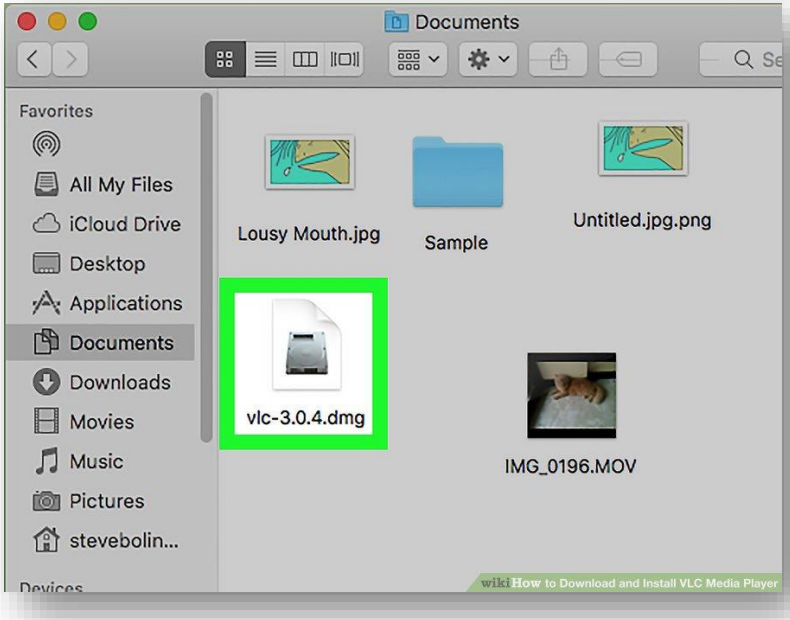
Step 03

Select a download location if prompted.

Doing so will allow the VLC setup file to download onto your computer.

- The VLC file will download automatically, so if you aren't prompted for a download location, skip this step.

Mac Download & Installation of VLC

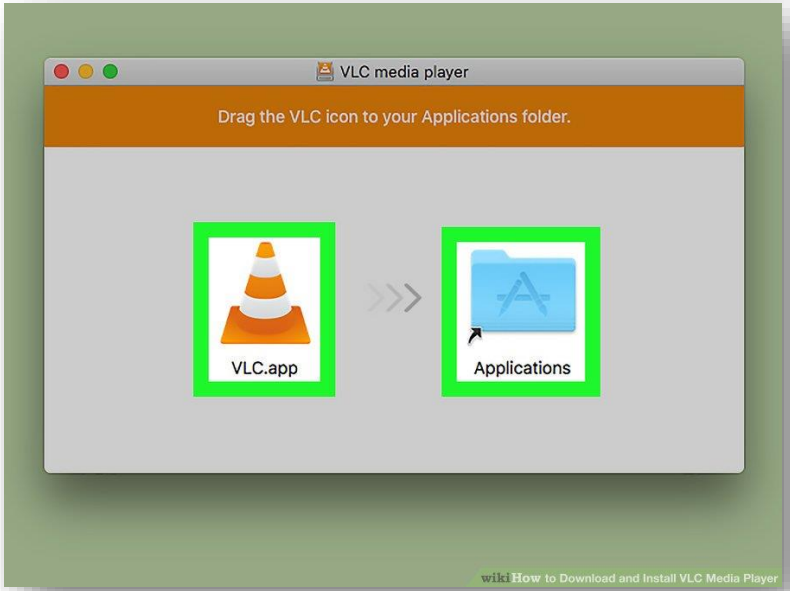


Step 04

Open the downloaded DMG file.

Go to the folder into which your browser downloads files, then double-click the VLC DMG file. This will open the installation window.

Mac Download & Installation of VLC

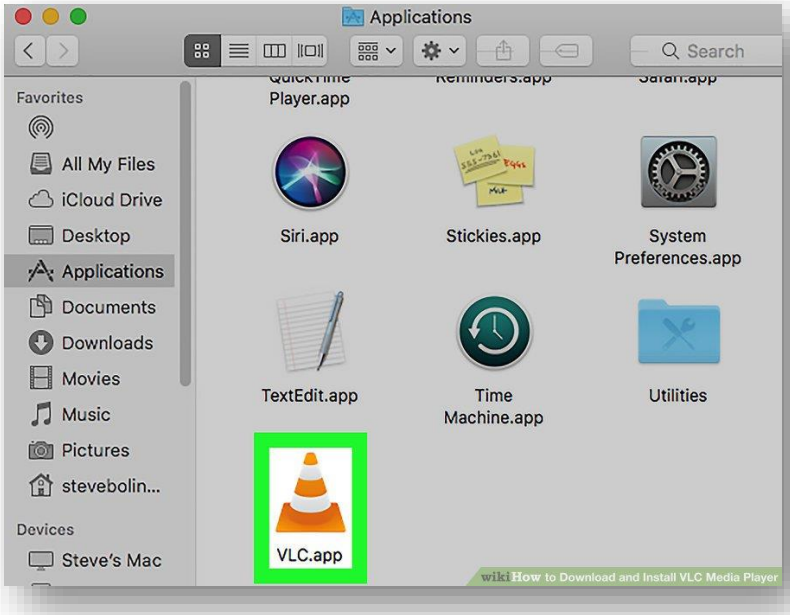


Step 05

Click and drag the VLC app icon onto the "Applications" folder.

