2024 National Ethics Trial Competition Case File

Libni Reyes
v.
Mica Haller

by
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Pacific McGeorge School of Law
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Copies of the Case File are available from the authors. Please direct inquiries to:

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(Libni Reyes v. Mica Haller 2024)

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NATIONAL ETHICS TRIAL COMPETITION

Official Rules 2024

1. Each invited school may enter only one team. Each team shall be comprised of four law students. In each round, two students will be advocates and two students will play the witnesses for their side. Over the course of the competition, teams may choose whether all team members will perform advocate roles or whether some will play witnesses only. Advocates and witnesses may, but need not, change their roles from round to round; but roles must remain consistent throughout each individual round.

2. For a student to be eligible, he or she must be enrolled for a J.D. degree. Students who graduated in December 2023 are eligible to participate only if the Competition counts toward their credits for graduation and they will not be admitted to practice before April 2024.

3. Questions concerning the case file must be received by the Competition Director (rrezvani@pacific.edu) no later than February 23, 2024, at 5:00 pm PST.

4. All questions arising during the Competition itself, including any protest about the conduct of a round, shall be addressed to the Competition Director verbally as soon as possible after the completion of closing arguments in the round. All such communications with the Director must be from a team's coach, not the students.

5. Teams shall be identified to judges only by a letter assigned by the Competition Director. No team member, coach, or person associated with a team shall directly or indirectly attempt to communicate the identity of a team to a judge, and no judge shall attempt to discover that information.

6. Except in the final round, no coach or other person associated with a team may be present during any part of a round in which that team is not competing. In the semi-final rounds, persons associated with eliminated teams may observe, but may not thereafter describe their observations to the finalists.

7. Coaching of a team, including conversations, notes, gesturing, or electronic communication, is prohibited during a round, including recesses and breaks. This rule does not prohibit or affect communications among the team members who are trying the round.

8. Each team will be allotted seventy-five (75) minutes for the conduct of its case. A further eight (8) minutes per side will be allowed for pretrial motions and trial logistics matters. The clock will be stopped for objections and responses to objections. Motions for judgment as a matter of law under FRCP 50 will be counted toward the 75 minutes. Any logistical matters (AKA""housekeeping") will be covered in advance by administrative announcement as decided at the Coaches' Meeting.

9. Each trial will consist of an opening statement, direct and cross-examination of two witnesses per side, and closing argument. Each advocate shall conduct an opening statement or a closing argument, one direct examination, and one cross-examination. Redirect is permitted but recross shall only be allowed, in the judge's discretion, only if the redirect raised an issue meriting the opportunity to impeach.

10. During the opening statement and closing argument, objections and arguments must be made and responded to only by the advocate assigned to make the opposing opening statement or closing argument. During the testimony of a witness, objections and arguments must be made and responded to only by the advocate assigned to examine or cross-examine that witness. Either or both advocates may address preliminary motions and trial logistics matters, but only one attorney will be heard on each motion or matter.

11. Witnesses may not take any papers or other aids to memory with them to the witness stand. This does not preclude an advocate's refreshing a witness's recollection or using exhibits consistent with the Rules of Evidence. All witnesses must acknowledge their signatures.

12. The excerpted Seaview Rules of Professional Conduct (SRPC) that are included in Appendix A hereto shall control. Only those rules, together with the law and authorities included in Appendix B hereto, may be used in argument. Students may cite any comments or advisory notes to the Federal Rules of Evidence and the specific SRPC Comments and Authorities that are included in both appendices. Pretrial motions and motions for judgment as a matter of law shall be made and argued orally. The presiding judge shall, however, deny any motion for judgment as a matter of law.

13. Each witness's complete recollection of the facts of the case is contained in his deposition testimony as provided in this Case File. In other words, counsel should assume that with regard to every topic and event covered in the deposition testimony, the witness was asked and responded, and there was no other information available from the witness as to the topics and events covered in the deposition.

14. All objections required to be made at a deposition in order to preserve objections to be raised at trial were made.

15. Applicable MRMT Rules

MRMT 2.7 No Inferences Are Permitted in Direct Examination

No advocate may elicit from a witness and no witness may draw any inference during a direct or re-direct examination. A witness must confine his or her answers to the facts and opinions stated in the file. Inferences may be drawn only in motions, opening statements where appropriate, and closing arguments.

(a) On direct examination, advocates must advise their witnesses that if they are asked to provide information that is not specifically provided in the file, they must respond by stating, "No, I didn't do [hear, say] that," "I don't know that," or "I don't have that information."

(b) An advocate is obligated to correct the record by withdrawing testimony that presented facts outside the file. Where an advocate's witness testifies to a fact outside the file, the advocate shall promptly ask the witness to correct the witness's testimony by withdrawing it and stating that he or she has no first-hand knowledge of it. If the witness refuses or is unable to do so, the advocate shall move to strike the answer as being outside the file and ask the court to disregard the statement.

MRMT 2.1 Facts That Are Not in a Witness's Deposition or Report but are Elsewhere in the File

(a) A witness may testify to a fact that, although not in the witness's statement or deposition, is part of the file (*e.g.*, is expressly stated in another witness's deposition or appears as an exhibit). Under these circumstances, it is permissible for an advocate to show the other portion of the file to the witness. In such cases, however, the opponent may impeach the witness regarding the omission of the fact from the witness's own statement under Rule 2.8.

(b) An expert witness may make reference to any fact, source, or exhibit that forms the basis of the expert's opinion, even if not expressly recited in his/her report or deposition, provided (i) the reference comes from a source the expert says he/she reviewed, (ii) the information meets any applicable requirements/limitations of FRE703 and 803(18), and (iii) the expert's testimony meets the requirements of FRCivP 26(a)(2)(B), namely: "The report must contain … the facts or data considered by the [expert] in forming [the expert's opinion]." The disclosure is sufficient if it gives the opposing party "a reasonable opportunity to prepare for effective cross-examination …." (Advisory Committee Note to 1993 Amendment to Rule 26)

> *[EXPLANATORY NOTE:]* To eliminate confusion about the intent of this special NETC Rule 2.1(b): the purpose is to clarify that an expert witness is not confined to testifying only by means of a verbatim oral reading of his Report. For example, suppose an expert writes in his Report: "In my opinion, the attorney did not violate SRPC Rule 1.6 concerning confidentiality of information by having a Notary Public present at the will-signing occasion in his office, even though he did have substantive discussions with the Plaintiff's testatrix on that occasion in the Notary's presence." The Report says nothing further about the basis for this opinion.
>
> Under MRMT Rule 2.1(b), the expert is NOT barred from testifying at the trial: "The testatrix knew the Notary's presence was required for the formalizing of the occasion, and in my view should have known that in such case a Notary is an adjunct (even if temporary) of the attorney's business operation." While the Report does not contain this elaboration on the expert's opinion, the testimony is consistent with the notice given in the Report of the expert's overall opinion on the subject. Opposing counsel cannot realistically complain that he was uninformed or taken by surprise.

MRMT 2.3 Cross-examining on the Absence of Evidence

(a) An advocate may cross-examine a witness on (i) the lack or absence of evidence or (ii) the failure to perform standard tests or examinations or to conduct an investigation or search that would have been reasonable for the witness or the institution to which the witness belongs to conduct. Because the file contains all of the evidence that exists, a witness must answer that the test, examination, or search has not been conducted, and that there is no evidence in the file of the matter that was not recovered or investigated. If an explanation is provided in the file, the witness may provide that explanation for the lack or absence of evidence.

(b) Expert and professional witnesses may not be cross-examined on scientific, technical, or other specialized knowledge, techniques, procedures, or examinations that are not generally recognized or not mentioned in the case file.

(c) If a witness is cross-examined about non-material background information not contained in the case file, the witness is permitted to invent a non-material answer, even though it is not contained in the case file. Non-material background information is information about a witness that does not affect the witness's credibility or competency to express an opinion. This includes, but is not limited to, information about the names of spouses and children or the names of schools, professors, courses, employment sites, and supervisors.

MRMT 2.8 Impeachment by Omission

Advocates may impeach witnesses by omission. When asked, witnesses must admit that the fact(s) to which they have testified are not in their statement(s), depositions, prior testimony, etc. It is a violation of these rules for witnesses to answer in any way that calls into question the reliability of the earlier statement. The witness must admit, if asked, that the fact(s) testified to are not in his/her statement. The witness must also admit, if true, that the advocate who prepared the witness to testify advised the witness to add or invent the fact on which cross- examining counsel is impeaching by omission. Advocates must instruct their witnesses that the following types of answers are not permitted to questions about what the witness earlier stated:

(i) I was not asked that question in my deposition.

(ii) I was not asked to discuss that issue in my statement.

(iii) I was not asked about those facts in my deposition.

(iv) Those facts are in another part of the deposition that has not been transcribed.

(v) This is the first time I've been asked about those facts, but I'm

prepared to respond at
this time.

(vi) Would you like me to tell you why I didn't mention that before?

But see MRMT 2.1(b) concerning expert testimony.

There may be rare instances in which a fact stated in the file could not have occurred without an underlying predicate fact that is absent from the file. For example, if the only two eyewitnesses to an incident state that the defendant reached into his car on the front passenger side and brought out a gun and that no one went near the car after that time during or after the incident, but the police report states that the front passenger-side door was locked, the underlying (although unstated) predicate fact is that the front passenger-side window was open. Nevertheless, to simplify the trial rounds and to avoid needless debate, such an omission from the case file may not be supplied during the competition rounds. Instead, any difficulty posed by such an apparent unintended omission must be resolved – if resolution is deemed necessary – by means of the file-question period set forth in paragraph 3 above.

MRMT 2.10 Judges May Question Advocates.

At the conclusion of any examination and speech, the presiding judge and scoring judges may ask the examining or presenting advocate to point to the specific language in the file that provides the basis for a question or argument.

16. Except during the closing argument, no objection shall be made that the opposing team is "going outside the record" or "going beyond the case file." Any alleged breach of the No Inference Rule shall be addressed by means of impeachment under MRMT 2.8.

17. To the extent that a chalkboard or easel is available in the courtroom, these aids may be used. Any writing on such aids may be done only by witnesses or team members during trial. Handwritten materials to be used during a closing argument may not be prepared until after both sides have rested and the evidence is closed, with the exception of materials created while examining a witness during trial. The use of presentation technology, such as the use of PowerPoint, TrialPad, etc. is prohibited.

18. No team may submit any document or item to the panel of judges, including, but not limited to, trial notebooks, lists of counsel, or entries of appearance. All judges, both Presiding and Scoring, have copies of the Case File, including all exhibits, to which their attention may be drawn by citing the exhibit number.

19. Before the start of each round, the Competition Director shall instruct the judges: (1) to ignore regional variations of courtroom practice; (2) to judge the teams on the basis of performance and not the apparent merits of the case; (3) to award or subtract points based on the attorneys' ethical and professional comportment; and (4) not to announce the result of the round

to the students. The Director may give such other instructions as may be appropriate.

20. There will be four preliminary rounds, a semi-final, and a final round. The first two rounds will be paired at random and will be announced at the coaches meeting. The third and fourth round pairings will be announced as soon as practicable after the previous round is complete and scores have been calculated. Pairings for the third and fourth round will be power-matched based on the following criteria: (1) win/loss records on rounds; (2) win/loss records on ballots; (3) total points; and (4) coin toss in the event of a tie.

21. The pairings for the semi-final round will be announced at the banquet and based on seedings using the above criteria (1 vs. 4, 2 vs. 3). This rule will be followed even if the teams have already met in a preliminary round. If the semi-final teams faced each other previously, they will reverse sides. Otherwise, the winner of a coin toss will choose sides.

22. The two finalists will be determined by single elimination during the semi-final rounds. The finalists will represent the party against whom they competed in the semi-finals. If they competed on the same side in the semi-final round, the sides will be determined by coin toss.

23. The Competition Director is the final decision-maker on all questions regarding the interpretation of these rules, all matters of administration of the Competition, and any protests; and their decision shall be final. For 2024, the Competition Director is Prof. Reza Rezvani: cell 917-769-6075, email rrezvani@pacific.edu.

Procedures

1. This case will be tried on liability only.

2. All exhibits are authentic and, to the extent necessary, original documents within the meaning of the Federal Rules of Evidence. The admissibility of any document or testimony, however, will be determined by the trial judge.

3. The Plaintiff must call Libni Reyes and Per Severance as witnesses in the case. The Defendants must call Mica Haller and DeVoyer Tour as witnesses in the case.

4. Both expert witnesses are qualified under FRE 702 to testify on all issues discussed in their Reports. Notwithstanding this Stipulation, an opposing party may cross-examine the expert on his/her qualifications and may, as a strategy, request that the Court exclude the expert's testimony on the ground of insufficient qualifications. However, the Court is required to deny such a request.

The expert reports follow FRCivP 26(a)(2)(B), modified as follows:

> "(iii) any exhibits that will be used to summarize or support them;" – this requirement is waived;
>
> ….
>
> "(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; " – this requirement is waived.

See also MRMT Rule 2.1(b), Rule 15, *supra*.

5. Other than what is supplied in the problem, there is nothing exceptional or unusual about the background information of any of the witnesses that would bolster or detract from their credibility.

6. Order of closing arguments: Plaintiff – Defendants – Plaintiff's rebuttal.

7. Parties are not permitted to request changes to the jury instructions.

8. The trial of the case takes place in March 2024.

9. The applicable law is set out in the Jury Instructions and Legal Addendum at the end of the case file.

10. The calendar dates in the file are chosen to make the appropriate time gaps between events. However, they are not intended to reflect actual days of the week in the year in question; in other words, no one should cross-examine a witness with, "You expect this jury to believe that you appeared before the Disciplinary Board on a SUNDAY?"

11. The Case Summary may not be cited in opening statements, examination of witnesses, or closing arguments. It is provided as background only.

12. Opposing counsel may request leave to voir dire a witness. Such examination shall be charged to the opposing (cross-examining) team's clock.

Stipulations

1. Jurisdiction and venue are proper and may not be contested.

2. Federal Rules of Civil Procedure and Federal Rules of Evidence apply.

3. All witnesses called to testify who have identified the parties, other individuals, or tangible evidence in depositions or prior testimony will, if asked, identify the same at trial.

4. All depositions were given under oath. All deponents agreed at the outset of their deposition to give a full and complete description of all material events that occurred and to correct the deposition for inaccuracies and completeness before signing the deposition.

5. All signatures are authentic and were written by the indicated individual. Witnesses must identify their respective signatures as such if asked.

6. Advocates may not attempt to impeach a witness by arguing to the jury that a signature appearing on a deposition does not comport with signature or initials located on an exhibit.

7. Other than what is supplied in the problem itself, there is nothing exceptional or unusual about the background information of any witness that would affect their credibility.

8. All exhibits are authentic.

9. All exhibits are originals of that document unless otherwise noted on the exhibit or as established by the evidence.

10. All times listed, including those on exhibits, are in Pacific Standard Time.

11. The excerpt of Bath's trial testimony quoted by Tour is accurate.

12. Bath's statement to the police on April 19 read: "I had $500 in five $100 bills. It could be I used one of them to pay for my dinner the night before - I'm not sure how much that was, but less than $100 for sure, it was just me - intending to replace it soon because the bills were gifts for my kids and grandkids I was going to be visiting – I was in kind of a rush to get to my hotel – long day of driving and I needed my sleep."

13. Due to the fluidity of the witnesses' genders (see Witness List, infra), Gloubermans's photo (Ex. 14) has alternate genders to match Reyes's, as the holding cell was not unisex.

14. No issue may be raised as to the sufficiency of Haller's advocacy in arguing against continuation of the trial without an overnight (or longer) recess to allow him time to investigate Glouberman's background and prepare the cross-examination. Further, Haller adequately preserved the issue in his post-trial motions, including a motion for a mistrial, and on appeal.

Witness List

For Plaintiff:	Libni Reyes
	Per Severance (Expert Witness)
For Defendants:	Mica Haller
	DeVoyer Tour (Expert Witness)

All witnesses are gender-neutral and should reflect the gender of the person playing the witness in trial. To the extent that any references made within the problem are gender-specific, these references are to be interpreted as gender neutral and should be adjusted accordingly. The judges will be instructed to ignore and dock no points for inadvertent errors in pronouns or gender references.

Throughout, for purposes of clarity only, and not as expression of any view on the use of "they" for singulars to avoid limiting gender identity or sexual preference, we have opted to use "he/she" etc. in lieu of "they" etc. Notwithstanding this usage, each individual participant may choose to use "they/them/their" instead of "he/she" etc.

Case Summary

This is a professional negligence action filed by Libni Reyes against Mica Haller.

Haller represented Reyes in a criminal action wherein the prosecution brought charges of Petit Larceny, a Class A misdemeanor, alleging that Reyes stole $500 dollars from a wallet he found in a parking lot. After a jury verdict of guilty, Reyes was sentenced to one year of community service and payment of restitution to the victim.

During a break in the trial, Reyes made statements while talking to Haller in a restaurant where a number of prosecutors were present, which plaintiff alleges led the prosecution to call a rebuttal witness it was not previously aware of. When Haller cross-examined that rebuttal witness, he used questions generated by an artificial intelligence platform, ChatGP, Plaintiff alleges two counts of professional negligence:

- failing to take steps to protect Reyes from making detrimental statements in a public place and therefore not protected by the attorney-client privilege;

- when conducting the cross-examination of the "surprise" rebuttal witness, using detrimentally- framed questions generated by ChatGP and in other ways incompetently performing the examination.

Haller contends he acted reasonably in all respects complained of, both in his repeated instructions to Reyes about safeguarding the privilege, during his public interactions with Reyes, and in his conduct of the cross-examination of the rebuttal witness.

Procedurally, in the underlying criminal case the trial court denied Reyes's motion for judgment of acquittal based on alleged trial errors, including the court's refusal to grant an overnight extension to allow the defense time to investigate and prepare for the cross of the new witness, and the sufficiency of the evidence. The Court of Appeals affirmed the judgment per curiam without opinion. Upon learning the extent to which Haller had used ChatGP during trial, Reyes, advised by new counsel, filed this suit for legal malpractice.

Peter Pears
Attorney for Plaintiff

DISTRICT COURT OF THE STATE OF SEAVIEW
COUNTY OF SUNSET

LIBNI REYES, Plaintiff, MICA HALLER, Defendant.	Case Number: DC-2022-477 CIV COMPLAINT FOR PROFESSIONAL NEGLIGENCE (2 COUNTS)

Civil Complaint and Jury Trial Demand

COMES NOW, Plaintiff, LIBNI REYES, by and through undersigned counsel, and hereby submits the following Civil Complaint and Jury Trial Demand and asserts:

1. Plaintiff and Defendant Mica Haller are residents and citizens of Seaview.

2. Defendant represented Plaintiff in a criminal action, *State v. Reyes*, that was tried in June, 2022 in Sunset County Court.

3. Defendant failed to exercise the care and skill required of attorneys practicing in Seaview, and failed to observe and comply with the Seaview Model Rules of Professional Conduct, as follows:

COUNT I

4. Defendant failed to instruct Plaintiff on, and adequately protect Plaintiff from waiver of, Plaintiff's attorney-client privilege.

5. These failures caused Plaintiff inadvertently and without knowledge to divulge to the prosecution in the criminal case the existence of a witness the prosecution then called in the case, to Plaintiff's detriment.

COUNT II

6. Defendant's cross-examination of said witness was incompetent in general, and specifically by Defendant's reliance on questions generated by an AI platform, ChatGP.

7. As a result of Defendant's failures specified in both Counts I and II, Plaintiff was found guilty in the criminal case, to the great detriment to Plaintiff's reputation, standing in the community, employment status, and family relationships.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be proved at trial, together with such other and further relief as is available to Plaintiff at law or equity.

December 4, 2022

Peter Pears

Peter Pears
Attorney for Plaintiff Libni Reyes

Daniella Dennison
Dennison Madison Unger PC
Attorneys for Defendant

DISTRICT COURT OF THE STATE OF SEAVIEW
COUNTY OF SUNSET

LIBNI REYES, Plaintiff, MICA HALLER, Defendant.	Case Number: DC-2022-477 CIV PROFESSIONAL NEGLIGENCE (2 COUNTS)

Defendant's Answer to the Complaint

Defendant, MICA HALLER, by and through his undersigned attorneys, hereby answer the Complaint as follows:

1-2, Admitted.
3-7, Denied.

WHEREFORE, Defendant prays the Court to enter judgment in favor of Defendant on all counts and grounds.

December 21, 2022

Daniella Dennison

Dennison Madison Unger PC
Attorneys for Defendant Mica Haller

Deposition of Libni Reyes
February 15, 2023

I, Libni Reyes, being duly sworn, deposes and says:

My name is Libni Reyes. At the beginning, I'd like to say I appreciate it if people pronounce my name right, as I'm very proud of my Latino heritage. It's not "Rays"; it's RAY-iss or RAY-ess. I'm 24 years old and I currently work at Techies, a customer service company that people call with tech issues. I got my bachelor's degree in computer science from Seaview State in December of 2020. I immediately enrolled in Seaview State's Master's Program in Computer Science in the Spring semester of 2021.

While I was a full-time student in the master's program, I also worked full time as a forklift driver at Colossal Wholesale Company a discount wholesale club that sells bulk quantities to members at deeply discounted prices, similar to but much smaller than Costco or Sam's. A forklift driver is the best job in the place. because I get to drive around by myself and don't need to deal with customers or carry anything heavy. I worked from 5 pm to closing time, 10 pm, Monday through Friday, and some weekend days when school wasn't crazy. I took a full course load during the day and worked straight from school. I would study before and after work, usually starting early in the morning.

Before starting at Colossal, I worked as a clerk at Vakili, the local video game shop; Ahmadi Chiropractic as a receptionist; and Karla's Ice Cream. Like at Colossal, with these part-time jobs my days were long! I always went to classes first then worked afternoons and evenings. Every time I changed jobs it was for one thing only – money. My ultimate goal in life is to work wherever I get paid the most, while working the least, so I can spend as much time with my family as possible. My current family – Dad, Mom, and three younger sisters - and my own family I hope to have in the future are very important to me.

My father came to the United States from El Salvador when he was 16 because he was being actively recruited by gangs. He went to the police for help, but he said they were obviously corrupt and told the gangs that my father had come to them - the police - for protection. He fled the country right after that, leaving his parents and siblings behind and never saw them again. Yes, that's why family is the most important thing to me.

My work and school schedule back when I worked at Colossal was mostly manageable. During mid-terms and finals, I would get overwhelmed and a little scattered, but I plowed through. I paid my own way through school so money was always tight, especially during the ridiculously expensive master's program where every dollar counted. Though extreme stress sometimes leads me to be very quiet and not eat, my work and school schedule in the spring of 2022 never got to that level. My false arrest and conviction, however, was a whole different ball game.

On April 18, 2022, I had just finished my shift at Colossal and me and the other workers left for the night. After the manager locked up the store, I got a call from my 12-year-old sister who wanted help with an assignment regarding ChatGP, an AI platform that started in November 2020. I got real into the tech behind ChatGP during the Covid lockdown and I've stayed up to date on it since it was launched. When family calls, everything else stops so I talked to my sister for a while as I was standing alone in the parking lot. She wanted to know about any concerns I had about ChatGP taking the place of humans at work or home. I told her not really because though ChatGP is useful for some kind of basic operations, like dividing up a zoo population into vertebrates and invertebrates, at more complex tasks it's likely to return inaccurate information because it's not constantly learning; doesn't yet have the ability to assess and resolve complicated situations; and isn't an "expert" that can analyze matters in any sophisticated way like humans can.

After that tech mini-lecture, I was wiped. Leaving work that night I dropped my car keys and that's when I saw a fat wallet almost under my front wheel on the passenger's side. I picked it up because I wanted to return it to its owner. It had a New York driver's license issued to Kris Bath with a New York City address. Even though I was prepping for finals and I had more than enough on my plate, I did everything I could to track Bath down online. Go to the cops?! When you grow up in a house hearing never-ending stories about how corrupt and useless cops are, you only go to them as a very last resort, if at all. My plan was to go to work the next morning at 7 am right when they open and drop it off for safe-keeping. No, I didn't count how much money was in there, because I never thought about taking any money from it. But in fact I didn't see any bills and mostly it seemed stuffed with papers, credit cards, and stuff other than cash.

At 7:00 am the next day I put the wallet in my work locker for which I had the only key and told the manager on duty that day, Adrian Allen, to call me if by chance Bath came back. I told him I would leave class, open my locker, and hand Bath the wallet. I came up with that plan because I didn't trust the Colossal staff enough to leave the wallet in an unlocked place or even with Allen, who I wasn't too sure of. When Allen called a few hours later to tell me Bath was at the store, I rushed over, opened the locker, and gave Bath the wallet.

Bath immediately opened it up, I thought to give me a reward. Nope. Bath started repeatedly screaming like a crazy person, “You stole $500!” Next thing I know Allen was calling 911 and the cops showed up and arrested me. When I got to Sunset County Court and was placed in a small holding cell with a lot of others. I talked for a few minutes through the bars of the cell with my assigned public defender. During that conversation he told me he would fight hard for low bail given the fact that the assigned ADA, Jared Rose, was one of the most aggressive lawyers in a DA’s office known for ruthlessness. I stayed in the cell with that bunch of scary people for over an hour. Yeah, I spoke to other inmates a little, including Glouberman – the one who later caused me all the trouble when he testified – Yes, my public defender had told me not to talk to anyone because it could be used against me, but I just chit-chatted, that’s all.

When I was finally brought into the courtroom the ADA on the case, Jared Rose, did seem, like, over the top and really aggressive. Fortunately the judge still set a low bail. I left the courthouse wondering how I was going to tell my family, whether my public defender was good enough, and how this would affect my career.

I saw Haller’s old school Pontiac on the side of the courthouse. Exhibit 1 is the Pontiac I saw that day, but the cheesy yet clever sign in the windshield isn’t in the picture. The sign read: “Tap on this window, stay out of that cell.” I tapped on the window. Haller rolled it down and the first question he asked me was “who was your ADA at the bail hearing?” I told him it was ADA Rose. He told me to get in the car, so I did, thinking it was out of the movies, like the Lincoln Lawyer.

The inside of the car was pretty much of a mess, with case files and papers all over the place. Exhibit 2 is a picture of the inside of Haller’s car – looks like it was cleaned up for the photographer. When I told Haller about my case he said he knew all about Rose’s style of operation. He explained that when the two of them worked together in the DA’s office, Rose prosecuted every case with the mindset of going to trial, so I should expect him to play hardball here to keep pressure on me by making very high plea offers so that I would be forced to go to trial. He told me Rose did this to further his career because the DA’s office incentivizes ADAs to try as many misdemeanor cases as possible to get promoted up to the higher-ranked Felonies Department. These promotions are strictly based on the number of cases prosecutors pursue all the way to verdict, not based on the number of guilty pleas or verdicts. I asked where the justice was in that, and Haller said, “Exactly,” but that I shouldn’t worry because my case “was riddled with reasonable doubt,” were his words. I said, “Yeah, because I didn’t do it,” and Haller came back with, “Bingo.” Before hiring him I went home and read every single review of Haller online – I’m a serial reviewer of reviews. The reviews were overwhelmingly positive, except one that said Haller wasn’t all that good in trial. I disregarded that as a “one-off” and hired Haller the next day.

Exhibit 3 you are showing me is the Retainer Agreement Haller had me sign. I do see the part you have underlined, about the attorney-client privilege, which of course I had heard about in the movies. That's probably why I kind of tuned out while he was going over the Agreement with me. I have no recollection of reading it then or later – just thought it was the usual "mumble-jumble" that you see in contracts and stuff. Yes, I obviously signed the line at the end of the agreement after he read it to me while I sat in his car.

Haller prepped me for trial by meeting two or three times in his car. I do remember that at one of those meetings a few weeks before the trial I mentioned something about telling my best friend about the case and some of the things Haller had told me. Haller stopped me to remind me about attorney-client privilege problems if I talk to people other than him. I don't remember exactly what he said about it though.

Rose and Haller picked a jury the day before the actual trial started – and ended – on June 21, 2022. We had a tough judge, Judge "I like to move it, move it" Weber. Judge Weber's favorite quips during the trial were, "Move it!" and "This trial will be done today." The trial was moving at a lightning pace, but Haller seemed unflappable and like a real pro in the courtroom. Haller's opening statement and crosses of Allen and Bath were amazing. Haller questioned Bath both about the timing of when he dropped the wallet around 10:30 am the morning before my arrest and when he returned to the store around 10:00 am the following day, and also his uncertainty about the missing money. I was feeling pretty confident. After the prosecution rested their cheap-shot case, I took the stand. Haller had advised me of the pros and cons of testifying, but we had decided I would do OK as a witness and my testimony was needed to establish the time I picked up the wallet, a fact needed for our SODDI defense. I felt very well-prepared, plus I wanted to tell the jury what really happened. The jury paid close attention to me on the stand and when I was done, I knew it was over. By the time I was off the stand, it was right before lunch time. After the judge sent my jury to lunch, my lawyer made some kind of motion to get rid of my case before Judge Weber who denied it but said to make that motion again after lunch, then advised us all to come back in an hour for closing arguments. Then the judge said something like: "Mr. Rose, the DA's office really should think about not wasting judges' valuable time by bringing these cases that never should have ended up in court." I don't know why that's not in the transcript. The court reporter must have been thinking the same thing everyone else was –I was going to win because the case was so weak. Judge W. also told Rose, "This case will be done one way or another after lunch, you understand what I am saying?" Rose -- I loved this – whimpered, "Yes, Your Honor," sounding like someone stole their lunch money. Haller told me that this was a good indication the judge was thinking that if the jury was crazy enough to convict -- which was highly unlikely -- she would seriously consider throwing out my case on her own.

As we walked to his office car, I was hungry for the first time in weeks and told Haller I needed food! I hadn't eaten much for a while because of the stress the trial had on me: I had been keeping the charges and the trial from my family because it would kill them if they found out. They don't understand the whole innocent until proven guilty thing and think that everyone who gets arrested or goes to jail is guilty. They never would have looked at me the same again if they found out. I figured once this was over, they would never be the wiser and I could continue my life as normal.

Haller was thrilled when I told him I was ravenous and suggested that we go to the Court Deli Diner next to the Courthouse and his Pontiac. I immediately pulled out my phone to read reviews of the restaurant, starting from the first one, like I always do, but after I read a couple of them, Haller said, "What, you don't trust me?" Of course, I did trust him, especially after that Perry Mason performance in the courtroom so I stopped reading. Exhibit 4 is the Yelp site of the reviews I started to read that day, but I never saw the third review because if I had I never would have agreed to go there. Haller must have stopped me from reading the reviews before I got to that one.

Exhibits 5 through 12 are all pictures of the exterior and interior of the Court Deli as it was on June 21, 2022, except they were not taken on the same day and do not show the number of people in the restaurant when Haller and I were there. Exhibit 5 shows how close the Courthouse is to the restaurant. We walked into the restaurant and the hostess sat us in the booth where the person in the yellow shirt is sitting in Exhibit 8. I sat down first in the seat where the person on the left is sitting with their kid, and Haller sat on the other side facing me. Every table in the restaurant was filled. I don't know how exactly how many people were sitting at the tables around us -- just that there were a lot. Yes, there were lots of people in suits, but there were people in shorts and t-shirts too, like the people in the photos.

After we sat down, I felt like I was on top of the world and couldn't wait to dive face first into a celebratory bacon cheeseburger. After we ordered we just sat there in silence on our phones. I started playing around on ChatGP and asking it for examples of cross examination of prosecution witnesses in a wallet theft case and saw that Haller had come up with and asked Rose's witnesses many of the same questions that were examples on ChatGP. I showed them to Haller and cracked a joke, saying something like, "Now I know where you got your inspiration." Haller looked confused. I told him all about ChatGP and how it's going to change the world. No, I didn't tell him my concerns about using the platform. I wasn't doing a Ted talk! Haller was dismissive, and said, "Not my world." I said, "Yeah, you're right, you're better than ChatGP," and Haller responded, "Damn right I am."

The food arrived and I dove into my burger. As I was on bite number two, a group of press people walked in and were seated in the section of the restaurant by the window in Exhibit 9. When I asked Haller why there were so much press today, he said they were reporting on a big drug conspiracy trial, then he typed something in his phone and showed me a picture of someone.

"This is part of the big news story - this guy just testified in the case and he's the poster child for the phrase, 'snitches get stitches.'" Exhibit 14 is what he showed me. I knew that person from when I was in jail waiting for my bail hearing. He sat next to me for most of the time I was in that holding cell. I was terrified being in the cell with all those criminals but I thought I had lucked out with this guy, he was so encouraging, telling me everything was going to be ok. I just wanted to keep the conversation going with him because it was a nice distraction. I wasn't able to hear everything he said because there were a lot of guys in a very small space talking all at once. Plus several met with their lawyers through the bars of the cell. I don't really remember everything I said, but I did tell him things about my ridiculous case, like how I got arrested and what the charges were. Then we just chit-chatted about sports, music we liked, and stuff like that.

Haller said the guy in the picture was Andie Glouberman. According to Haller, just yesterday Glouberman ratted out his co-defendants in this drug-ring case. I started to say, "I know …," wanting to tell him I knew who that person was, but Haller was really heated about Glouberman, saying he got a sweetheart deal from the DA to flip on his friends and used words like, liar, rat, and "people like this will say anything to save their skin." Haller said he'd heard a rumor that the DA's office had made the deal for Glouberman to rat out not only his co-defendants in that drug case, but also anyone else he could dish up to the DA. Haller told me this guy would flip on anyone if it helped him get a lighter sentence in the conspiracy case, even if it meant lying through his teeth.

Feeling stressed, I immediately asked the waitress for the check - telling Haller we should leave. Haller asked why, pointing out that the food had just gotten there. Haller then put his hand on my shoulder and I took that to mean he was telling me to stay. Haller asked what had gotten into me. I couldn't really talk, but definitely said in a low voice, a very low whisper, "I can't believe I talked to him." I don't know why I whispered, it must have been because I was in the early stages of a freak out. I thought he wanted to discuss what was on my mind and assumed he knew I wanted to share something about the snitch. Haller said he couldn't hear me and, "If I can't hear you, I can't help you. Remember, you can tell me anything." That gave me a little bit of comfort, so I said in a much louder voice so he could hear me, "I talked to that snitch about my case when I was in jail." Immediately after I said that Haller put his index finger near his mouth as he started to look around the diner and said, "Let's go." I understood the index finger gesture to be the international sign for "shhh." We both got up and started to head to the counter to pay. I waited a second and started to ask the server for some boxes, but Heller said, "Now. We have to go now." Haller never spoke to me in this type of tone before and I took it to mean that Haller thought me talking to Glouberman was going to be bad for my case.

We went to the counter by the register to pay and my freak out was escalating because of the tone Haller had just used. It's the area next to the booth we were sitting in next to the partition in Ex. 10. I have no idea how many people were in line, but I know there was a line. Maybe one group was in front of us and one group behind us, but I really don't remember.

I remember we waited 20, 30, 40 seconds - - not more than a minute -- before we got to the register to pay. While we were on line, Haller looked visibly shaken, then he leaned in and whispered, “Don’t worry, you’re small potatoes to the DA’s office and they use their snitches to fry bigger fish.” I guess Haller was trying to calm me down, but all that kept playing in my head were the words, “use the snitch to fry me.” These words pushed me into full-on panic mode. While still in line I asked Haller whether Rose would find out about my speaking to Glouberman while I was in the holding cell. As soon as the last word left my mouth, Haller mouthed the words “shut up” while gesturing his hand to his throat for me to “cut” it. I stopped talking until we were outside the diner.