The "Applications" folder is on the right side of the window, while the traffic cone-shaped VLC app icon is on the left. Doing so will install VLC on your computer.

Mac Download & Installation of VLC



Step 06

Run VLC.

The first time you open VLC after installing it, do the following:

- Double-click the VLC app icon in the Applications folder.
- Wait for your Mac to verify VLC.
- Click **Open** when prompted.

Types of Adapters

Depending on on your device;

- JAVS unit requires a VGA connector and a Mini stereo cable to preview your media.
- In most cases you will need some type of hardware adapter to convert this.
- There will be a standard adapter kit present at the units, however it is better to come prepared.
- Here are a few links for these adapters depending on your device.
    - Male to Male Stereo Cable
    - HDMI to VGA
    - Mini Display Port to VGA

Types of adapters

Male to Male Stereo Cable

This is an audio cable required for previewing media with sound.

Works with both Windows and Mac.

Types of adapters

HDMI to VGA

This is an HDMI TO VGA converter.

It can transport videos from HDMI compatible devices to a monitor or projector with VGA port.

This adapter is most likely needed for a newer Windows device.

Types of adapters

Mini DP to VGA Adapter

This is Mini DP to VGA converter to an HDTV, monitor, or projector where VGA is required.

This adapter is most likely needed for newer Windows and Macintosh devices.

Types of adapters

Lightning® to VGA Adapter

This adapter lets you use your Apple smart device to display photos, slides, websites, and more on monitors, projectors, or TVs with a VGA connection.

This adapter is needed on most Macintosh devices.

QD1200 Evidence Presentation System

QD1200 Diagram

QD1200 Evidence Presentation System (JAVS)

The Evidence Presentation System is a truly plug-and-play experience. The cart comes with built-in speakers with the ability to be routed to your room's public address speakers. Display presentation media easily via a laptop and desktop computer connection.

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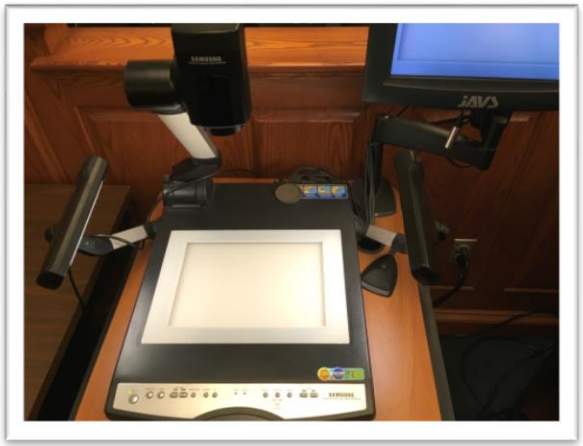
Additional configurations include a control panel at the judge's bench, a touch screen monitor placed at the witness stand, and/or input connections placed at counsel tables.

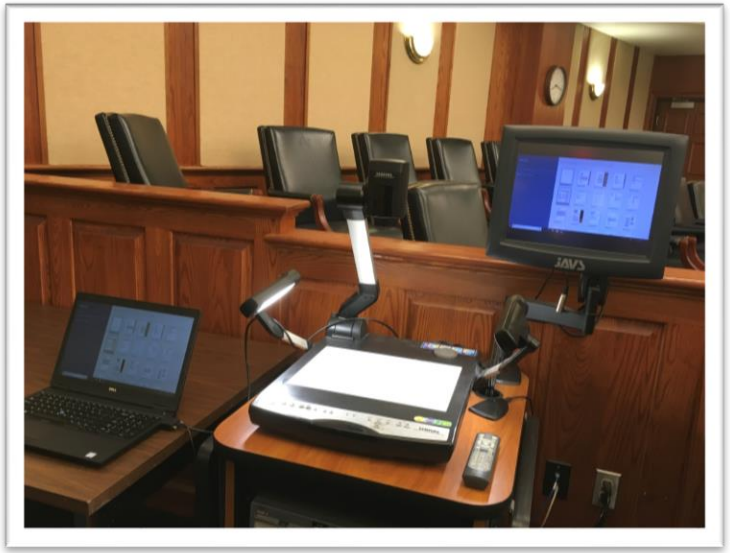
JAVS Evidence Cart

Although they vary in style from county to county, below are examples of JAVS unit available in most courtrooms. They are definitely recognizable, so they will be easy to locate.