Once inside his car Haller explained that the place was crawling with people from the DA’s office and that anything I said in there would not be privileged. This was news to me. Now I was panicking because I thought everything I said to my lawyer was privileged. At no point while we were in the restaurant did he tell me otherwise. I know Haller was asking me questions when we were in the car about what I said to Glouberman “to prepare for the worst-case scenario,” but I honestly can’t remember what I said. There’s nothing you could say to me or show me that would refresh my recollection. Haller kept reassuring me that everything was going to be fine, that the chances of Rose getting the information were slim, and that even if he did, there was no way Rose would be able to find and prepare Glouberman in the short window of time between now and returning to the courtroom, because Judge Weber would never give Rose an adjournment.

When we got back to court, the judge took the bench; Rose stood up and told the judge he would be calling Glouberman as a rebuttal witness. I don’t remember anything too well from that afternoon – I was kind of rehashing the mistakes I apparently made in the diner and wondering why Haller had let me wander into that kind of a trap without more explanation.

When Haller asked the judge for an adjournment to the next day to prepare his cross for this surprise witness, she said no -- that a half hour was plenty. It’s true that right before Haller left the courtroom to prepare his cross-examination [witness used air quotes when saying “prepare”], I did remind him that he knew what to do because he was better than ChatGP. No, I didn’t say that to encourage him to use ChatGP or in any way consent to him using it. I said it because I thought, at least up until the time he cross-examined Glouberman, that he was an excellent trial lawyer who knew what to do. It was nothing more than a client giving a lawyer a pep talk. But thinking about it all in the light of day after the trial ended, I do think that Haller’s putting me in a position where I waived my attorney-client privilege and then using AI to cross examine that snitch badly violated my rights.

During cross Haller took a laptop to the podium, which I thought was weird because Haller took only a legal pad up with him during the other examinations. Then Haller read from the laptop during most of cross-exam, except for the first few questions. When Haller sat down from what was a short cross and put the laptop on counsel table I saw a ChatGP conversation on the screen that looked like a script. I’m not sure if Exhibit 15 is what was on the screen: I wasn’t reading it carefully. Haller saw me looking at his screen and wrote me a post-it note, Exhibit 16.

I was horrified because I have a right to be represented by a human, not a robot. But then we went straight to Rose's and Haller's closing arguments, which calmed me down because Haller's was excellent. I was back to feeling good about moving past this nightmare.

Then, the jury convicted me of petit larceny and the Judge sentenced me to six months of probation. I was shocked. I immediately hired a new lawyer, which is costing me about $10,000 altogether, to bring this suit against Haller. Yes, we discussed whether I should bring also, or instead, what he called an ineffective assistance of counsel claim. I decided I had had enough of criminal court, and the damage had been done as I'm about to tell you, so I'm sticking just with the civil case.

The conviction has caused me great emotional distress. My family doesn't trust me anymore and thinks I'm a criminal. My relationship with them will never be the same. I lost my job at Colossal when I was arrested and I stayed unemployed for eight months, which cost me about $20,000 in lost income. I also had to drop out of school because I couldn't afford it anymore, and no one was going to hire me after all the press this baseless case got. Now I drive around in a stupid van helping dumb people with their computer issues by turning their computer off and on. An economist I consulted guesstimated that my future loss of income from not having my master's is in the range of $1,250,000.

I, Libni Reyes, certify that I have read the foregoing pages of my testimony as transcribed; that it is a true and correct transcript of the testimony given by me in this deposition held February 15, 2023, in the offices of plaintiff's counsel; and that it contains all that I can remember of the issues and events addressed in it.

Libni Reyes

STATE OF SEAVIEW)

SS COUNTY OF SUNSET)
Deposition held February 15, 2023
Subscribed and sworn before me March 10, 2023

Harry Gebippe
Harry Gebippe, Cert. Ct. Rptr.

Pre-trial Certification
I, LIBNI REYES, certify that I am familiar with the issues in the case, that I reviewed this deposition transcript shortly before the trial of this matter, and that I have no further information pertinent to the case.

Libni Reyes

Dated: March 12,20244

Deposition of Mica Haller

February 28, 2023

MICA HALLER, being duly sworn, deposes and says:

I'm 30 years old. I graduated from Columbia Law School in 2018 and immediately started working at the Sunset County District Attorney's office. I left after 18 months in part because the DA created a culture where promotions were based on the number of jury verdicts an ADA took, regardless of the outcome. This led to prosecuting and trying cases that should have been dismissed or resolved through reasonable plea offers from our office. Yes, I did try cases, and got convictions, including against a few people who probably shouldn't have been prosecuted because supervisors turned me away when I took that position, So I got out as soon as I could without doing the irreparable damage to my reputation and career that an earlier resignation would have caused. This did mean that I missed out on more trial experience in that office, as I had just been promoted to the Felony bureau a week before I resigned. Though during my time there I tried over 25 bench and jury trials, I was disappointed that I never tried a felony while there.

After I left the DA's office I started my own criminal defense firm. Being good at foreign languages, I also polished my basic Spanish and learned a little Arabic, Korean, and Hebrew (greetings and thank-you's) so I could relate to my clients better. That's one of the main reasons I went to law school – to establish a personal-relationship style of practice. My experience at the DA's, while a strain for me because it was antithetical to this goal of mine, proved to be a boon for business as a criminal defense lawyer. I got a lot of clients right away. My practice consists exclusively of misdemeanor cases so far – DUI's, low-level drug charges, bar-fight type assaults. For my first two years out I rented an office at a personal injury firm right next to the courthouse. As will become pertinent in this case, around the corner about 40 feet from my office was the Court Deli Restaurant, as shown on Exhibit 5, and this was also adjacent to the DA's office, which is located inside the Courthouse.

Unfortunately, my office building had an electrical fire in February of 2022 and everyone had to vacate the property for 6 months while they did the construction and repair work. Yes, that's when I started working out of my Pontiac GTO.

The car in Exhibit 1 was left to me by my parents when they both died after a scaffold they were walking under collapsed because of the negligence of the construction company. Ibarra & Samano, the firm I was renting office space from, got me a large settlement. And while my parents didn't really have much, they had this car, which is more special to me as their only child than the pot of gold I got from the lawsuit.

After the office fire, I said to myself, "When life gives you Lincoln Lawyer, make Lincoln Lawyerade." I parked the car on the same street as my office, sandwiched between the Courthouse and the Diner. It was marketing genius. People would walk out of court, see me in the car and start talking to me. I got a lot of business from that and met some great people. After a month, I decided to put a sign in the windshield reading: "Tap on this window, stay out of that cell." Yes, I was referring to a prison cell. The sign was a smashing success. I had almost more clients than I could handle, money was rolling in, but I kept the number to a manageable amount, allowing me to establish real relationships of trust with each client and fully prepare their cases. There was something about sitting with them in the car that seemed to work for both me and the clients. I got the sense they really felt comfortable with me from the beginning, in part because of the lack of office formality. No, I don't have the sign anymore, I threw it away after I moved back into my office in August, 2022.

I first met Libni Reyes in April 2022, when he tapped on my car window. I asked him which ADA was handling the case because I know of most of them and have worked with many when I was an ADA or against them now that I'm a defense lawyer. This information gives me a sense of how much work the case will require and helps me estimate attorney's fees during my first or second meeting with new clients. When I heard that Libni's DA was Jared Rose, I knew Libni was going to get prosecuted like an accused murderer. In my view, all Rose cares about is how many trials he has so he can move up the ranks faster under the DA's "incentive program" – that's my term – they try to keep this aspect of the office hidden from view, of course. My belief was confirmed when I learned how thin the case was against Libni.

The case was riddled with reasonable doubt, in my view. First, Libni didn't act like someone who stole anything. In fact he acted just the opposite. Libni made real efforts to find Bath, the owner of the wallet, first online, then took the wallet to work the next day at 7 am and locked it in his locker for safe-keeping until and in case the owner showed up. Who steals money and makes sure to be there when the victim learns of the theft? In my field that's called "consciousness of innocence." On top of that, Bath's statement to the police said he "thought" $500 was missing but that he "couldn't be sure." Yes, later at trial Bath said he was sure that sum of money was missing, but in trial preps I did some digging and learned that just one year earlier, at age 81, he had moved to a graduated-care senior living community. I also discovered that Bath had been convicted eight years ago for felony DUI and just two years ago for low level tax fraud, understating his annual income two separate years. So my job was to figure out whether to use (a) his senior status and (b) one or both of his convictions if he testified at trial to impeach his credibility.

Since my analysis of Libni's case led me to conclude that winning the trial for us largely turned on my cross examination of Bath, I conducted an 8-person focus group at a co-working space near the courthouse. I hired participants through Facebook and an actor to play Bath. I tried different approaches to see which points on cross hit the hardest and which didn't work as well. There was one clear take away from the focus group – cross examining on his age and/or his convictions would almost certainly backfire with the real jury. All of the mock jurors said I was beating up on this 82-year-old victim too much. They said, "Haller, you don't need to point out his age – the jury will see him on the stand and infer what they want to about his ability to recall, etc. And you'd better not pick on him with the convictions: everyone fudges on their taxes, and the DUI – he's learned his lesson and stayed a responsible driver for 8 years, so big deal." They said the more I beat him up , the more they felt bad for him and the less persuaded they were by the other points I was trying to bring home to them – one, how he admitted to the police he wasn't really sure whether or what amount of money was missing, and two, that he couldn't rule out that someone else took it. By the way, in his statement to the police Bath said he left Colossal around 10:30 a.m., noticed his wallet was missing at lunchtime, finally remembered only that night he might have dropped it in the Colossal parking lot, which explained why he didn't go back until the next morning. This gave the real thief, in our SODDI defense theory -- Some Other Dude Did It – almost a full 12 hours to loot the wallet before Libni found it.

The trial began on June 21, 2022, with very quick jury selection one day before. (Judge Weber caps misdemeanor jury selection at one and a half hours- 45 minutes per side.) The judge is known for running a military-style courtroom. Everything starts on time, ends on time, and moves very quickly. Judge Weber also isn't a fan of the DA's policies and tends to make the cases she feels are weak – she calls them "nonsense cases" -- move at a much quicker pace than other cases on her docket. From the beginning it was my strong sense she really did not think much of the charges against Libni. She made several off-the-record comments to Rose during our pretrial appearances like, "From what I'm seeing up to this point, you will need to come in with some solid proof or I might just grant defense counsel's motion for a judgment of acquittal at trial." The Judge was very clear that the case would get tried in one day and that the jury would start deliberations at the end of that day or the next morning at the latest. I didn't think that would be a problem because Rose was only calling two witnesses -- the store manager, who would be very quick, and Bath. I also prepped Libni to testify because I assessed he would be a credible witness on his own behalf and we needed his testimony to establish what time he picked up the wallet.

My opening statement went really well, I thought – jurors were nodding their heads, giving positive body language. My cross of the manager brought out the facts I needed to support the points I planned to make in my closing argument, including how Libni's handling of the wallet showed consciousness of innocence, not guilt.

I felt my cross of Bath was one of the sharpest I've ever done. Based on what I had learned from the focus group, I crossed only on the topics affecting the credibility of his claim that $500 was missing, and on the time gap that established the SODDI defense. I omitted anything about his age --- he looked at least 85 if not older, so the jury could consider that without my mentioning it (as the focus group had suggested), and I did not touch on his convictions, which Rose had not brought up on his direct — as I'm sure you know counsel, that's a technique called "stealing the thunder" – I guess Rose thought I was going to walk into that trap and then he would come back on redirect with some sympathetic backstory regarding the convictions. By the surprised and disappointed look on his face when I said "no further questions," it was definitely the right call not to ask about the convictions. When the prosecution rested the judge asked if I planned to put on a case. After briefly conferring with Libni, I said we would present him as our only defense witness. Though the judge denied my motion for an acquittal at the end of the State's case, she urged me to remake the motion at the end of the defense case. I took that as a very good sign. She also told me to call Libni before the lunch break, cross would follow, then closings would happen right after lunch.

On his direct Libni had the jury eating out of his hands; it looked to me like they absolutely loved him. Rose tried to bring out Libni's financial circumstances to suggest his motive to take the money, but the jury looked bored by or dubious of his points. The old saying is true - prosecutors don't get much practice doing crosses. Libni was excused from the witness stand right before lunch and the defense rested. I felt that after my very fine cross of Bath and, now, my direct of Libni, Rose's case was "donezo" and the judge would grant my renewed motion for judgment of acquittal scheduled for right after the lunch break.

Libni said he was really happy with the way the trial was going and what he really wanted over the break was to stick his face into a good burger. He had told me during our prep sessions that he wasn't eating much in the weeks before trial and was living off caffeine, so I was very happy he had an appetite. I suggested the Court Deli Restaurant because the burgers served at the only three other restaurants close enough to use over the hour break got inferior ratings to the Deli's. Libni started looking at his phone reading restaurant reviews as we crossed the street, walked into the restaurant, and got into our seats. Yes, I knew that lots of people from the DA's Office eat there, but I wasn't concerned about that. Defense lawyers bring their clients there all the time and there's no rule against grabbing a bite in a place like that with a client. It wasn't like I was preparing Libni to testify or discussing the case with him. Everything was done, we thought, except our closing arguments. Then the case would be complete one way or the other, hopefully with either the jury coming back with a quick "not guilty" or the judge granting our motion for acquittal. I know every defense lawyer says this, but in this case, it was true - Libni didn't commit this crime. Forget reasonable doubt – I thought there was no doubt that Libni was innocent.

The hostess took us to the booth where the person in the yellow shirt in Exhibit 8 is sitting. Libni sat in the bench to the left of the picture. Libni was buried in his phone as we walked to the table. He picked the seat I had wanted to use so I could see and be seen, because I'm still building my practice -- the Deli is a hub for the local legal community, so appearing there is a bit of free publicity.

It wasn't very busy when we sat down. There wasn't anyone sitting at the table to my left where the guy is playing on his phone in Exhibit 8. I'm not sure if there was anyone sitting behind me, but I'm sure I would have checked and registered as we walked over if anyone was seated there. The restaurant is typically packed during lunch with every table filled – that day was no exception.

As we sat down, Libni said pretty loudly something like, "I'm King of the World." I laughed and told him to keep his voice down. I didn't explain why I gave that instruction. I thought he'd have known to keep a low profile in a restaurant that overlooks the Courthouse and the DA's Office – I thought he would have been reminded of my written and oral instructions on how to protect the privilege. We didn't go over that yet in this deposition, but it's important, of course. Exhibit 3 is the Retainer Agreement with an instruction on the privilege. I give that to all my clients and explain it in detail, both at the outset and repeatedly during the case preparations. As that is my standard practice, I am confident I did all that with Libni.

He must have understood my instructions on voice volume in the restaurant because after we ordered, he stayed quiet and again got lost in his phone as we waited for our food. I checked emails and so on until Libni broke the silence to show me some things on his phone, saying they were ChatG something. I had read about AI platforms that could answer some kinds of inquiries and help with case preparations, but I had never used them or bothered to learn about them. I had skimmed an article about ChatGP a few months earlier but never paid much attention to the platform. But because I knew this tech stuff was in Libni's wheelhouse, I asked him what it was, how it worked, what I could use it for, and whether there were any limitations on its use. Libni gave me quite the lesson and seemed very supportive of the platform. He even typed some questions into the platform about examinations during trial, and showed me several direct and cross-examinations where the AI generated many of the same questions I had asked during the trial. As I had felt pretty good about my performance that morning, I thought there might be some AI-generated questions I could actually use in my next trial -- I appreciated the education. There had never been any local CLE's on ChatGP or AI that I was aware of prior to June 2022, so this whole thing was a brave new world to me. After this intro to AI by my computer-centric client, the food arrived and Libni dove in. Shortly after that, a gaggle of people proudly sporting their press badges walked in and were seated in the section of the restaurant by the window in Exhibit 9.

I didn't notice them at first, but when Libni asked me why there was so much press in the restaurant I turned my head and saw them. I pulled up Exhibit 14 in my phone and showed the photo to Libni and said, "This guy is the reason for the press. He's Andy Glouberman, and just testified as a prosecution witness against his co-defendants in a current drug conspiracy case on another floor of the Courthouse." I filled Libni in some more: that the courthouse talk was that Glouberman was not only getting a great plea deal from the DA for that testimony, but possibly an even sweeter deal if he was able to provide evidence against other defendants in unrelated cases. Plus, I knew about another time he snitched in a lower-level narcotics case. While I was waiting for a status call on a case, I heard the DA recommend a really light sentence "due to Mr. Glouberman's forthright testimony against his co-defendant." I told Libni he is "the quintessential jailhouse snitch," and I think I went on a little rant about how I feel about "rats" like Glouberman.

As soon as I finished answering Libni's question about Glouberman, Libni abruptly asked for the check and said, "We have to leave." I asked Libni what the rush was given that the food just got there. Libni started to get up and I put my hand on his shoulder because I wanted him to sit and eat, given that he hadn't done so in a while because of all the pretrial stress. Libni then said something, but I have no idea what because he spoke in a very low whisper. I told Libni I couldn't hear him, thinking he was telling me something about the food being bad or not sitting well after his first few bites. The case had gone in so well, I didn't want to have to beseech Judge "Rocket Docket" Weber to adjourn the case because of a stomach issue. Libni then said loudly, "I talked to that guy when I was in jail." His volume was the same as when he said he felt like the king of world when we first sat down. I put my finger up and made a "shush" sound, looked around the diner in an exaggerated way to emphasize the public nature of the place, and said, "You can't say that stuff in here" and "Let's go." I didn't say more than that because I didn't want to give a legal lecture and attract more attention to us. I wanted Libni to stop talking and for us to get out of the diner ASAP with no fanfare. It seemed obvious to me that Libni understood my clear directive to shut up because he didn't talk or ask follow-up while we were still seated. If they had said another word, I would have reminded them about the privilege issue exactly as I had previously done when we first met and walked through my retainer letter together, which included an explanation of the attorney-client privilege. As I said earlier in my deposition, it's also my practice to remind my clients about the privilege several times over the course of the representation, so I'm sure I did that in this case. I clearly recall doing so early on when Libni told me he had talked briefly with his mother about the case; I told him not to talk with anyone other than me, period.

Back to the diner: after this exchange I told Libni again in a stern tone that we had to pay and leave right away, There were about five people in front of us at the cashier's counter (Ex. 10) waiting to pay, I don't know if they were together or separate.

There were also a few groups behind us. As we walked to the line to pay, I did not notice if anyone from the DA's office was seated near us or was in the line to pay. As we were waiting, Libni looked like he was on the verge of a breakdown and I wanted to calm him down before we got in my car to discuss this further. So, I said really softly something like, "Don't worry, you're small potatoes, and the DA's office uses their snitches to fry bigger fish than you." But then, right there in line, Libni asked in a normal voice, "Is Rose going to find out I talked to Glouberman in jail?" I couldn't believe he said that after all the warnings I had given him. No, it wasn't loud, but there were people around us and we know now that someone from the DA's office heard him and got back to Rose – because that's what Rose told the judge. Two interns were apparently in our line at the same time. No, I didn't see them or know who they are.

As soon as the words about "Rose finding out" left Libni's mouth, I told him to shut up and made an-- aggressive gesture for him to "cut it out." I had to escalate things because I knew the importance of stopping Libni from lighting his attorney client privilege on fire. Once we were outside, I again instructed Libni to stop talking until we got in the car. Once there, I told Libni that the diner was basically wall- to-wall people from the DA's Office and reminded him that anything he said in the presence of anyone other than me was not protected by the privilege. No, I didn't tell him all this before we entered the diner, but everything I did while inside the diner was to convey that message. Plus, I've looked at the reviews for the diner, and I know they all say the place is full of DA's, so Libni definitely was aware of that fact before entering the restaurant after reading the reviews on his phone.

I saw Libni was worried, so I decided not to rip into his mistakes. I needed more information to figure out whether this was even an issue. In Sunset County Court, the holding cells for people awaiting bail hearings, etc., are 20x20, with benches on three sides of the room all around the perimeter. There's not much room for walking around inside the holding cell. Libni had the bad luck to sit next to Glouberman for a lot of the time he was in there. Libni told me Glouberman started a conversation with him asking what he was in for. Libni told me he shared just the facts he had told me in our case preparations, so nothing concerning there. I asked if he said anything else, to which he responded that he also may have told Glouberman he hadn't seen any money in the wallet, so it made it easy to decide not to take what wasn't there to take. Because I know the holding cell has awful acoustics and even if it's at only half capacity, it can be very challenging to hear what people are saying, particularly when they are all talking at the same time, it was doubtful Glouberman could confidently hear anything that was actually said to him. So both Libni's information on their conversation and the setting where it took place made me confident Glouberman could have nothing to offer.

I explained to Libni that from a practical standpoint, even if Glouberman heard him, it wouldn't be helpful to the prosecution. Thinking about taking money isn't a crime, especially when the person says there was nothing there to take. Additionally, even if Rose thought it somehow could be helpful, the odds of anyone hearing what Libni blurted out in the diner and getting that information to Rose, and Rose having time to talk to Glouberman before trial resumed after lunch, were close to zero. And even if Rose wanted Glouberman to testify, Judge Weber would never adjourn the case to allow Rose to prepare the witness. That made it even more unlikely that Rose would call Glouberman – he would never call a witness to the stand he had not prepared beforehand.

However, to my great shock, when we returned to court after lunch, Rose told the judge that he was calling Glouberman as a rebuttal witness. Explaining that he had just learned about this witness at lunch, he requested an adjournment until the next morning to prepare. Exhibit 13 is a transcript of everything that happened in court immediately after lunch leading up to Glouberman's testimony. Rose gave what is called an "offer of proof" to the Judge, stating that Glouberman would testify that while in the holding cell Libni had confessed to taking the money from the wallet. With this surprise, lying rebuttal witness, I needed time to fully prepare my cross-examination and urged the judge to grant Rose's request for an overnight adjournment. In support of that request I reminded the Court about the importance of due process for my client when facing criminal charges -- which in this case meant adequate time to prepare for a potentially damaging surprise prosecution witness. Justice, I said, required the Judge to grant overnight to prepare. I felt this so strongly that I admit I got bit worked up during my request. But the judge denied my request, ending up giving me only 30 minutes after Rose's direct examination to prepare my cross.

Because my practice had been all misdemeanors to date, I had never cross examined a "confidential informant" – a "snitch" – before. But I knew that the basic principles of cross examination applied – attack the credibility of the witness. I had confidence my cross-exam would be strong. If Rose had zero minutes to prepare, I could live with the 30 minutes I had to prepare. After Glouberman's direct exam where he repeatedly lied in line with Rose's offer of proof, I went to a nearby conference room to prepare. With Glouberman's current plea agreement (Ex. 14a) and conviction record (Ex. 14b) that Rose had given me - as required by criminal-procedure law - in hand, I started my preparation.

First I texted my former mentor at the DA's Office, Leland Washington, asking for tips on cross examining a snitch. Exhibit 17 is the text message I sent to Leland; he responded only the next day. So with little time left, I jotted some notes about questions to ask and then, thinking of Libni's examples of ChatGP cross-exam questions, I went on ChatGP real quick to see if I could get any guidance. Exhibit 15 is a screen shot of the search I did and the results. Oh yes, it's noteworthy, I believe, that as I went to do my preps, Libni said, "Don't forget about your friend, ChatGP."

In his direct of Glouberman, Rose had gone through his priors and the plea deal very quickly, as if to say they did not matter much, and then asked three questions about the holding-cell conversation – "Do you know the defendant? How do you know him? What did he tell you in that conversation?" I decided to do a short cross on Glouberman's inability to hear Libni's words inside that very loud cell and to spend most of my time on his motive to lie to get a much better result in his pending criminal case. I don't remember if I took my laptop up with me when I was asking the questions, but I may have. No, I didn't just read the ChatGP questions off the computer screen. I didn't use ChatGP at all for the cross on the noisy cell and asked only some of the ChatGP questions on the "snitch" part of my cross. I added some of my own questions from my notes. After I finished I wrote Libni the post-it note in Exhibit 16 to make him feel better, as I was sure he was beating himself up for screwing up in the diner. I don't have the other notes I used for the cross – I must have tossed them when collecting my papers at the end of the trial.

The jury verdict against Libni was, of course, unfortunate. But, as you have asked me how I explain it, I would be a poor criminal lawyer if I did not defend myself against the charges of malpractice and unethical conduct. With respect to the attorney-client privilege issue, as I made clear earlier, I informed LIbni on several occasions what the privilege means and how to make sure it stays intact throughout my representation of them by only sharing confidential information about the case with me when we were alone. I also indicated through voice and gestures while we were inside the restaurant that LIbni should STOP talking to me about any conversation with Glouberman, again, until we were alone. He ignored my advice – but short of putting my hand over his mouth, I couldn't enforce my instructions any better.

And as to using ChatGT as part of my cross-examination against Glouberman, the combination of the ChatGT questions I asked, mixed in with my own questions, furthered my cross-examination dual goals of making the jury see that this informant was lying about hearing any type of confession in the holding cell and that he had huge reasons for telling those lies: to get a greatly reduced sentence in the drug conspiracy case where he was dead to rights. In the tight 30-minute period the judge, over my objection, gave me to prepare the cross, I made sure to include enough questions to leave the strong impression with the jury that this man would sell his own mother for a price. That's good lawyering under stressful conditions and certainly not legal malpractice.

I, Mica Haller, certify that I have read the foregoing pages of my testimony as transcribed; that it is a true and correct transcript of the testimony given by me in this deposition held February 28, 2023, in the offices of defendant's counsel; and that it contains all that I can remember of the issues and events addressed in it.

Mica Haller

STATE OF SEAVIEW)

SS COUNTY OF SUNSET)
Deposition held February 28, 2023

Subscribed and sworn before me March 19, 2023

Harry Gebippe
Harry Gebippe, Cert. Ct. Rptr.

Pre-trial Certification
I, MICA HALLER, certify that I am familiar with the issues in the case, that I reviewed this deposition transcript shortly before the trial of this matter, and that I have no further information pertinent to the case.

Mica Haller

Dated: March 12, 2024

Expert Report of Per Severance

A. Introduction. I have been retained by counsel for Plaintiff Libni Reyes in the matter of *Reyes v. Haller* to give my expert opinion on whether Mr. Haller met his obligations under applicable legal malpractice law and the Seaview Model Rules of Professional Conduct (SMRPC) in his defense of Mr. Reyes in *State v. Reyes.* In my opinion, Mr. Haller fell far short of the standard of care expected of attorneys in his –and indeed, all – jurisdictions.

To reach my conclusions I reviewed:

- The parties' depositions
- The trial transcript in *State v. Reyes*
- All exhibits admitted in *State v. Reyes*
- The current SMRPC, including all commentaries therein
- Formal Opinion 508 (August 5, 2021), Seaview Bar Association Standing Committee on Ethics & Professional Responsibility (Ex. Severance-2)Applicable case law on legal malpractice

B. Bases of My Opinion:

1. **Haller did not properly and competently protect Reyes's attorney-client privilege.**

The attorney-client privilege is so enshrined in Anglo-American jurisprudence, it trumps two essential goals of trials and trial evidence: 1) truth-seeking (see, e.g. administration of the oath to all witnesses; the law of perjury; the right of cross-examination to test credibility) and 2) the admissibility of all relevant evidence (SRE 402). The importance of the privilege is underscored by the Model Rules's emphasis on the lawyer's ethical obligation of confidentiality (SMRPC 1.6). Accordingly, it is of the utmost importance that the lawyer, who understands the law of privilege, both competently and adequately explain the privilege to the client and take adequate steps to ensure the client's ability to apply the privilege in actual practice.

Haller met the first obligation of instruction and explanation but failed at the second. He did not vigilantly reiterate the principles and application of the privilege as events unfolded at the Court Diner, with results disastrous for Reyes. Reyes's reference to his station-house conversation with "The Snitch," aloud and within hearing of people from the DA's Office who were nearby, led to Glouberman's recitation of Reyes's "confession" to the crime. Given the very favorable balance of the case in favor of Reyes's defense up to that point in the trial, this evidence was a "land mine" that solidified the prosecution's case and blew up the defense case, leading to the guilty verdict.

I need not comment at any length on this evaluation of the two sides of the case sans the confession. Haller brought out very well (a) Reyes's "consciousness of innocence" in bringing the wallet directly to its owner – arguably an action no thief would risk; (b) the twelve-hour time lapse between Bath's dropping the wallet and Reyes's finding it empty of cash, giving plenty of time for Some Other Dude to have Done It (a vividly catchy theme, well-used by Haller); (c) Bath's lack of certainty about how much money, if any, had been in the wallet. On those facts, I consider it virtually impossible that the jury would have found Reyes guilty beyond a reasonable doubt.

With such an advantageous status of the case at lunchtime, what should Haller have done differently to safeguard the privilege? Very simply, he should have reiterated to Reyes a warning to avoid comment about the case at all costs, <u>anywhere and at any time, but especially when entering a restaurant populated by virtually the entire letterhead and staff of the DA's Office.</u> In my experience and that of the lawyers I tried cases with and against, the instruction on privilege needs repetition when arriving at the courthouse; when adjourning to the hallways; when visiting the rest rooms; when riding in the elevator; when leaving the courthouse; and when appearing together in any public setting.

Haller's early coverage of the privilege, repeated once early on in case preparation, does not save him from a finding that he did not exercise the required ethical responsibilities of Competence (SMRPC 1.1), Diligence (SMRPC 1.3), and Communication (SMRPC 1.4, especially Subsection [b]: "Duty to Explain the Law …") to safeguard Confidentiality (SMRPC 1.6). Haller's coverage of the principles of the privilege in the Agreement (Ex. 3) was a good start. When early in trial preparations Reyes made reference to his intention to talk the case over with a friend (Reyes Dep., p.7, ll. 7-11), Haller alertly used that opportunity to underscore the privilege (Haller Dep., p.16, ll. 31-32). Still, these early communications were no substitute for on-the-spot reminders, required due to human psychology, in which trial lawyers must be proficient. That is, at trial clients nerves are jangled; adrenaline courses through their veins; under stress their breathing is shallow, depriving the brain of oxygen and diminishing the ability to think clearly; they have likely slept poorly during the weeks leading to, and during, trial, depriving them of crisp and logical reasoning. These symptoms are magnified many-fold for a criminal defendant, who stands to lose liberty, if not life, at the approaching outcome. Accordingly, the lawyer must anticipate and guard against the client's likely tenuous grasp of the subtler aspects of the privilege. Haller did not do so. He did not re-instruct Reyes; he did not adequately silence Reyes in the restaurant even when forewarned of the approaching danger of disclosure.

2. The loss of the privilege was compounded by Haller's utterly incompetent cross examination of rebuttal witness Glouberman, most especially due to Haller's misplaced reliance on AI.

Given the favorable but delicate balance of the case in plaintiff's favor at morning's end, the need to counteract the "surprise" rebuttal witness's devastating testimony of Reyes's supposed "confession" was paramount. In colloquial terms, Haller blew it.

Preliminarily, I will distinguish the ways in which Haller competently crossed Glouberman:

- He adequately called into question Glouberman's ability to perceive – to hear accurately – and to recall. See Perrin et al., The Art & Science of Advocacy at 325-328.
- He adequately used Glouberman's record of convictions to impeach his credibility. SRE 609(a)(1-2).

But those are "garden-variety" impeachment techniques that jurors are used to hearing in courtroom dramas. For that reason, they don't carry a lot of "punch" – they are not "knock-out blows." Jurors are likely to consider them only with an attitude of "yeah, so ...?"

The crucial tool to use against a jailhouse snitch is the argument of the "benefit of the bargain." The snitch is testifying in return for a promise of favorable treatment in his own case – lighter punishment, reduced charges, in some cases even complete immunity. His need to testify favorably for the prosecution is a powerful motive to lie or embellish the facts. In oratorical terms for the closing argument to the jury, "Glouberman sold his testimony against Mr. Reyes to save himself. This creep – whose own criminal record shows he cannot be trusted – is lying to get himself off the hook. You have to doubt his every word, don't you, members of the jury? Yet the prosecution wants you to find Mr. Reyes guilty <u>beyond a reasonable doubt</u>. As Texas lawyers might say, 'That dog won't hunt.'"[1]

Rhetoric aside, the point of the witness's lack of credibility (polite lawyer talk for "lying his head off") due to his personal interest in meeting the prosecutor's expectations needs to be made forcefully and effectively in the actual cross-examination itself; it cannot come to the fore only during closing argument. The jury has to be led to think <u>during the cross</u>, "I don't believe this creep for one minute." Haller's cross was neither forceful nor effective, as I will review in Ex. Severance-1. From his deposition we know why: he used as his guide an incompetent instructor – ChatGT. This constituted a complete abandonment of his own (not AI's) duties of competence and diligence.

[1] In my law-school trial advocacy mock trial, my partner – from Texas – used the expression: "Ladies and gentlemen, I ask you will that dog hunt?" One of our guest (volunteer) jurors, who was not shy about joining in during the trial, piped up "Will that dog WHAT?".

And we further know why he did so – he had no experience in how to cross-examine a jailhouse snitch (Haller dep., p. 18, ll. 24-25), so he asked ChatGT: "example cross examination jail house snitch" (Ex. 8). The questions generated by ChatGT are Ex. 8, which I have in front of me as I write this Report.

Attached as Severance Ex.-1 is an annotated copy of the transcript of the cross, in which I have noted particularly by highlighting where Haller followed ChatGT's outline to the letter and to the detriment of the cross. It is noteworthy that of the total of nine questions Haller asked on the topic of "benefit of the bargain," seven were direct quotes or slight paraphrases of the ChatGT questions. Further, I have added in Severance Ex.-1 my editorial comments demonstrating how hopelessly misguided were AI's – and thus Haller's – efforts. I base these criticisms on my years of trial experience, predominantly in criminal cases (see Education and Experience, infra); on my CLE learning from both taking and teaching CLE courses at the National Institute for Trial Advocacy (generally acknowledged as the country's premier trial-skills training program); and on my initial training in trial skills at Seaview Law School under Professors Cary Grant (yes, that was his real name) and Debra Swingerstein. Where noted, my comments are based on these professors' "pet peeves," which they codified as "Rules of Cross- Examination."[2]

As my annotations demonstrate, this cross on the key issue of the benefit of the bargain was grossly incompetent. While no one error, taken alone, would have been fatal, the sum total of the errors was. Reyes's case went from an almost sure winner, i.e., an acquittal, to a disastrous guilty verdict. The most telling point is that Haller's open-ended question (Ex. Severance-1, p. 31, ll. 14-15) allowed Glouberman to put the last nail in the coffin by adding a corroborating detail that left virtually no room for the jury to find his testimony anything other than solidly believable.

The question might be asked: should Haller have known that using AI – ChatGT – was ill-advised? Isn't the technology so new that some misapplication of it should be deemed forgivable? The answer is: Yes, he should have known;; no, his misapplication is not forgivable.