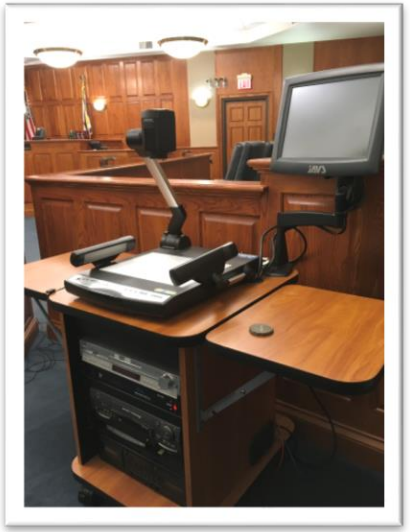


JAVS Evidence Cart

JAVS Evidence Cart



JAVS Evidence Cart



When in doubt:

Consider the Bailiff your evidence cart experts who are easily accessible.

They have spent a considerable amount of time learning the cart and how to use all of its attachments.

Most of them can even help you download and install a media player during a time crunch!

Questions?

I hope this presentation has been informative and helpful.

The Supreme Court of Appeals of West Virginia thanks you for allowing us to be a part of your training.

Biographies of Speakers

Law Office Management – Consumer Issues That Can Effect Your Law Practice

ANN HAIGHT

Ann is a Deputy Attorney General and the Director of the Consumer Protection Division. She previously worked for a private law firm in Charleston, practicing in the area of insurance defense including medical malpractice and employment law.

NORMAN GOOGEL

Norman is a Senior Assistant Attorney General in the Consumer Protection Division. Prior to coming to the Attorney General's office, Norman was employed as a legal aid lawyer in the southern coalfields of West Virginia. There he specialized in representing adult victims of domestic violence, children in abuse, neglect and delinquency proceedings, prisoners facing inhumane conditions, and tenants seeking decent housing.

While at the Division, he has sought to protect consumers from a wide range of unfair or deceptive sales and credit practices with a focus on predatory lending, unscrupulous debt relief schemes, abusive debt collection practices, home improvement contracting, and the sale and financing of used motor vehicles.

STEVE JARRELL

Steve is an Assistant Attorney General in the Consumer Protection Division previously he was in private practice for over twenty years doing personal injury, criminal, domestic and Social Security claims. He covers areas of opioids and veterans issues, as well as mortgage servicing and other pharmaceutical matters with the Attorney General's office.

KANETTE PETRY

Kanette is a Consumer Representative and Compliance Specialist with the Attorney General's office and is a licensed attorney who previously was in private practice.

LAW OFFICE MANAGEMENT – "CONSUMER" ISSUES THAT CAN AFFECT YOUR LAW PRACTICE

Presented by the
Consumer Protection & Antitrust Division
West Virginia Attorney General's Office
October 2018 WVSB REGIONAL MEETINGS

I. Scams
   a. What is a scam?
   b. Types of Scams that may affect a law office
      i. Utility Scams
      ii. Phishing Scam
      iii. Computer Scams/Microsoft Technical Support Scams
      iv. Wire Fraud/Fake Checks

II. Data Breaches

III. Awareness of the Abuse, Neglect and Financial Exploitation of the Elderly
   a. General Awareness of Issues
   b. Power of Attorney
   c. Statutory Protections

IV. Lawyers Collecting Fees and Costs from Clients
   a. Fee Contract/Retainer Agreement
   b. General Rules to Comply with Federal and State Rules for Debt Collection
   c. Hiring a Collection Agency
      i. Reasonable Care/Due Diligence
      ii. L.E.I. 94-01 Collection of Overdue Accounts
      iii. Terms of the Collection Agreement
      iv. Liability for Actions of an Independent Contractor

V. Referrals to Consumer Protection Division

1. Scams

    a. What is a scam?

A scam is variously defined as a con, scheme, a dishonest scheme, fraud or swindle, but all are methods of someone taking someone else's money.

> "Confidence Trick" "an attempt to defraud a person or group after first gaining their confidence, used in the classical sense of trust. Confidence tricks exploit characteristics of the human psyche, such as credulity, naïveté, compassion, vanity, irresponsibility, and greed."

See: Wikipedia, the free encyclopedia: Confidence Trick.

    b. Types of Scams that may affect a law office

        i. Utility Scams

Utility Scams – caller threatens that your utility (electric, gas, water) will be shut off because you are behind on your payments and you need to pay money quickly, such as wiring money or using a prepaid card.

Action to take:	Call the utility directly to determine if any money is owed. Report to the company, to the FTC and to the WV AGO.
Action not to take:	Send money by wire or prepaid card.

        ii. Phishing Scam

Phishing Scams – when an email purports to be your bank, reporting an overdraft or to confirm a purchase, request verification by logging-in to your account, but the e-mail link to the account goes to a fake cite that captures your username and password.

Action to take:	Contact the account holder directly, by calling or by using a separately obtained account email address
Action not to take:	Do not use any link in the email

        iii. Computer Scams/Microsoft Technical Support Scams

Computer Scams/Microsoft Technical Support Scams/Computer Viruses when a caller claims to be technical support from a computer or software company reporting a virus on your computer and offers to remotely connect to your computer and fix the problem – for a price.