The starting point is the lawyer's duty under SMRPC 1.1 (Annotation – Knowledge – Technology): "Rule 1.1 requires a lawyer to have a basic understanding of the benefits and risks associated with technology [multiple citations] …." The lawyer cannot gain this "basic knowledge," as Haller tried to do, from a lunchtime, mid-trial "tutorial" from an uncredentialed instructor (Reyes). There were numerous warning signs available by a virtually instantaneous search of the Internet. See, e.g. Donahue, "A Primer on Using Artificial Intelligence in the Legal Profession," Harv. J.L. & Tech. 13, 16 (2018) ("What AI Can't Do … AI can't yet replicate advocacy …."); Guy D'Andrea, "Benefits & Best Practices of AI in Law,"Temple Univ. webinar

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2 I will likely be accused of using optional "rules of cross" as if they are sacrosanct, cast in stone. I am not. One can pick and choose among the recommended approaches. But I learned over my years of practice that the Grant-Swingerstein "Rules" are reliable and reward the lawyer who follows them. Yes, one may use some and leave the rest. But if a trial lawyer flouts them all, as Haller did, he shows himself to be unskilled – so unskilled as to fail to meet the level of Competence required by SMRPC 1.2.

(January 24, 2022) ("Watch Over-reliance on AI: a. Avoid substituting AI for critical legal reasoning and personal judgment that (at least as of now) cannot be replaced by the use of AI. NEVER NEVER NEVER simply copy and paste something from any AI platform ... VET VET VET!!!"); "Fifty Must-Know Crucial Golden Nuggets About AI and the Law that You Need to Know," Forbes.com (Aug. 2, 2021) ("If AI can be sufficiently applied to the law, even if only as an aid to lawyers, will lawyers become reliant upon the AI and ergo tend toward a decay of their lawyering skills? Might the use of AI end up lulling lawyers into not remaining fully steeped in the law? Could we have a deskilling of lawyers?"); Formal Opinion 508 (August 5, 2021), Seaview Bar Association Standing Committee on Ethics & Professional Responsibility (Ex. Severance-2). The last source is particularly pertinent to the preliminary inquiry Haller should have made:

> Counsel are advised to consider all aspects of this issue as the development of AI use continues, and to exercise extreme caution due to the <u>dangers of misuse</u> of AI; <u>of erroneous</u> <u>delegation of the lawyer's duties under the Rules</u>; and of <u>prejudice to clients' interests resulting</u> <u>from over-reliance on the technology to the detriment of the exercise of professional judgment</u> <u>and skill.</u>"

(*Id*. at 1, emphasis added) The warning becomes even more pertinent to this case in the Committee's Conclusion:

> [T]here is no substitute <u>under the Model Rules</u> for the lawyer's own independent analysis and evaluation of the help s/he is getting from technology. The examples [given in the Opinion, *q.v.*] illustrate this well: neither lawyer, even though forewarned of the need for curated evidence based on his/her study and research of the controlling rules of evidence, applied the necessary competence and diligence. Instead, they turned those portions of their examinations over to AI, with results their clients arguably and predictably should not have suffered.

(*Id.* at 3, emphasis in original)

I concede that the examples in the Opinion are rooted in the law of evidence, which is a "harder," that is, more concrete topic than the "softer" area of methods of cross-examination. And, Haller and his expert might protest, he had only 30 minutes to prepare his cross. The counter to this is that this type of cross is not truly specialized or complex; it is merely a variation of the standard impeachment of a witness by bias. See, e.g., Defense Expert Tour's cited resource, The Art and Science of Trial Advocacy, at 322: "Impeachment by Bias, Prejudice, Interest, or Motive … Has the government granted the witness immunity or promised him leniency in exchange for testimony." As with any such cross-examination technique, the rules of cross are invariable, and all the cross-examiner need do to prepare is to brainstorm the facts necessary to bring out the witness's bias. Every law-school advocacy skills course teaches this skill. The Sunset County DA's new-ADA training course, which I took in 1999 as, presumably, did Haller in 2018, offers the training. And, perhaps most telling, the facts Haller needed for this specific type of cross (benefit of the bargain) were handed to him by Rose in Glouberman's plea agreement and criminal record (Ex. 14a) just before Haller went to prepare the cross. It is puzzling why Haller thought he needed outside advice for this. The answer may lie in the dire predictions I quoted earlier: "Might we have a deskilling of lawyers [and] overreliance on the technology [of AI] to the detriment of the exercise of professional judgment and skill."

C. Conclusion. In my opinion, which I hold to a reasonable degree of certainty as required for expert opinions in legal malpractice cases, Haller failed to "exercise that degree of care, skill, and diligence …exercised by prudent practicing attorneys in [his] jurisdiction," and this failure was a substantial factor in causing the harm plaintiff alleges, i.e., the guilty verdict and the resulting and ongoing effects on plaintiff. See Alison v. Jerome, 715 Seaview 38 (2004). Of particular note were his violations of the SMRPC cited in this report, which, while not negligence per se, nevertheless are relevant to the assessment whether the lawyer met the required standard of care. Milstein v. Kay & Young, P.C., 705 Seaview 444 (1999).

D. Education and Experience

B.A., *summa cum laude*, U.C. Berkeley 1996

J.D., *summa cum laude*, Order of the Coif, Seaview University School of Law 1999

Assistant District Attorney, Sunset County, 1999-2003

PV Criminal Defense, P.C., 2003-present

As an Assistant D.A. and in my private criminal-defense practice I have tried over 200 jury and bench trials, about evenly divided between felonies and misdemeanors. In at least 40 of those cases I cross- examined a prosecution informant ("snitch"), which brought acquittals in 18 cases.

I have taught trial skills for the National Institute for Trial Advocacy for the past 18 years. In that capacity I developed an interest in the ethics of trial practice, which I pursued by getting a Certification of Specialization from the ABA Center for Professional Responsibility in 2010. I then served on the Seaview Bar Association Standing Committee on Ethics and Professional Responsibility from 2010 to 2016.

As a result of my specialization, I have been engaged as an expert witness in approximately 14 legal malpractice cases, all of which turned in whole or in part on allegations of breaches of the SMRPC. I was recognized by the court as a qualified expert in all 9 of those cases that went to trial (the rest settled after the expert reports were filed and depositions were completed). I have testified about evenly for both sides of the malpractice / ethics cases I was engaged for.

I recognize that many experts' C.V.'s list their publications. As a busy practicing courtroom lawyer I have not been able to spare time for this more academic side of expert-witnessing. I have, however, served on the Seaview Bar's annual CLE panel on "Ethics and Legal Malpractice – How to Stay Out, or Get Out, of Trouble!" for the past 10 years. I received the Bar's Ethics Attorney of the Year Award in 2015 and 2019.

I am compensated for my expert consultation at the rate of $250/hour for researching and writing my opinion, and at $350/hour for testifying in deposition or at trial. Those rates are at the customary level for expert witnesses of my background and experience in this jurisdiction. To date I have spent 22 hours to prepare this opinion.

April 12, 2023

Per Severance

E. August 29, 2022 Supplement: Rebuttal to the Report of Defense Expert DeVoyer Tour

1. Mr. Tour has an unrealistic view of what a defendant in a criminal trial, buffeted by anxiety and fear, can manage to remember and apply of what his lawyer has told him about the rather arcane subject of attorney-client privilege. I suspect this "ivory tower" view stems, at least in part, from the fact that Mr. Tour has never represented a criminal defendant or tried (as counsel) a case.

2. Mr. Tour says there is room in advocacy styles and skill for a wider range of artists than Rembrandt (I thank my colleague for the compliment!). I agree. But to get their work shown artists must generally pass it by a jury for approval – just as we put our clients' cases to a trial jury for decision. What there is <u>not</u> room for in either setting, in order to have the work accepted by the jury, is painting by the numbers. But that is what Haller offered in his cross examination of Glouberman –see Ex. Severance-1. Not surprisingly, the work did not pass.

3. Tour's offhand rejection of the idea that there are stylistic "rules" of examination is puzzling he acknowledges "candidly" that his source for what is "art" and what is "science," the Perrin treatise, lists "right ways and wrong ways to ask questions" as <u>science</u>. He disposes of this idea with a conclusory three words: "I strongly disagree." He does not say why. One suspects, again, that his view stems from his lack of on-the-ground experience in trying cases. He cites his affiliation with NITA as one purported source of such experience, yet acknowledges that he was served at NITA only as a judge – in the same way his trial experience is only as a judge. But trial lawyers know that the only way to know <u>how</u> to do a skill – to examine witnesses, address juries, get evidence admitted is to actually <u>do it</u>.

That is why NITA's motto has always been "Learning by Doing." See https://www.nita.org/s/category/courses/course-type/trialskills/0ZG4W000000tBdkWAE?c_results_layout_state=%7B%7D: "**NITA's High-Caliber Training, World-Class Faculty, and Learning-by-Doing Method.**"

4. Finally, I hear in Tour's Report, albeit in muted terms, a legal malpractice defense expert's customary retreat to the plaintiff's inability to prove causation. Tour Report, p. 37, ll. 18-22. This is admittedly a persuasive tactic with the jury in a legal malpractice case: it appeals to their wish to have a concrete, almost bulletproof result they can justify to their family and acquaintances when asked how they decided the case. This is especially true of "law and order" types of jurors sitting on a malpractice case arising from an underlying criminal matter; they are reluctant to "allow the convicted criminal back on the streets" without proof of innocence. But this is a dodge – one I have been battling all my years of serving as an expert witness. In short it says: Even if the lawyer did not do the job right, we don't know what the result would have been if he had. By this reasoning, assuming the cause (improper performance) led to the effect (a criminal conviction), still the plaintiff cannot recover for the effect because the cause disabled him from proving the effect. Fortunately for wronged plaintiffs in Seaview, that Catch-22 is not the law of Seaview. See *Point v. Dunstable*, 727 Seaview 1 (2010); *Alison v. Jerome*, 715 Seaview 38 (2004).

EXHIBIT SEVERANCE-1

CROSS-EXAMINATION BY DEFENSE COUNSEL:

Q: Good afternoon, Mr. Glouberman, You overheard my client, Mr. Reyes, confessing to the crime while you were both in jail together, is that correct?

Note: Rule of Cross 2 -start strong with a point that will stick with the jury – "Primacy." Rule of Cross 4 – do not repeat the direct exam. Rule of Cross 5 – do not say in positive terms what you intend to contradict. Rule of Cross 7 – do not say "Good morning etc." to a witness you intend to rake over the coals – instead, telegraph to the jury that they should send the witness packing. Rule of Cross 10 – do not use "my client," which is easily heard as "the guy who's paying me to get him off."

Rewritten: Mr. Glouberman [scorn dripping from your voice], you CLAIM Mr. Reyes [air quotes] "confessed" to you? You had never met him before? You claim he took you, a complete stranger, into his confidence?

A: I didn't "overhear" it – he said it to me when we were talking about what we were in for and generally shooting the shit.

Note: Rule of Cross 3 – do not let the witness dodge your point by smudging it up – punish him with a comeback.

Add: Again, your claim is that he was confessing to a complete stranger?

Q: Well, let's talk about the setup in the holding cell you and Mr. Reyes were locked up in for around 45 minutes. The cell was about 20 feet by 20 feet?

Note: Rule of Cross 8 – always phrase your point so the jury gets it – here, that the <u>small</u> size of the cell made the auditory conditions less favorable for clear hearing and recollection.

Rewritten: … was ONLY about 20 by 20?

A: I'll take your word for it.

Note: Rule 3 again.

Rewritten: Well, sir [scornfully], you are not saying it was larger, are you? [If he persists in "cracking wise", more punishment:] This was not your first time in the holding cell, was it? So you have familiarity generally with its layout? 20 by 20 sounds about right, yes?

Q: About three car lengths each way?

A: About

Q: There were seats lining the cell on three sides, yes?

A: Yes

Q: While you two were in there together, there were around 15 other arrestees in with you, some seated, some standing, making it pretty crowded?

Note: Rule of Cross 1a – only one new fact per question, and 1b – no words calling for a debatable judgment ("pretty crowded").

A: Yeah.

Q: Fair to say that many of these guys were talking while inside the cell?

Note: Rule of Cross 9 – don't try for more than you need ("many") and, likely, more than the witness will concede.

Rewritten: … some of these guys …

A: Some were.

Note: see previous Note - I rest my case.

Q: Men were also being brought into and out of the cell while you were inside?

A: Yes

Q: Lots of movement then?

Note: see Rule of Cross 9, above.

Rewritten: A fair amount of movement then?

A: Some.

Note: I rest my case again.

Q: During your time in jail you were facing your own charges, correct?

Note: Rule of Cross 6 – introduce a new topic – at least an important one, as here, - with a headline so the jury can switch gears with you.

Add: Let's talk now about the deal you made with Mr. Rose in exchange for your testimony today.

Q: In exchange for your testimony against my client here today, were you offered any leniency or reduction in your own charges?

Note: Rule of Cross 1 – UNBREAKABLE!! Ask only leading questions. Rule of Cross 11 (and of Direct as well) – avoid legalese / fancy talk; use plain words, short sentences. Rule of Cross 1a – one new fact per question.

PROSECUTION: Objection – compound and argumentative.

THE COURT: Rephrase, Mr. Haller.

Q: Were you offered any leniency in your own charges?

Rule of Cross 11 – avoid legalese ("leniency").

Rewritten: Mr. Rose offered you a deal to testify against Mr. Reyes, isn't that true, sir?

A: He said I had to tell the truth about what Reyes said.

Note: Rule of Cross 3, above.

Add: It is Mr. Rose who will decide whether you in fact told "the truth"? Mr. Rose will decide whether you upheld your end of the deal you made with him?

Q: So you had a personal interest in providing information that might be favorable to the prosecution?

A: What I had to do was, tell the truth about what Reyes said to me – that he took the money – pretty simple.

Rule of Cross 3, above.

Add: Please answer my question, Mr. Glouberman – you had a personal interest in taking the stand today against Mr. Reyes, didn't you?

Q: Let's talk a little bit about your history as an informant. How many times have you provided information to the prosecution in exchange for a deal?

Rule of Cross (and Direct) 12 – never diminish the importance of your questions by the limiting phrase "little bit." If it is important enough to take the jury's time, it is BIG, not little, and so you are going to talk about it just as much and as long as it takes to make your point. And UNBREAKABLE Rule of Cross 1 – only leading questions. Rule of Cross 1c – at all costs, do not do "discovery" during the cross - use only what you know - in this case, that Glouberman is serving as a snitch for the third time

A. For telling the truth, like I already said – I testified yesterday two floors up in my current case where I'm a co-defendant. I told the jury how my codefendants and I all committed the drug crimes they were claiming they didn't do. I took responsibility for what I did but they sure didn't.

Q: Counting today, isn't it a total of three times, sir?

Note: Good comeback [Rule of Cross 3], but Unbreakable Rule of Cross 1, above. Haller seems to dislike leading questions, when he should love them and never leave them.

A: About that, yeah.

Q: Let's be sure, sir: it is one earlier time, plus today, plus your own case "upstairs," yes?

A: OK, yeah.

Q: And in those other cases, how many times did those deals result in reduced charges or a more favorable outcome for you?

Note: Rule of Cross 1; Rule of Cross 1a.

A: Well I haven't been sentenced on the case upstairs yet but on that case a few years ago, yeah.

Q: So it's fair to say that providing information to the prosecution has paid off for you in the past?

A: Counsel, when a guy's done the crime, like Reyes admitted to me he did, he should be held accountable – isn't that the justice system you guys preach?

Note: Rule of Cross 3, above.

Add: That wasn't my question sir. Let me repeat: testifying for the prosecution has paid off for you, yes?

Q: Separate from these cases where you've served as an informant, you were convicted of credit card fraud in 2016, true?

A: Yes, and I paid my debt to society in both cases.

Note: Rule of Cross 3, above.

Add: You WERE CONVICTED in both earlier cases, yes? [Here is the crucial opportunity, which Haller missed, to underscore by actual numbers the size of the reward the witness is expecting – without that amount of detail, the jury is left with toothless generalities. The transcript should read:] Going back to your "deal" with Mr. Rose, in the narcotics conspiracy case you are on trial for right now, the potential sentence without the "deal" is 20 years? PLUS, your criminal record makes you what the law calls a "recidivist" – for that reason, you know this 20-year sentence could be enhanced – added to – by 5 years? Your plea agreement with Mr. Rose offers you a sentence of only 5 years? So you are trying to save yourself 20 years of jail time by your testimony here today? And before we forget it, your sentence, without the deal, could include 8 years of supervised release? But if the DA likes your testimony here against Mr. Reyes, he will recommend only 4 years? The maximum fine in your pending case is $250,000? But the DA is recommending – if you [air quotes] "cooperate" – a fine of only $5,000? So your total SAVINGS are [portentous pause] … 4 years of supervised release? $245,000? And 20 years in jail?

Q: You talk about telling the truth – how can the jury trust your testimony today about what Reyes said to you, given your history of dishonesty and your personal interest in receiving a favorable deal?

Note: UH-OH- open-ended, non-leading, compound. Rules of Cross 1, 1a. Watch what happens:

A: Oh [long pause], now that you are taking me back to our conversation, I remember a detail I had forgotten and didn't mention when the DA just now asked me questions. Reyes told me, "I'm gonna use that money to get tickets for me and my girlfriend when the Rolling Stones '24 tour comes to town."

Q: So you want the jury to take your word for all this against Mr. Reyes's denials?

A: I ain't telling the jury what to do – I'm telling you the truth about what happened in that jail cell.

Note: Rule of Cross 13 – never give the witness a chance – much less, as here, another chance – to explain himself. Rule of Cross 14 – end strong ("Recency"); go out on a high note. This was Haller's chance to impeach Glouberman by omission (see next Note); instead, he meekly slunk away, leaving the witness with the last word.

DEFENSE COUNSEL: No further questions, Your Honor.

Add: Whoa, Mr. Glouberman – that's something quite new, isn't it? But in preparing you to testify less than an hour ago, Mr. Rose asked you, didn't he, for all the details you could give about your conversation with Mr. Reyes? This supposed conversation you claim you had with Mr. Reyes was less than two months ago? You don't have memory challenges, do you? But you claim you [air quotes] "forgot" to mention this detail – a detail about the money you claim Mr. Reyes admitted to you he stole – until just now?

A strong point like this will allow you to end with a reference, even if a subtle one, to Cousin Vinny's end of a cross:

DEFENSE COUNSEL: [scornful tone] I'm through with this witness, Judge.

EXHIBIT SEVERANCE-2

SEAVIEW BAR ASSOCIATION

Formal Opinion 508 **August 5, 2021**

The Ethics of the Use of Artificial Intelligence (AI) in Legal Proceedings

Introduction. Recent cases have highlighted the challenges presented to counsel and the courts by the use of Artificial Intelligence (AI) in legal proceedings. See, e.g., Mata v. Avianca, Inc., 21-cv-1461 (S.D.N.Y. 2021[3]) (attorneys sanctioned under FRCIVP 11 for citing unverified citations generated by AI); "Cohen Used Artificial Intelligence to Give Lawyer Bogus Case," N.Y. Times, Dec.30, 2021*). The Committee has received numerous requests for guidance on the reach of the Seaview Model Rules as they may pertain to the proper use of AI in a variety of settings - pertinently for the background of this opinion, in trial preparation and conduct in the courtroom.

While the Committee cannot address all likely scenarios raising this issue, as they are too numerous and varied to admit of one answer, nevertheless the Committee deems it advisable to set out general observations about which of the Model Rules should be considered, with some commentary on how they might best be applied. Future cases will put "meat on the bones." Counsel are advised to consider all aspects of this issue as the development of AI use continues, and to exercise extreme caution due to the dangers of misuse of AI; of erroneous delegation of the lawyer's duties under the Rules; and of prejudice to clients' interests resulting from over-reliance on the technology to the detriment of the exercise of professional judgment and skill.

Discussion. It is helpful, the Committee believes, to give illustrative examples of the inquiries we have received from practitioners. The Rules that the Committee has looked at in considering its responses, although not exclusive, will help guide decisions for lawyers who will be encountering similar ethical considerations. In the final analysis, a direct inquiry to the Committee is always recommended.

Example 1: In a California state trial court, Lawyer A, for plaintiff, asks an AI platform (hereafter, simply "AI") for cases pertinent to whether emails can be admissible as business records under California Evidence Code sec. 1271. AI produces, inter alia, a case decided under FRE 803(6) - which, in most, but significantly not all, particulars matches the California rule - that appears to support admissibility under the facts of the lawyer's case. In response to the opponent's objection that the facts do not indicate trustworthiness, Lawyer A argues that the burden is on the opponent to demonstrate lack of trustworthiness. While that is a correct reading of the federal rule as amended in 2014, it is incorrect under CEC sec. 1271, which places the burden on the proponent of the evidence to demonstrate trustworthiness. See Leach & Garcia Uhrig, *Federal & California Evidence Rules with Comparative Commentary*, at I-160-161. Lawyer A, caught unawares and apparently flustered by his reliance on AI's research, gives up the fight and fails to get the emails admitted. Because the emails were

[3,*] *[Case File Note: These dates are changed from the actual, historical dates to enable these real-life instances of AI "misdeeds" to fit into the timeline of the case. No impeachment is permitted based on the changes.]*

essential to plaintiff's claim of a contract, without them in evidence plaintiff lacked proof of a required element of his claim and suffered a compulsory nonsuit at the close of his evidence.

Question: Did Lawyer A breach any obligations under SMRPC? (While the California MRPC controlled, due to the lawyer's appearance pro hac vice, the case is pertinent because the Seaview and California RMRPC are identical.) The Committee believes he did, on the facts supplied in the inquiry (though more facts might lead to a more nuanced result).

Under Rule 1.2 COMPETENCE -- specifically the requirements of knowledge (Basic Research, Court Rules) / Thoroughness and Preparation (Investigation and Research), and Rule 1.3 DILIGENCE - the general requirements of "commitment ,,, dedication and ... zeal," and the specific requirement of Carrying Out Representation (Inadequate Investigation and Preparation), the lawyer was obligated to read the two rules of evidence closely, with particular attention to the small but influential difference between them, and to make his arguments with full awareness that the case AI had given him did not, in this important respect, support his argument for admissibility. Instead, he took too much comfort in the AI-generated case and came to grief, to his client's complete detriment.

Example 2: Lawyer B, representing defendant in an auto-intersection crash case – her first negligence case, as she had only recently passed the Bar – calls an eyewitness to testify to the plaintiff's excessive speed, to prove defendant's claim of plaintiff's sole liability or contributory negligence. She relies solely on AI-generated questions for this segment of the direct; the transcript reads:

Q: How far from the intersection were you standing?

A: About 40 feet.

Q: Could you see both cars from where you were standing?

A: Yes, clearly saw 'em.

Q: Did you form an opinion as to how fast plaintiff was traveling?

A: I sure did.

Q: In your opinion, how fast was he going?

PLAINTIFF'S COUNSEL: Objection, lack of foundation.

DEFENSE COUNSEL [looking at notes ….] Your Honor, my research tells me I have laid the foundation for the witness's first-hand knowledge, so … um … submitted.

THE COURT: Objection sustained. Move on, counsel.

After a plaintiff's verdict, the Court denies defendant's post-trial motion positing, inter alia, error in the above ruling, on the following ground: "Defendant failed to offer evidence of a necessary component of the foundation for a lay opinion, viz., sufficient data to form a reliable opinion that is 'rationally based on the witness's perception,' SRE 701. She asked no questions to establish <u>how long</u> the witness had to observe the cars as they approached the intersection, nor <u>how far away from him</u> the cars were for the duration of his observation."

Question: Did Lawyer B breach any obligations under SMRPC? The Committee believes she did. In relying solely on AI-generated questions, which from the facts given us did not suggest any line of questioning to meet the foundational requirements the court found lacking, the lawyer failed to meet the requirements of both Rule 1.2 and 1.3, on analysis similar to that in

Example 1. If she had opened a standard evidence treatise she would have found the answer in black-letter law. Indeed, some treatises lay out the Q and A in the same way AI did, but with a full understanding of the evidence rule – an understanding the AI program did not have. See, e.g., Imwinkelried & Leach, *California Evidentiary Foundations* (5^{th} ed. 2023), sec. 8.B[2] at p. 8-4. As in Example 1, the lawyer appears to have taken an "AI shortcut" without exercising independent judgment and research. That is neither competent nor diligent.

Conclusion. Busy lawyers have to deal with both the expected and the unexpected. This is especially true of those who toil in the heat and hurly-burly of trial work. It is fortunate they have technological tools to help them: in older times, Nexis/Lexis and Westlaw research engines; in current practice, AI platforms. But it goes without saying that there is no substitute <u>under the Model Rules</u> for the lawyer's own independent analysis and evaluation of the help s/he is getting from technology. The examples above illustrate this well: neither lawyer, even though forewarned of the need for curated evidence based on <u>her/his</u> sound understanding of the controlling rules of evidence, applied the necessary competence and diligence. Instead, they turned those portions of their examinations over to AI, with results their clients arguably and predictably should not have suffered. In short, Artificial Intelligence, in the trial-court setting especially, must serve only as a legal assistant to Actual Intelligence -- the lawyer's.

SEAVIEW BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

CENTER FOR PROFESSIONAL RESPONSIBILITY: Cary A. Bricker, Lead Senior Counsel

EXPERT REPORT OF DEVOYER TOUR

I submit this report on behalf of Defendant Mica Haller in the case brought against him by Libni Reyes. To fulfill my role as a retained expert witness, I offer first my background and experience, particularly as they pertain to issues in legal malpractice and ethics cases.

I graduated first in my undergraduate class at Stanford University in 1976, and repeated that accomplishment in my law school class there, receiving my J.D. degree in 1979. Because I had been a ROTC candidate at Stanford, for the next three years I served as a U.S. Army attaché, first assigned to the Brussels office of NATO. There I liaised almost daily with Judge Advocate General attorneys from the four armed services operating in Europe (Army, Navy, Air Force, Marines). In that role I was called upon frequently to assist in the interpretation and application of the principles of ethical conduct for lawyers. This was, of course, just before the ABA promulgated the current Model Rules of Professional Conduct in 1983, so we were interpreting the predecessor to the Rules, the Code of Professional Responsibility. In all respects pertinent to the current case, however, the ethical principles codified in the Rules were the same as in the Code. Thus, I had early training and experience in the law of lawyers' ethical responsibilities.

After only six months at NATO I was seconded to the JAG Office (Europe) for the remaining thirty months of my three-year posting in Europe. In that role I served as a presiding judge *pro tem* over approximately 60 court proceedings: about half courts martial, half criminal charges that had arisen from events on base. When my orders sent me back to the States I was appointed a judge in the JAG Corps, where I served for another four years (1982-1986).

Because I had always enjoyed and done well at the scholarly side of legal studies, I decided to turn my career towards academia. I was admitted to Harvard's Doctorate in Juridical Science (SJD) Program – apparently a one-of-a-kind accomplishment, given that Harvard's description of the program states, "Students who have not received an LL.M. degree from Harvard or another leading U.S. law school are virtually never admitted to S.J.D. candidacy." I imagine that my substantial practical experience in JAG was a key factor in my "surprise" admission to the program. My dissertation, "Ethical Conduct in Military Tribunal Proceedings," was awarded the "Best Brief" award in my final year of studies, 1990; it is so named as a kind of in joke, as it is not a brief at all, but a scholarly work of upward of 250 pages.

I took a position as Assistant Professor of Law at Seaview State University during the two years I spent writing my thesis (1988-1990), and upon getting the SJD degree was promoted to Associate Professor. I was tenured two years later and have remained a full professor since that time. I took emeritus status at the age of 70 in January 2024. It is my intention, supported by my Dean, to continue to teach my "signature" course, Practical Ethics, in the Spring semester each year going forward, health and Short Term Memory Loss permitting.

As noted, my specialty is ethics. I have published two books[4] and 14 articles[5] on ethics issues. Most recently I co-authored *Tour & Croxall's Ethics Simulations: Bridge to Practice* (West, 2020) in which the law and practice of ethics are taught via simulated practical settings. While Prof. Croxall had lead

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[4] *U.S. & U.K.Legal Ethics – A Comparative Study* (West, 1991); *Black-Letter Ethics Law* (Aspen 1994).

[5] *E.g.*, "Ethics in Modern Practice," 14 Loyola J.L.& Ethics 3 (1996); "A Brave New World: How to Switch from the Code of Professional Responsibility to the Model Rules of Professional Conduct," ABA Lit J., Dec. 1983. I wrote this last article as my first-level bid to enter academia, in which publishing is a requisite.

responsibility for drafting the litigation portions of the volume, I taking the corporate side of the issues, we co-shared the editing of both segments, whereby I kept myself current on ethics applied to trial work.

For this current case, the question may be raised whether I can bring knowledge of trial practice to the issues, as it is clear from the complaint and Mr. Severance's report that at least half of the plaintiff's claims are based on the way in which Mr. Haller conducted a cross-examination. The answer is that I observed numerous – upwards of 70 – trials of all kinds in my years as a JAG judge. I have also served (like Mr. Severance) as a faculty member at National Institute for Trial Advocacy trial-skills programs, where I sat as a presiding judge on mock trials and listened to commentary – critiques – from the country's top trial lawyers. I am proud to be the recipient of NITA's 2004 Keeton Outstanding Faculty Member Award.

I have testified as a recognized expert in twenty-seven legal malpractice cases, either at trial or in deposition. I have appeared for both plaintiffs and defendants – about 70% for defendants because, I believe, my view of the reach of the Ethics Rules is less expansive than that of some of my colleagues in our field of expertise.

Opinion

Mr. Haller competently, ethically, and responsibly carried out all his duties in representing Mr. Reyes in *State v. Reyes;* he performed his duties to his client in absolute conformity with the standard of care, skill, and diligence expected of attorneys practicing in Seaview. I hold this opinion to the degree of certainty required of expert witnesses in legal malpractice and ethics cases.

Bases

Reyes's inattention caused his loss of the privilege.

Mr. Haller's initial communication of instructions on how to safeguard the attorney-client privilege could not have been clearer – it is in the Retainer Agreement in black and white. He also explained it at length in his initial meetings with Reyes. (Haller dep., p. 15, ll. 14-17) Haller reinforced the instruction at the first opportunity, when Reyes admitted he was about to talk with his mother about the case. (Haller dep., p. 16, ll. 29-32) To that point in the matter there can be no complaint about Haller's complete compliance with his duties of Communication under SMRPC 1.4.

Mr. Severance opines that Haller should have reiterated the instruction at numerous times during the trial, and especially leading up to and in the lunchtime events at the Court Deli. This is arrant nonsense. Mr. Reyes is a college graduate in a field of sophisticated study and was continuing on to get his master's degree. Mr. Haller was not required to treat him like a child of limited intelligence.

Moreover, when the issue arose in the restaurant, Haller did caution Reyes sufficiently to observe the confidentiality the privilege is intended to protect. He gave numerous warning signs and utterances – subtly, to be sure, to avoid drawing undue attention to the instruction. (Haller dep., p. 16, ll. 20-28 & p. 17. ll. 11-13.)

Finally, there is no way to be certain that, but for Mr. Reyes's waiver of the privilege, Glouberman would not have been called as a witness. While it is true that Mr. Rose candidly told the court that his office learned of the Reyes/Glouberman connection from Mr. Reyes's incautious remarks, it is also noteworthy that Glouberman was apparently in the Courthouse that day on his own case "upstairs." One cannot rule out the possibility, or indeed the likelihood, that, chancing to see Reyes in the Courthouse corridors and vicinity, he might have spontaneously brought his knowledge to a DA's attention; after all, he was on that very day pursuing the benefits of his plea agreement, so his interest in reporting on other miscreants (*see* the Plea Agreement, Ex. 14a) would have been fresh in his mind.

In short, on this issue, in Mr. Severance's words, this dog won't hunt.

<u>Haller did an adequate cross-examination of Glouberman</u>

I phrase this basis very precisely: Haller's cross-examination was adequate – nothing more -- but pertinently for this malpractice case, nothing less either. Very simply put, he met his obligations under legal malpractice law and the SMRPC.

From all the discussions among trial lawyers I have listened in on, I can state two verities: (one) there is almost nothing these combative, litigious, argumentative types agree on, except (two) they all agree there is no one right way to try a case or to perform a given segment of a trial. One of the classic treatises on trial skills is Perrin *et al.*, *The <u>Art</u> & Science of Trial Advocacy* (LexisNexis, 2d ed. 2011) (emphasis added). There may well be some science involved – the volume cited refers to "rules, procedures, and protocols … burdens of proof, rules of evidence and procedure, court rules and protocols …. Empirical research in the fields of communication and learning theory establishes that there are certain principles of effective advocacy…."[6] But that means that the rest is … art.

Mr. Severance's report does an able job demonstrating how <u>he</u> would have done the cross of Glouberman. Assuming a preternatural ability to abide by 14 "Rules of Cross" (one with 3 sub-parts), Mr. Severance's cross would likely be a masterpiece – a Rembrandt. That does not mean – it cannot mean, under the law and the SMRPC – that no other artist of the courtroom arts can submit a different painting. Surely there is room for Renoir (romantic), Van Gogh (turbulent), Klee (geometric), Pollack (abstract), even Grandma Moses (rustic) … I could go on, but I believe my point is made.

From the false premise that there is only one cross that would fulfill the requirements of the lawyer's duty to his client, Mr. Severance leaps to the conclusion that the alleged flaws in Haller's cross are the cause of the jury's guilty verdict. The support offered is that, on the assumption that an effective cross would have removed the effect of Glouberman's testimony against Reyes, plaintiff had the case won. This is yet another dog that will not hunt.

As I read the transcript, the prosecution's case was persuasive:

- Reyes was the only person shown to have handled the wallet from the time it was dropped until he handed it to Bath.
- When Reyes took the stand, he admitted on cross-examination that "money was tight"; that he was attending school full-time while working 20 hours a week to support a "ridiculously expensive Master's program where every dollar counted"[7] – strong motivation to take advantage of a $500 windfall.

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[6] In candor, I omitted one phrase from the treatise's examples of "science": "There are right ways and wrong ways to ask questions …." I strongly disagree.

[7] These quotations are from Reyes's deposition in the current civil case, but their equivalent is found in the criminal-case transcript.

- Haller cited the "innocent behavior" of turning the wallet over to its owner in person, exposing himself to an accusation of theft; but the prosecutor likely defused this argument in closing argument by quoting an experienced detective: "Yes, crooks do stupid stuff – it's only the smart ones we don't catch."

- Haller did his best to call into question Bath's ability to perceive and recall with certainty how much money had been in the wallet when he dropped it. From my read of the transcript, however, Bath still made a very sympathetic, persuasive, <u>believable</u> witness who likely had the jury eating out of his hand. When pressed on the accuracy of his recollection of the exact amount of money missing, he told a charming story:

  > "Counsel, I know it was $500 and I hadn't used any. I have 2 kids and 3 grands, and I had gotten a $100 bill for each of them for the holidays, even though, God knows, they never call, they never write – not even a postcard, 'How you doing, Pop?'"

  This was brilliant testifying, given that the focus group had already told Haller he needed to lay off Mr. Bath.

Mr. Severance and I could debate the pros and cons of Haller's cross for a long time and with appreciation of the other's point of view on how better to cross Glouberman. In the end, though, we still would not know how the <u>jury</u> would have debated it and what outcome they would have arrived at. In other words, as is so often the case in legal malpractice cases, the necessary element of causation, on which plaintiff bears the burden of proof, cannot be established.