Action to take:	Have security software (anti-virus program) on your computer and keep it updated. Scan thumb drives, disks, or other media before downloading to your computer.
Action not to take:	Do not allow anyone to remotely access your computer unless you have a contract with the company or know the person getting access. Do not download any software from an unknown technical support representative. You could be allow spyware/backdoor access.
How to Protect Yourself	Have security software (anti-virus program) on your computer and keep it updated. Check thumb drives, disks, or other media before downloading to your computer.

What if you allowed someone to access your computer or downloaded software?

Take your computer to an expert.

Reset passwords.

iv. Wire Fraud/Fake Checks

Wire Fraud/Fake Checks – when a check appears to be a real check is a fake check. The check may appear to be from a legitimate bank and appear to be from a legitimate company, but if you contact the company, it does not have an account at the designated bank. The check may be sent to pay for a good or service, it may be described as a refund, etc. Often the scammer will then contact you and allege an overpayment and ask that some funds be sent back. If you send money, you are then responsible for the funds when the original check is identified as fraudulent.

According to Consumer Affairs, the most common victims of a fake check scam are small business owners or direct-sales representatives who are more likely to accept checks from individuals they don't know.

A variation of the check scam involving alleged past due child support has been used successfully against lawyers. A new client contacts a lawyer and reports that their ex-spouse owes back child support, has come into money and wants to pay up. Client wants to hire you to collect the money – maybe the new client or the ex-spouse

is out of the country and the client wants help processing funds. Lawyer will be paid a reasonable fee. Check arrives, lawyer deposits it in their trust account. Maybe the amount of the check was more than it was supposed to be or maybe the client calls with a crisis and needs part of the funds immediately. Lawyer writes a check on the trust account – and then the child support check is reported as a fake check. Note: this is not generally covered under professional liability insurance coverage.

Action to take:	If on a business account, call the company to see if the company sent you a check and why. Ask your bank to verify the issuing bank and account information.
Action not to take:	Do not deposit the funds If you deposit the check, do not do anything with the "money" until you know the funds are actually there (i.e. the check has cleared); do not rely on your account reflecting a deposit.

II. Data Breach

West Virginia Code §§ 46A-21- 101, *et seq* addresses a data security breach that affects West Virginia residents. The law applies to any business operating within the state or licenses protected information. A business must notify its customers/clients "without unreasonable delay" but should wait until law enforcement confirms the notice will not affect its investigation. A business can be fined up to $150,000 for each breach for repeated, willful violations.

The Attorney General is statutorily authorized to enforce Article 2A, Breach of Security of Consumer Information, under the WVCCPA. Those businesses which own or license computerized data that includes personal information are required to give notice of any breach of the security of their systems to any resident of West Virginia whose unencrypted and unredacted personal information was or is reasonably believed to have been accessed and acquired by an unauthorized person and that causes or reasonably may cause identity theft or other fraud. Failure to comply with notice requirements is an unfair or deceptive act or practice in violation of W. Va. Code § 46A-6-104.

Statue applies to law firms:

> (2) "Entity" includes corporations, business trusts, estates, partnerships, limited partnerships, limited liability partnerships, limited liability companies, associations, organizations, joint ventures, governments, governmental subdivisions, agencies or instrumentalities, or any other legal entity, whether for profit or not for profit. W.Va. Code 46A-2A-2

Protected information includes name plus one or more of the following:

Name	+	SSN,
		Driver's license number, or
		Account number, credit card number, and debit card number if it includes PIN, password, and access codes

Notice of a breach is required to be given

> (a) An individual or entity . . . shall give notice of any breach of the security of the system following discovery or notification of the breach of the security of the system to any resident of this state whose unencrypted and unredacted personal information was or is reasonably believed to have been accessed and acquired by an unauthorized person and that causes, or the individual or entity reasonably believes has caused or will cause, identity theft or other fraud to any resident of this state.

WV Code 64A-2A-102 Notice of Breach of Security or computerized personal information.

Notification may be provided in writing, by phone or electronically by email. If more than 1,000 people are affected, notification must also be given to credit reporting agencies.

In addition, be aware of the impact a data breach may have under the West Virginia Rules of Professional Conduct:

Rule 1.6 Confidentiality of Information

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

III. Awareness of the Abuse, Neglect and Financial Exploitation of the Elderly

a. General Awareness of Issues

Elder abuse refers to any knowing, intentional or negligent act by a caregiver, family member or any other person that causes harm or a serious risk of harm to older people. Elder abuse covers a spectrum of conduct that includes physical abuse, neglect, psychological abuse and financial abuse. Older people are more vulnerable to abuse because of many factors including social isolation, mental impairments, dependent and trusting of others. Older people do not report abuse because of fear of retaliation by the abuser, embarrassment, fear of being alone, etc.

Examples of financial abuse and exploitation include:

Taking money or other items from bank accounts or home
Selling or transferring property without knowledge or consent
Failing to provide services agreed to be provided, such as caregiving, financial management, home repairs.
Using credit or bank cards for unauthorized purchases
Refusing to return borrowed property or funds
Changing a power of attorney or a will for their benefit

Signs of Financial Abuse and Exploitation

Change in banking habits
Amending a will or other financial planning documents
Transfer of money or property to a non-family member
Transfer of money or property to one family member to the exclusion of others
Isolation from family, friends

b. Power of Attorney

West Virginia has adopted the Uniform Power of Attorney Act, found at W.Va. Code §§ 39B-3-101*, et seq.* Attorneys should be careful when agreeing to prepare a Power of Attorney for any individual who may appear unable to make an informed decision and/or who may be under the influence of another person. The same is true for notaries who witness signatures.

Under W.Va. Code § 39B-1-105, the principal must sign the power of attorney or must direct another individual in his or her "conscious presence" to sign the principal's name and acknowledge the same.

If the power of attorney only becomes effective upon the principal's incapacity, there are alternative methods to determine if the principal is incapacitated? Under W.Va. Code §39B-1-105(c), there are alternatives:

(1) the document can designate a person to determine incapacity, or
(2) a written determination is made of incapacity by
    a. a physician or licensed psychologist
    b. an attorney at law, judge or "appropriate" government official

With reference to the principal, a power of attorney may be terminated when the principal becomes incapacitated or dies, the principal revokes the power of attorney or the power of attorney designates circumstances by which it terminates or its purpose is completed. See W.Va. Code §39B-1-110.

Protections available for seniors:

West Virginia Guardianship and Conservatorship Act, W.Va. Code §44A-1-1 et seq.

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. W.Va. Code §44C-1-1 et seq.

Financial Exploitation of an elderly person, protected person or incapacitated adult; penalties; definitions. WV Code 61-2-29B.

Report to:

Adult Protective Services, the state agency responsible for investigating allegations of abuse, neglect and financial exploitation of an incapacitated adult or a facility resident.

Legal Aid Ombudsman, representatives located throughout the state to investigate allegations related to residents of nursing homes, assisted living centers, etc.

Law enforcement

WVAGO Elderly Abuse and Litigation and Prevention Unit

Persons who report abuse in good faith to Adult Protective Services or to law enforcement are immune from civil or criminal liability. WV Code § 9-6-12; W.Va. Code 61-2-29b(g).

Lawyers also have obligations under the West Virginia Rules of Professional Conduct.

1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall,

as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substandard physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, **the lawyer should take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.**

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6[1]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

[1] 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation . . . .

IV. LAWYERS COLLECTING FEES AND COST FROM CLIENTS

Debt collectors are subject to the regulations set forth in the West Virginia Consumer Credit and Protection Act (the "WVCCPA"), W. Va. Code §§ 46A-1-101 *et seq*. A debt collector is "*any* person or organization engaging directly or indirectly in debt collection." W. Va. Code § 46A-2-122. The Supreme Court of Appeals of West Virginia held that the provision of the Act governing debt collection "must be applied alike to all who engage in debt collection, be they professional debt collectors or creditors collecting their own debts." Syl. pt. 3, *Thomas v. Firestone Tire & Rubber Co.*, 266 S.E.2d 905 (W. Va. 1980) (emphasis added). The West Virginia Collection Agency Act ("Collection Agency Act"), W. Va. Code §§ 47-16-1 *et seq.* requires a person or firm engaging in the business of a "collection agency" in West Virginia to have a license and surety bond with our State Tax Department. *See* W. Va. Code § 47-16-4(a)-(b). The Collection Agency Act, in W. Va. Code § 47-16-2(11), exempts lawyers who are admitted to practice law in West Virginia.

a. Fee Contract/Retainer Agreement

A retainer agreement may not provide that unpaid, past due amounts accrue monthly interest. A creditor may not charge or represent that it may charge interest, attorney's fees, or other such fees, however denominated, to a debt that arises from a non-credit transaction. *See* W.Va. Code §46A-2-127(g), 128(c), and 128(d).

b. General Rules to Comply with Federal and State Rules for Debt Collection

West Virginia Consumer Credit and Protection Act ("WVCCPA"), W.Va. Code §§ 46A-1-101 *et seq*., governs the conduct of all persons or entities that collect debts from consumers in West Virginia. Unlike the Federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1601, *et seq.,* which only governs third party collection agencies, the WVCCPA applies to all debt collectors, including creditors collecting their own debt. As such, a lawyer collecting his or her own debt is subject to the regulatory authority of the West Virginia Attorney General under the WVCCPA. Examples of violations of federal and state laws are listed below:

Registration Requirements

1. A debt collector collecting debts in West Virginia must have a license and surety bond from the State Tax Department as required by the West Virginia Collection Agency Act, W.Va. Code § 47-16-4(a) and (b). Failure to do so is a violation of W.Va. Code § 46A-6-104.