There remains the issue of the use of AI. In my view, Severance's emphasis on this aspect of the cross-examination is considerably overstated. It starts with the assumption that the cross was so bad that it led to Reyes's conviction. I have already debunked that assumption. But taking it, *arguendo*, as valid – that reliance on AI for an outline of questions on cross is presumptively a bad choice – it does not follow that AI's questions <u>on only a part of the cross</u> vitiated the effect of the cross entirely. As Severance concedes, Haller did a good job at undermining Glouberman's ability to perceive and recite Reyes's confession, and at raising doubts about Glouberman's credibility by reference to his record of criminal convictions. And even on the benefit-of-the-bargain issue that Severance makes the centerpiece of his argument, Haller improved on AI's questions in at least one instance: "So it's fair to say that providing information to the prosecution has paid off for you in the past?" is livelier and more challenging than AI's legalese-ridden "So, it's fair to say that providing information to the prosecution has been a successful strategy for you in the past?"

The advisability of using AI in the law generally and in litigation settings specifically will no doubt develop rapidly over the coming years, in line with the rapidity of AI's improvement on its capabilities. *See* "Embracing the Rapid Pace of AI," (MIT Tech. Rev. podcast, May 21, 2023). But Mr. Haller performed his duties to his client in this case in full compliance with his obligations under tort law and the SMRPC. He should not be treated as the lightning rod for the storms that are likely to rage around the subject of AI and the law. The management of that daunting challenge should be left to scientists and academics, not imposed on a hard-working lawyer like Haller as he toils nobly in the trenches on behalf of clients like Mr. Reyes.

Respectfully submitted,

DeVoyer Tour

July 22, 2023

Addendum: (1) I reviewed the same materials as Mr. Severance plus, of course, his Report. (2) My rate of compensation is variable depending on the size of the matter and the circumstances of the party on whose behalf I am engaged. In this case my rates are virtually identical with Mr. Severance's, and I agree with him that these are the customary level in our field on matters such as this one. (3) My first name, passed down to me by my French-Canadian ancestors, gives people some difficulty. It is pronounced "dee-VOY-uhr" as in "thee-BOY-uhr," but most call me simply "Professor." (4) One final note: Mr. Reyes's decision not to pursue a claim of ineffective assistance of counsel is puzzling, as relief by that means would give him a clean, instead of a criminal, record. That would go far, in my opinion, to mitigate the damages he claims to have suffered by the conviction.

Exhibits

EXHIBIT 1

PHOTO OF HALLER'S PONTIAC (EXTERIOR)

EXHIBIT 2

PHOTO OF HALLER'S PONTIAC (INTERIOR)

EXHIBIT 3

RETAINER AGREEMENT

LAW OFFICES OF MICA HALLER

RETAINER AGREEMENT

I hereby retain the law firm of Mica Haller to represent me with respect to all aspects of representation of my interests in relation to **State v. Reyes, Sunset County Criminal Court**.

I agree that I will pay all hourly fees incurred by Mica Haller in his representation of my interests as aforesaid, subject to a maximum fee of **$12,000** for the case from outset of representation through verdict or other disposition. I acknowledge that I have been informed that his current billing rate is $250 per hour.

I agree that I am responsible for all reasonable and necessary costs and expenses incurred in the representation of my interests in the case.

By my signature hereto, I acknowledge that I have read and understand the terms of this Representation Agreement and that I have received a copy of it.

Signed:

Libni Reyes

Dated: *April 20, 2022*

ATTORNEY-CLIENT PRIVILEGE ACKNOWLEDGEMENT

I, Libni Reyes, hereby acknowledge that Mr. Haller has explained to me that my communications with him, and his to me, are protected by the attorney-client privilege, so that I may speak freely with him and freely obtain his advice, but that these communications are protected only when he and I are speaking alone; if others are present, the privilege is not in force. Further, if I share with others the content of any of our communications, that may void the privilege as to those communications.

Signed: *Libni Reyes*

Dated: *April 20, 2022*

EXHIBIT 4

YELP REVIEW OF THE COURT DELI

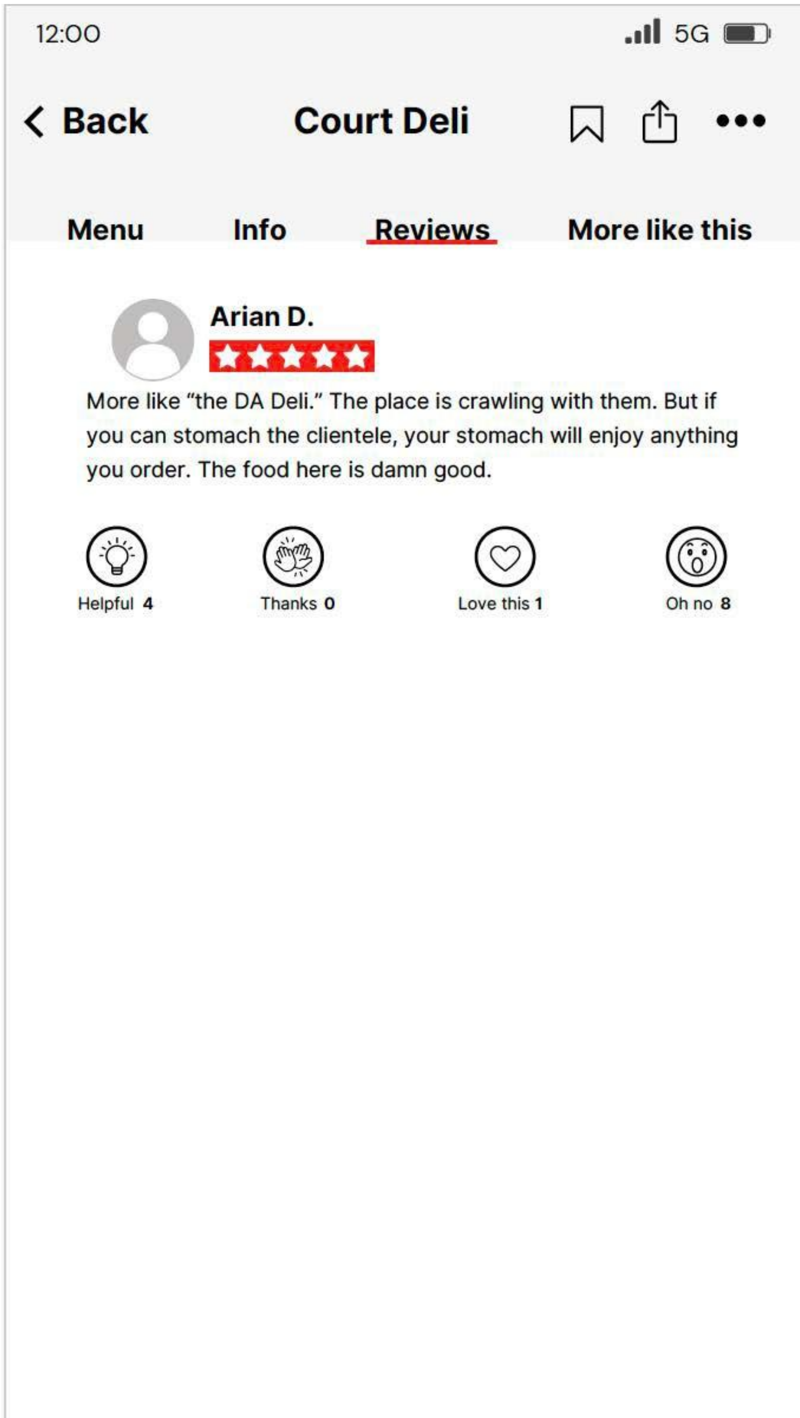


EXHIBIT 5

THE COURT DELI – PHOTO A

EXHIBIT
6

<u>THE COURT DELI – PHOTO B</u>

EXHIBIT 7

<u>THE COURT DELI – PHOTO C</u>

EXHIBIT
8

THE COURT DELI – PHOTO D

EXHIBIT
9

<u>THE COURT DELI – PHOTO E</u>

EXHIBIT 10

THE COURT DELI – PHOTO F

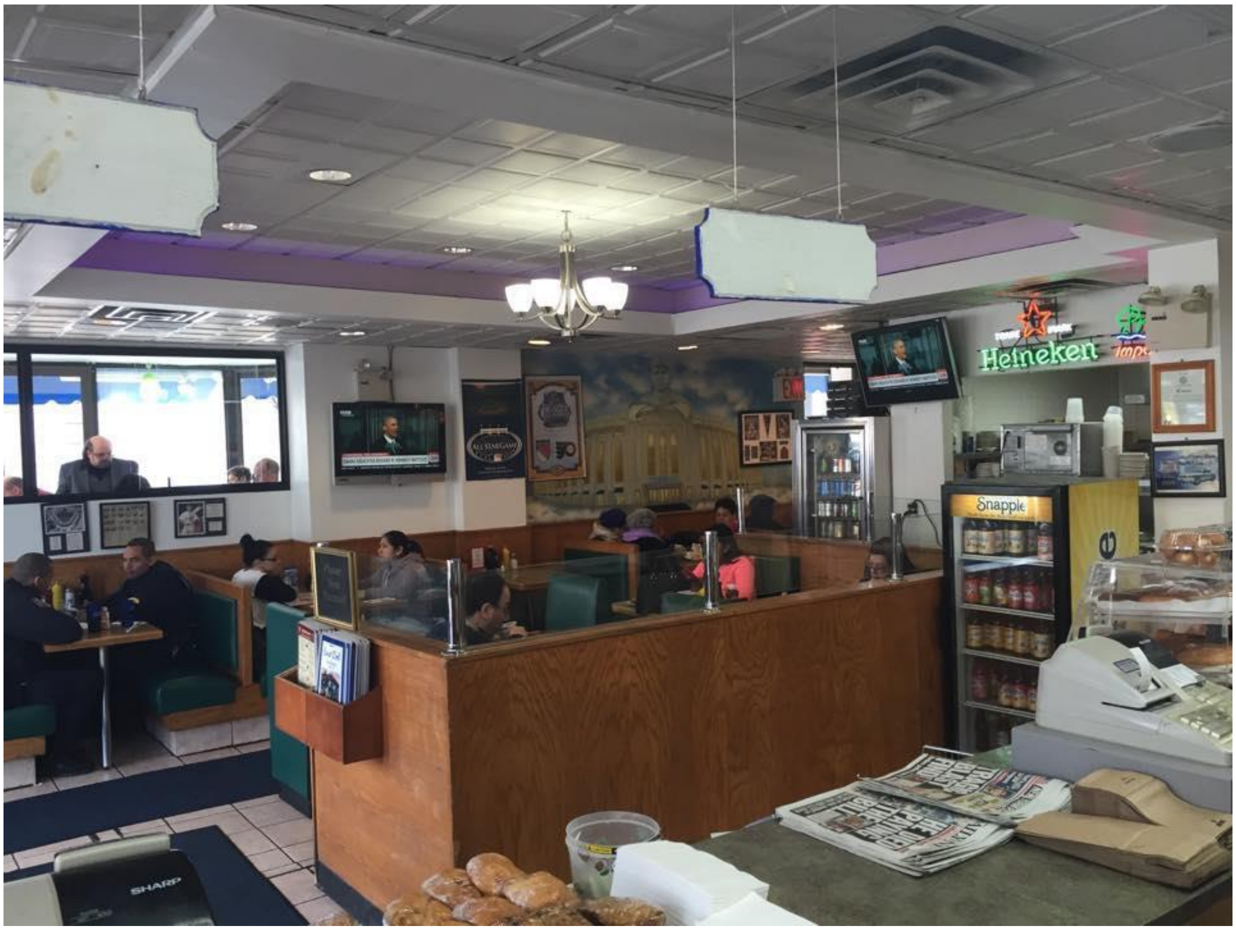


EXHIBIT 11

THE COURT DELI – PHOTO G

EXHIBIT 12

THE COURT DELI – PHOTO H

EXHIBIT 13

TRANSCRIPT OF 6/21/22 COURTROOM POST-LUNCH COLLOQUY

Rose: Your Honor- we intend to call one rebuttal witness, Mr. Glouberman, who we just learned about at this lunch recess when some interns from our office overheard the defendant saying he talked to Glouberman in the holding cell right after he was arrested and was waiting for his bail hearing.

The Court: Mr. Rose, I suspect this witness will just be a waste of time given the evidence presented this morning. I expected when we adjourned for lunch that we would proceed directly to closing arguments.

Rose: We respectfully disagree with this assessment of the value of this witness, Your Honor. As an offer of proof, it is our understanding that Mr. Glouberman will testify that the defendant admitted to him that he took Mr. Bath's money from the wallet, which amounts to a confession. And because we just learned about this witness and because his testimony is so crucial to proving our case, we ask for an overnight adjournment to properly prepare his testimony.

The Court: It's remarkable that at the 11th hour, when things are not going well for the prosecution, you are coming up with a witness who you say will provide a confession. I deny your request for an overnight adjournment. And be sure to immediately turn over to Mr. Haller any discovery materials based on this new witness.

Rose: We will provide Mr. Haller with Mr. Glouberman's criminal record and plea agreement right now. This satisfies our discovery obligations. [Hands Haller documents]

The Court: Mr. Haller- what is your position regarding this surprise government witness?

Haller: Your Honor is correct that this rebuttal witness comes as a complete surprise to us. We are learning about him being a prosecution witness at the same time you are, Judge. Given the fact that this is a criminal case where Mr. Reyes has strong due process rights, which include adequate time to investigate this new witness and prepare for the cross-examination, including review of the discovery materials the prosecutor just provided, we urge the court to reverse your ruling and we join in Mr. Rose's request for an overnight adjournment.

The Court: I hear your concerns, Mr. Haller, but have much confidence in your abilities as a trial lawyer -- and that with a half hour of time to prepare cross after Mr. Rose's direct examination, you will get the job done. I will, of course, give the standard jury instruction on the credibility of an in-custody informant. Mr. Rose, do the Court and Mr. Haller have your assurance that there is no written statement from Mr. Glouberman and that you have given both a complete summary of what you expect his testimony will be, as well as full disclosure of any pertinent documents?

Rose: Yes, You Honor, I give you those assurances as an officer of the court.

The Court: The request for an adjournment is denied. Mr. Haller, I'll give you a moment to confer with Mr. Reyes, [Haller and Defendant confer.] You are ready to proceed? [Haller nods affirmatively.] Madam Bailiff, please bring in the jury. Mr. Rose, as soon as the jury is seated, call your witness to the stand. Mr. Haller, after the direct you will then have 30 minutes to prepare your cross.

EXHIBIT 14

PHOTO OF GLOUBERMAN

EXHIBIT 14a

GLOUBERMAN'S PLEA AGREEMENT

STATE OF SEAVIEW
SUNSET COUNTY DISTRICT ATTORNEY'S OFFICE `

STATE OF SEAVIEW	Case Number: DC-2022-1734-CRIM
v.	Hon. Jan Rostal
ANDIE GLOUBERMAN, Defendant.	Superior Court of Sunset County

PLEA AGREEMENT

This constitutes the plea agreement between Andie Glouberman and the District Attorney's Office for Sunset County. The terms of the agreement are as follows:

1. The Defendant Agrees to Plead Guilty. The defendant agrees to plead guilty to the superseding indictment, which charges him with conspiracy to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; to wit, 500 grams or more of cocaine in violation of Sunset Penal Code Sec. 2102(b), a Class C felony. The defendant is pleading guilty because he is guilty of the charge described above.

2. The Defendant Understands the Penalty. The statutory maximum sentence that the Court can impose for the current conviction is imprisonment for 20 years, a $250,000 fine and up to 8 years supervised release. Because this defendant was convicted within the past 10 years of the Class C felony crime of possession with the intent to distribute narcotics, the sentencing judge has the discretion to impose the sentencing enhancement of up to 5 years of additional imprisonment, to run consecutively to any prison term imposed for the current conviction. Thus the statutory maximum sentence for the underlying crime, together with the 5 year enhancement for the prior conviction, is 25 years in prison, a $250,000 (Two Hundred and Fifty Thousand Dollars) fine and 8 years supervised release.

3. Cooperation in Criminal Investigations. The defendant agrees to fully cooperate with the Sunset County District Attorney's Office, the Sunset local and State Police and any other law enforcement agency in their investigation of the charges contained in the superseding indictment. The defendant's cooperation will consist of all steps needed to uncover and prosecute such crimes, including, but not limited to, providing investigators with a full, complete and truthful statement concerning his knowledge of any and all criminal activity of which he is aware; truthfully answering investigators' questions; meeting with prosecutors before testifying; truthfully testifying before grand juries and in any court proceedings; and providing all relevant tangible evidence in his possession or under his control, including, but not limited to, objects, documents, and photographs.

Additionally, this plea agreement imposes on this defendant an obligation to voluntarily come forward with any and all information which he should reasonably know will assist in the investigation of criminal activity unrelated to the crimes charged in this superseding indictment, again committing to providing truthful answers to investigators and prosecutors, testifying in grand jury and any court proceedings and providing relevant tangible evidence in his possession or under his control.

The defendant will not commit any criminal offense during the course of his cooperation with the Sunset County District Attorney's Office. The defendant will submit to polygraph examination upon request. The defendant's obligation under this paragraph is a continuing one, and shall continue after sentencing until all investigations and prosecutions in which his cooperation deemed relevant by the Sunset County District Attorney's Office has been completed.

4. The Sunset County District Attorney's Office Agrees to Make the Following Sentence Reduction Motion. The District Attorney's Office will decide whether to recommend the sentencing reduction outlined below only if the defendant fully cooperates with and materially assists the State in the investigation or prosecution of others, including co-defendants in the current conspiracy case, as well as any other criminal activity about which he should reasonably be aware. The determination of whether the defendant has materially assisted the State in investigations and prosecutions will be made in the sole discretion of the Sunset County District Attorney's Office.