2. A debt collector collecting debts in West Virginia must have a certificate of authority from the West Virginia Secretary of State as required by W.Va. Code § 31D-15-1501. Failure to do so is a violation of W.Va. Code § 46A-6-104.

3. Attorneys who are admitted to practice in West Virginia are exempt from these registration requirements under The Collection Agency Act, W. Va. Code § 47-16-2(11).

Required disclosures

4. Collection letters must advised the debtor of his or her right to dispute the debt within 30 days and of other debt validation rights as required by the FDCPA, 15 U.S.C. § 1692(g). Failure to do so is a violation of W.Va. Code § 46A-6-104.

False Statements

5. If a collection letter is captioned "Court Case Notice," the letter violates several provisions of the FDCPA, including the following: (a) simulating or falsely representing that the document was authorized, issued, or approved by a court, 15 U.S.C. § 1692e(9); (b) use of false representation or deceptive means to collect an alleged debt, in violation of 15 U.S.C. § 1692e(10); (c) falsely representing or implying that the document constitutes legal process, 15 U.S.C. § 1692e(13). Such statements are all in violation of W.Va. Code § 46A-6-104.

6. A collection letter may only state that the debt collector has purchased the account if it has, in fact, purchased the account. Stating so when such was not the case is a violation of W.Va. Code § 46A-6-104.

7. A collection letter that states "Our attorneys intend to use all specified methods available by law to collect this account," when the collection agency is not a law firm and does not employ any lawyers to collect alleged debts is in violation of W.Va. Code § 46A-6-104.

8. A collection letter that threatens "if you fail to contact us now immediate legal action will take place," when no such action is intended is in violation of the FDCPA, 15 U.S.C. § 1692e(5) and W.Va. Code § 46A-6-104.

9. A collection letter that advises that non-payment will result in the filing of a negative credit report with Experian, Transunion, and Equifax, when the collection agency is not a subscriber to these credit reporting agencies and is without the ability and intention to file reports with any consumer reporting agency is a violation of the FDCPA, 15 U.S.C. § 1692e(5) and W.Va. Code § 46A-6-104.

Threaten Legal Action when there is no intent to follow through

10. A collection letter that threatens that "we intend to file a lawsuit and issue a subpoena to order you to appear in court," when the collection agency has no intention of doing so is a violation of the FDCPA, 15 U.S.C. § 1692e(5) and W.Va. Code § 46A-6-104.

11. A collection letter that advises "our attorneys will file a motion for the court to order a forensic accountant to examine your personal and business records and get you set up for an income tax audit," when the collection agency has no attorneys and when such action cannot legally be taken and is not intended to be taken is in violation of the FDCPA, 15 U.S.C. § 1692e(5) and W.Va. Code § 46A-6-104.

12. A collection letter that threatens "if you fail to obey the subpoena and fail to appear or follow the order of court you could then be held in contempt of court," constitutes a false representation or deceptive means to collect a debt and is a violation of the FDCPA, 15 U.S.C. § 1692e(10), and threatens an action that cannot legally be taken or that is not intended to be taken is in violation of 15 U.S.C. § 1692e(5) and W.Va. Code § 46A-6-104.

13. A collection letter that threatens that this is "your final and only opportunity to settle this debt for much less than you actually owe" and "if you do not contact us now we will have the attorneys set a lawsuit and subpoena date and notify you in a few days," constitutes a false representation or deceptive means to collect a debt is in violation of the FDCPA, 15 U.S.C. § 1692e(10), constitutes a threat to take an action that cannot be legally be taken or that is not intended to be taken is a violation of 15 U.S.C. § 1692e(5), and constitutes an unfair or deceptive act or practice, a violation of W.Va. Code § 46A-6-104.

Threaten Garnishment, Liens, etc. without explaining the need to first obtain a Judgment

14. A collection letter that threatens that the collection agency will obtain a "judgment against you," which will result in the filing of liens against your property, attachment of bank accounts, and garnishing of wages, when the collection agency has no intention of taking such actions is a in violation of the FDCPA, 15 U.S.C. § 1692e(5) and W.Va. Code § 46A-6-104.

15. A collection letter that threatens "Your failure to [pay the debt] will likely result in an immediate small claims lawsuit, and potential negative credit reporting, garnishment, lien and/or attachments against you and/or your property" is a violation of the WVCCPA. The WVCCPA places an important restriction on threats to garnish wages or attach property. Specifically, W.Va. Code § 46A-2-124(e)(2) prohibits:

> The threat that nonpayment of an alleged debt will result in (2) Garnishment of any wages of any person or the taking of other action requiring judicial sanction, without informing the consumer that there must be in effect a

judicial order permitting such garnishment or such other action before it can be taken.

Unfair Practices

16. A collection letter that threatens "we will also ask the court to award attorney's fees and additional court costs," when attorney's fees cannot be awarded in suits to collect consumer debts in West Virginia, is in violation of W.Va. Code § 46A-2-127(g), -2-128(c), and -2-128(d), and W.Va. Code § 46A-6-104.

17. A collection letter for an alleged debt where the statute of limitations has passed that fails to include required language, is in violation of W.Va. Code §46A-2-128(f), The required language includes:

> (f) (1) When collecting on a debt that is not past the date for obsolescence provided for in Section 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it. If you do not pay the debt, (INSERT OWNER NAME) may report or continue to report it to the credit reporting agencies as unpaid"; and
>
> (f)(2) When collecting on debt that is past the date for obsolescence provided for in Section 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it and (INSERT OWNER NAME) cannot report it to any credit reporting agencies."

c. Hiring a Collection Agency

i. Reasonable Care/Due Diligence

A creditor must exercise reasonable care when selecting a collection agency and may be liable for negligence in the selection, instruction, and supervision of the collection agency. The most basic requirement is that a collection agency must have a business license and surety bond from the State Tax Department. If it is a foreign corporation, it must have a certificate of authority from the West Virginia Secretary of State. Simple telephone calls or a search of the Secretary of State's online service would disclose whether a potential collection agency meets these requirements.

The West Virginia Supreme Court has held that the collection of debts in West Virginia without a license and surety bond constitutes an unfair or deceptive act or practice. *Cavalry SPV I, LLC v. Morrisey,* 752 S.E. 2d 356, 366 n. 17 (W.Va. 2013).

The purpose of requiring due diligence before selecting an outside collection agency is to prevent subjecting a former client to unlawful abuse and harassment. The failure act reasonably may result in a client being subjected to multiple, serious violations of state and federal debt collection law which constitutes an unfair or deceptive act or practice in violation of W.Va. Code § 46A-6-104.

ii. L.E.I. 94-01 Collection of Overdue Accounts

A lawyer licensed to practice law in West Virginia owes an even greater duty of care to his or her clients when selecting an outside collection agency. The Lawyer Disciplinary Board issued a Legal Ethics Opinion[2] in 1994 regarding collection of accounts. The Opinion permits lawyers to refer delinquent accounts to outside collection agencies subject to certain restrictions. In L.E.I. 94-01*, Collection of Overdue Accounts,* there were enumerated eight guidelines that must be followed by lawyers when referring delinquent accounts to outside agencies for collection.

1. The fee must be legally and ethically binding;
2. The lawyer did not believe when the fee agreement was made that the client would not be able to afford it;
3. The lawyer is no longer responsible for the client's case;
4. There is no genuine dispute over the debt;
5. The lawyer has exhausted all other reasonable efforts short of litigation in attempting to collect the debt;
6. The lawyer has first informed the client in writing that he plans to refer the matter to a collection agency;
7. The lawyer must also exercise caution in his selection of a collection agency:
    a. The lawyer should not use a collection agency that he knows or has reason to believe is and/or has acted illegally;
    b. The lawyer must not employ an agency that engages in the unauthorized practice of law;
8. The lawyer may provide the collection agency with information regarding former clients, such as names, addresses and fee. However, the lawyer shall not disclose any confidential information that is unrelated to the collection of the debt; and

In addition, while the L.E.I. recognizes it is acceptable to place unpaid bills for legal services to outside collection agencies, subject to several restrictions, it did not authorize the outright sale of accounts to debt collections.

[2] Legal Ethics Opinions are advisory only and are not binding upon the Supreme Court of Appeals. In addition, this opinion was issued under a previous version of the Rules of Professional Conduct but the opinion has not been vacated.

iii. Terms of the Collection Agreement

You cannot directly authorize a collection agency to act on your behalf to collect amounts that are not permitted by law. For example,

1. An agreement to collect an account authorizing payment of a share of attorney fees awarded by a court is a violation of the WVCCPA.

2. An agreement that includes payment for amounts over the actual amount due is a violation of the WVCCPA.

3. An agreement to sell the account to the collection agency, or to allow the agency to represent the account has been sold to the collection agency.

iv. Liability for actions of an Independent Contractor

While it is generally true that a creditor is not liable for the wrongful conduct of its independent contractor, there are important exceptions to this rule. In the much-cited case of *Colorado Capital v. Owens,* 227 F.R.D. 181 (E.D. N.Y. 2005), the consumer sought to hold the credit card company liable for the unlawful actions of its outside collection agency. In that case, Colorado Capital, the credit card issuer, sought to dismiss the consumer's claim that it "owed him a duty to exercise reasonable care in selecting, instructing and supervising the debt collection firms it hired." 227 F.R.D. at 188. The court declined to dismiss the consumer's claim, holding that the "creditor, owes Owens, a customer and debtor, a duty of reasonable care in the handling of his account, which includes the collection of his debt." ***Id.*** Other courts have reached the same conclusion. *See, i.e., Freeman v. CAC Financial,* 2006 WL 925609 (S.D. Miss. 2006) (court declines to dismiss consumer's claim that creditor may be held vicariously liable for general negligence in hiring the collection agent, citing *Colorado Capital v. Owens*); and *Becker v. Poling Transportation Corporation,* 356 F.3d 381, 389 (2nd Cir. 2004) (a party may be liable to an injured plaintiff where the party itself was negligent in selecting, instructing, or supervising the contractor).

1. Referrals to Consumer Protection Division[3]

The Consumer Protection and Antitrust Division ("Division") is central to the Attorney General's Office's mission to protect the public from unfair, deceptive, and fraudulent acts or practices. The Division's mission is also to foster fair and honest competition and ensure that monopolies do not override the free market. In furtherance of these missions, the Division has vigorously enforced and advocated the State's consumer laws through its base of attorneys, investigators, mediators, and staff.

The Division is responsible for enforcing the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 *et seq.* ("WVCCPA"); the West Virginia Antitrust Act, W. Va. Code §§ 47-18-1 *et seq*.; and the Preneed Funeral Contracts Act, W. Va. Code §§ 47-14-1 *et seq.*

The office handles complaints relating to non-compliance of contractors, used car dealers, collection agencies and other consumer transactions protected by the WVCCPA. In addition, the Division promotes scam awareness and has a reporting process. The reporting process begins with a consumer calling the Hotline Number (1-800-368-8808) to report a scam. The call information is entered into the "scam" database and the consumer is invited to fill out a formal complaint form. These reports are monitored and if a trend involving a certain scam is identified, the Office will send out a press release to the area where the consumers are receiving these contacts or, if indicated, statewide.

The Consumer Complaint Process. If a consumer has a dispute with a business, he/she can call the Division's toll-free hotline at 1-800-368-8808 or the Eastern Panhandle Office at 304-267-0239. Information on consumer issues is also available on the Office website at www.ago.wv.gov. Additionally, in order to determine if a consumer has an issue that may be handled by our Division, a consumer can call the office to speak with a mediator or an attorney on call for general information or to inquire about filing a complaint.

[3] Private causes of action for violations of the WVCCPA are permitted under W.Va. Code §46A-5-101, *et seq*.

The complaint process is initiated through a written complaint form. There are four (4) complaint form options for consumers: General, Motor Vehicle, Mortgage, and Preneed. Complaint forms are available online or, when requested by a consumer, a complaint form and instructions are sent to the consumer's home address. If the consumer has questions or difficulty in completing the form, an employee of the Division will assist the consumer over the phone or schedule in-person assistance at the Division office in Charleston, the Eastern Panhandle, or with a consumer specialist in his or her region. A complaint form can be mailed to the Division, or submitted online for consumers who prefer electronic filing. Once a complaint is received at the Division, it is docketed in a database and referred to a mediator for review and handling.

Mediation Process. When a complaint is filed, the Division first decides whether it can be addressed through our mediation process. We provide consumers and businesses with the opportunity to participate in a voluntary mediation process, which is an informal resolution of a dispute without formal litigation. The Division serves as a *de facto* mediator to aid in reaching a positive outcome in a dispute, to bring about a resolution for the consumer, and to ensure awareness and compliance with Consumer Protection laws for businesses.

When the complaint form is received, it is assigned to a mediator within the office. The mediators are specifically trained and charged with overseeing the complaint process and guiding its resolution. The mediator contacts the business and requests a written response to the consumer's complaint. The business then responds either by agreeing with, or disputing, the complaint. Sometimes the response includes an offer to resolve the matter for a designated amount of money as reimbursement, or, sometimes, there is no response from a business. Depending on the nature of the complaint and the cooperation of the parties, the mediation process averages 30 to 45 days from filing of the complaint form to resolution. For this reporting year, the average amount of time for a complaint to go through the mediation process was 33 days.

Attorney Review. If a complaint is not resolved through mediation, the file is reviewed by a staff attorney. If no Consumer Protection laws have been violated, or if the facts are in dispute, no further action may be taken. The consumer is notified and provided with other alternative steps to pursue his or her complaint, whether through the hiring of private counsel, referral to

Legal Aid, referral to West Virginia State Bar telephone or online services, or *pro se* pursuit of a claim in Magistrate or Circuit Court. The Division cannot act as private counsel for a consumer.

Investigation, Assurance of Discontinuance and Litigation. If the Division believes the business may be violating state consumer laws or engaging in a broader pattern of unlawful practices, the Division may initiate an official investigation, which remains confidential until action needs to be taken to enforce a subpoena or other legal process to enforce Consumer Protection laws. The investigation may include the review of all complaints against a business, together with an informal request for information and documents, or the issuance of a subpoena to the business. After a review of the responses, the Division decides if further legal action is needed to ensure that a business complies with West Virginia law. The Division may enter into an Assurance of Discontinuance with the business, whereby the business agrees to stop a particular activity, may refund payments to consumers, and may pay a civil penalty for its violations of the Consumer Protection laws. If necessary, a lawsuit may be filed by the Attorney General's Office to enjoin any illegal activities of the business and to obtain monetary refunds to consumers, as well as civil penalties and reimbursement of attorney fees and costs.