If the State determines that this defendant has fully and completely satisfied the above criteria, they will recommend to the sentencing judge in Case DC-2022-1734-CRIM the imposition of a 5-year prison sentence without any consecutive sentencing enhancement resulting from this defendant's prior (2016) narcotics conviction. The State will also recommend 4 years supervised release and a $5,000 (Five Thousand Dollars) fine.

[For case-file brevity, we have omitted the standard paragraphs on waiver of constitutional rights.]

5. Consequences of Breach. If the defendant breaches any provision of this agreement, including any promise of cooperation, whether before or after sentencing, the Sunset County District Attorney's Office shall have the right to terminate this agreement, or deny any or all benefits to which the defendant would otherwise be entitled under its terms. In the event the District Attorney's Office elects to terminate this agreement, the agreement shall be considered null and void, and the parties shall return to the same position they were in prior to the execution of this agreement, as though no agreement ever existed. In such event, the defendant shall remain liable for prosecution· on all original charges, and the District Attorney's Office shall be free to bring such additional charges as the law and facts warrant. The defendant further agrees to waive and forever give up his right to raise any claim that such a prosecution is time-barred if the prosecution is brought within one year of the breach that gives rise to the termination of this agreement.

6. Complete Agreement. This agreement has been entered into by both sides freely, knowingly, and voluntarily, and it incorporates the complete understanding between the parties. No other promises have been made, nor may any additional agreements, understandings or conditions be entered into unless in writing signed by all parties or on the record in open court.

Jesse Cormack

Date: May 27, 2022

Jesse Cormack
Assistant District Attorney

I have read this agreement and carefully discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the sentencing provisions, and of the consequences of entering into this agreement. No promises or inducements have been made to me other than those contained in this agreement. No one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

Andie Glouberman

Date: May 27, 2022

ANDIE GLOUBERMAN
Defendant

As Defendant's attorney, I have carefully discussed every part of this agreement with my client and fully advised my client of their rights, possible defenses, the sentencing provisions, and the consequences of entering into this agreement.

Rome Mather

Date: May 27, 2022

Rome Mather
Attorney for Defendant

EXHIBIT
14b

ARREST AND CONVICTION RECORD OF ANDIE GLOUBERMAN

DOB: 04-21-90
NAM/01 GLOUBERMAN, ANDIE
NAM/02 GLOUBERMAN, ANDY
NDL/M9566312, STATUS VALID
SOC/069528655

****

#1
03-14-2016 ARREST S.P.D., CREDIT CARD FRAUD, MISDEMEANOR
06-25-2018 CONVICTED AFTER JURY TRIAL
SEN: 6 MONTHS COUNTY JAIL, 150 HOURS COMMUNITY SERVICE

****

#2

09-14-2018 ARREST S.P.D., POSSESSION WITH INTENT TO DISTRIBUTE
CONTROLLED SUBSTANCE (COCAINE), FELONY
11-12-2018 CONVICTED ON GUILTY PLEA
SEN: 1 YEAR COUNTY JAIL, 2 YEARS PROBATION

****

#3
03-02-23 ARREST S.P.D. SUNSET. CONSPIRACY TO SELL CONTROLLED
SUBSTANCE (COCAINE), FELONY
04-13-23 CONVICTED ON GUILTY PLEA
SEN:

NOT TO BE DUPLICATED

CERTIFIED AS A CORRECT COPY
FROM THE RECORD.
Attest: Geri D. Scrivener
Clerk, Criminal Division

EXHIBIT 15

CHAT GP QUESTIONS

You
example cross examination jail house snitch

ChatGP

In a cross-examination involving a jailhouse snitch, the defense attorney aims to challenge the credibility and reliability of the informant. Here's an example:

Attorney: Mr. Smith, you overheard my client, Mr. Johnson, confessing to the crime while you were both in jail together, is that correct?

Jailhouse Snitch (JS): Yes, that's correct.

Attorney: And during your time in jail, you were facing your own charges, correct?

JS: Yes, I was.

Attorney: In exchange for your testimony against my client, were you offered any leniency or reduction in your own charges?

JS: They said they would consider it.

Attorney: So, you had a personal interest in providing information that might be favorable to the prosecution?

JS: I just wanted to do the right thing.

Attorney: Let's talk a little bit about your history as an informant. How many times have you provided information to the prosecution in exchange for a deal?

JS: A couple of times.

Attorney: And how many times did those deals result in reduced charges or a more favorable outcome for you?

JS: I don't remember the exact number.

Attorney: Isn't it true that in one case, the charges against you were dropped entirely in exchange for your cooperation?

JS: Yes, but that was a different situation.

Attorney: So, it's fair to say that providing information to the prosecution has been a successful strategy for you in the past?

JS: I just want to help bring criminals to justice.

Attorney: Mr. Smith, you've been caught lying under oath in the past, correct?

JS: That was a mistake.

Attorney: How can the jury trust your testimony now, given your history of dishonesty and your personal interest in receiving a favorable deal?

JS: I'm telling the truth about what I heard.

This example demonstrates how a defense attorney might question the credibility of a jailhouse snitch by highlighting their history of cooperation with the prosecution, potential personal motives, and previous issues with honesty.

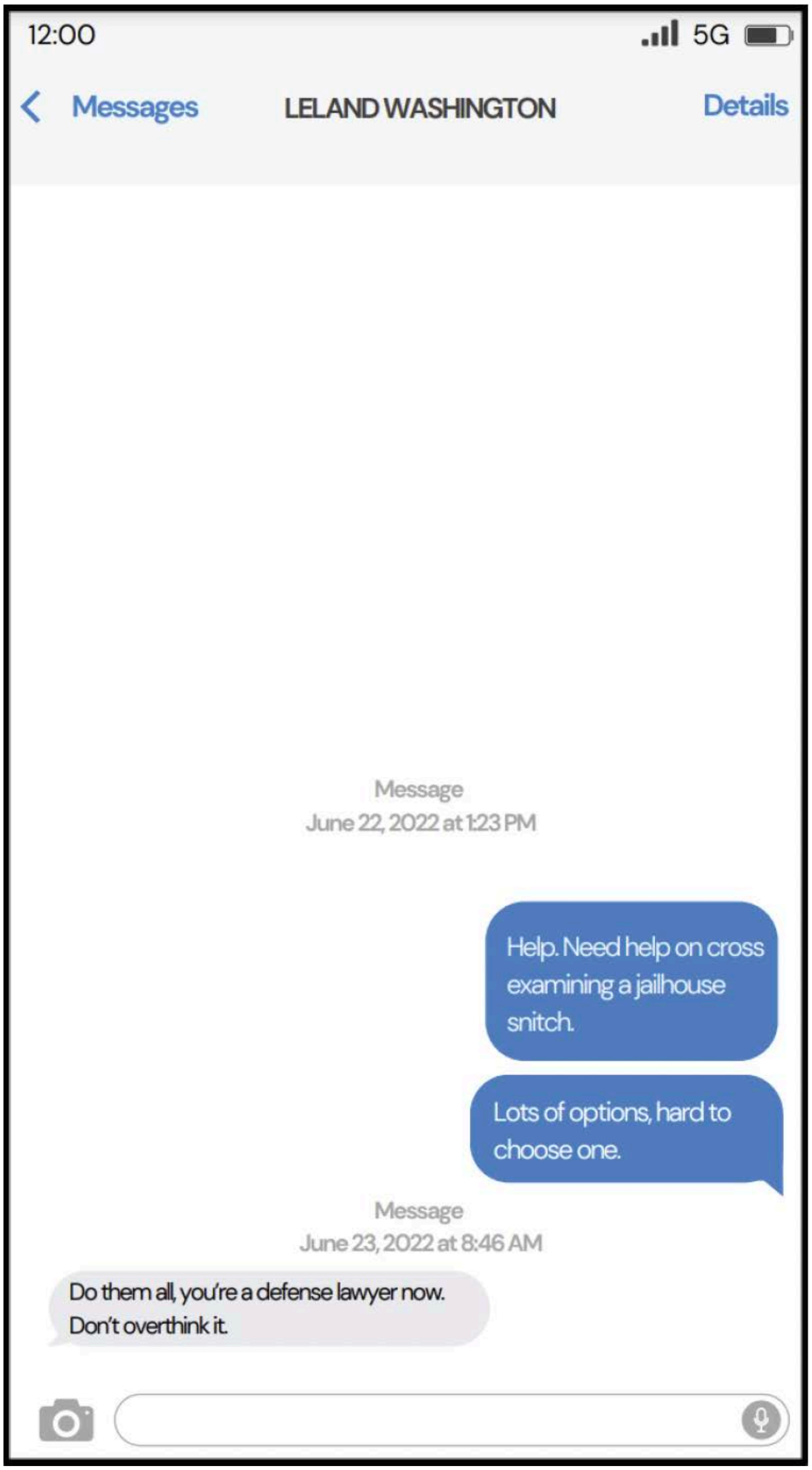
EXHIBIT 16

HALLER'S POST-IT NOTE TO REYES

Chat GP
is
better than me

EXHIBIT 17

<u>**HALLER'S TEXT EXCHANGE WITH LELAND WASHINGTON**</u>



DISTRICT COURT OF THE STATE OF SEAVIEW

COUNTY OF SUNSET

LIBNI REYES, Plaintiff, v. MICA HALLER Defendant.	Case Number: DC-2022-477 CIV COMPLAINT FOR PROFESSIONAL NEGLIGENCE (2 COUNTS)

JURY VERDICT

1. Was the Defendant negligent on either Count I (Safeguarding the Privilege) or Count II (Conduct of the Cross-examination), or both? YES ____ NO ____

If YES, go to Question 2. If NO, enter your verdict for the Defendant.

2. Was the Defendant's negligence a substantial factor in causing the harm of which Plaintiff complains? YES ____ NO ____

If YES, enter your verdict for Plaintiff. If NO, enter your verdict for Defendant

We, the jury, in the above-entitled matter, return the following verdict. At least three-fourths of us concur in this verdict.

For the Plaintiff _______

For the Defendant _______

Signed by the Foreperson: __________________________

FINAL JURY INSTRUCTIONS

1. Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you to the facts as you find them from the evidence.

2. The evidence in this case consists of the sworn testimony of the witnesses, all exhibits and other evidence received in evidence, and all the facts that may be admitted or agreed to by the parties. In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case, but you may not speculate on any matters outside the evidence.

3. Evidence can come in many forms. It can be testimony about what someone saw, heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion. Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. This indirect evidence is referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky. As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

4. A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony. In deciding whether to believe a witness's testimony, you may consider among other factors the following:

- How well did the witness see, hear, or otherwise sense what he or she described in court?
- How well did the witness remember and describe what happened?
- How did the witness look, act, and speak while testifying?
- Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties in the case? Does the witness have a personal stake in how this case is decided?
- What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. But, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest. Do not make any decision simply because there were more witnesses on one side than the other. If you believe it is true, the testimony of a single witness is enough to prove a fact. You must not be biased in favor of or against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.

5. In this case, each witness has signed a prior statement. Each witness later certified that the statement was complete. If a witness has provided information that differs from, or is in addition to, information contained in the statement, you should consider that witness's entire testimony with great caution.

6. During the trial you heard testimony from expert witnesses. The law allows an expert to state opinions about matters in his or her field of expertise even if he or she has not witnessed any of the events involved in the trial. You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert testimony, and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony. In deciding whether to believe such testimony, you should consider the expert's training and experience; the facts the expert relied on; and the reasons for the expert's opinion. If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matter that each witness relied on. You may also compare the experts' qualifications.

7. During the trial, you heard testimony read from a deposition. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was read to you the same way as you consider testimony given in court.

8. Libni Reyes, the Plaintiff, has brought this professional negligence claim against Mica Haller, the Defendant. It is the Plaintiff's claim that the Defendant was careless, negligent, and failed to act with the ordinary skill and competence of an attorney engaged in the practice of law in the State of Seaview in his representation of the Plaintiff in the following respects:

<u>Count I – Safeguarding the Attorney-Client Privilege</u>

a. Defendant failed to properly and adequately instruct Plaintiff on how to safeguard the attorney-client privilege and/or failed to take preventive action so as to avoid Plaintiff's waiver of the privilege.
b. As a result of these alleged failures, the prosecution in the criminal case against Plaintiff learned of, and called as a witness, a confidential informant who testified against Plaintiff.
c. As a direct result of the informant's testimony, the jury found Plaintiff guilty of the charges against him.

<u>Count II – Conduct of Cross-Examination</u>

a. Defendant improperly and incompetently conducted the cross-examination of the informant, in large part, although not exclusively, by relying on questions generated by an Artificial Intelligence platform called ChatGT.
b. Defendant's conduct of the cross was in other respects so ineffective as to be incompetent.
c. As a direct result of the ineffective nature of the cross-examination, the jury found Plaintiff guilty of the charges against him.

A verdict of liability may be based on either Count I or Count II, or both. The Verdict form I will give you will help you follow this instruction.

9. The Plaintiff claims that as a result of his conviction in the criminal trial he has suffered damage to his reputation and standing in the community and with his family, monetary losses, and other damages. However, you are not to concern yourselves with the measure of Plaintiff's damages, if any, which will be determined in a later proceeding.

10. The Defendant denies all of Plaintiff's claims and asserts that at all times he acted with the ordinary skill and competence of a lawyer practicing in the State of Seaview.

11. Plaintiff has the burden of proving that it is more likely true than not true that:

i. An attorney-client relationship existed between the Defendant and the Plaintiff. In this case, it is undisputed that the attorney/client relationship existed.

ii. The Defendant did not exercise the care and judgment of a reasonable attorney possessed of legal skill and knowledge in similar circumstances;

iii. The Defendant's failure to exercise the required standard of care was a substantial factor in causing the harm to Plaintiff that Plaintiff alleged and sought to prove.

12. Legal professional negligence consists of negligent or unskilled performance by an attorney of the duties undertaken by her on behalf of her client, or a lack of proper care and skill in the performance of a professional act of representation.

13. An attorney is obligated to exercise that degree of care, skill, and diligence that is exercised by prudent practicing attorneys in the jurisdiction in which she is licensed to practice law.

14. An attorney is not required to exercise perfect professional judgment in every instance. However, the attorney's license to practice law and her contract of employment hold out to the client that she possesses certain skills, knowledge, and abilities commensurate with those of similarly situated practicing attorneys in the State.

15. The duties imposed by law on an attorney are to possess and employ in the handling of the client's legal affairs such reasonable skill and knowledge usually possessed by attorneys in the same jurisdiction in which she is licensed to practice law. In employing the required skills and knowledge, she is also required to exercise the care and judgment of a reasonable attorney possessed of legal skill and knowledge in similar circumstances. This duty applies to all conduct in the representation of a client in a criminal matter, including, but not limited to, case investigation, providing legal advice to the client, plea bargaining, and all aspects of the litigation and trial of the matter.

16. While proof of a violation of a rule regulating the conduct of lawyers (e.g., the Seaview Rules of Professional Conduct) does not give rise to an implied cause of action for legal malpractice – also known as "professional negligence" – it may nevertheless be considered by you as the trier of fact as an aid in understanding and applying the standard of negligence set forth in Instruction 10, to the extent that:

17. The Seaview Rules of Professional Conduct include the following provisions:

[Counsel may rely on and argue any of the excerpts from SMRPC included in Appendix A hereto.]

18. It is now your responsibility to deliberate and, if you agree, return a verdict in this case. Your verdict should concern liability only and must be the decision of at least three-fourths of the jury.

APPENDIX A

EXCERPTS FROM SEAVIEW MODEL RULES OF PROFESSIONAL CONDUCT (SMRPC)[8]

1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

[8] *[Case File Note: For economy we have omitted the elided language not pertinent to the issues in the case.]*

ANNOTATION KNOWLEDGE

- Technology

Rule 1.1 requires a lawyer to have a basic understanding of the benefits and risks associated with relevant technology. Cmt. [8]; ABA Formal Ethics Op. 477R (2017). See, e.g., ABA Formal Ethics Op. 498 (2021) (technological competence required when practicing virtually); ABA Formal Ethics Op. 483 (2018) (duty to monitor for and respond to data breach); ABA Formal Ethics Op. 11-459 (2011) (protecting confidentiality of client's electronic communications); Ala. Ethics Op. 2010-02 (n.d.) (cloud computing); Alaska Ethics Op. 2014-3 (2014) (cloud computing); Ariz. Ethics Op. 20-0008 (n.d.) (handling metadata); Cal. Ethics Op. 2020-203 (n.d.) (data security); San Diego Cnty. Ethics Op. 2018-3 (2018) (technology- assisted discovery); Colo. Ethics Op. 141 (2020) (data security); D.C. Ethics Op. 371 (2016) (social media); Fla. Ethics Op. 21-2 (2021) (accepting mobile or internet-based payments); Ill. Ethics Op. 16-06 (2016)(cloud computing); Ind. Ethics Op. 1-20 (2020) (social media); Ky. Ethics Op. 446 (2018) (cybersecurity); Mich. Informal Ethics Op. RI-381 (2020) (ensuring lawyer's procedures keep pace with technology risks); Miss. Ethics Op. 263 (2020) (cloud computing); Mo. Informal Ethics Op. 2021-12 (2021) (virtual law office); N.H. Ethics Op. 2019-20/3 (2020) (social media research on jurors); N.H. Ethics Op. 2018-19/1 (2019) (lawyer traveling with electronic devices should understand information storage and take reasonable steps to preserve confidentiality); N.Y. State Ethics Op. 842 (2010) (keeping up with advances in technology used in law practice); N.Y. Cnty. Ethics Op. 749 (2017) (electronically stored information [ESI] and e-discovery); N.Y. City Ethics Op. 2022-3 (2022) (copying client on email to opposing counsel); N.Y. City Ethics Op. 2015-3 (2015) (recognizing common e-mail trust account scams); N.C. Ethics Op. 2020-5 (2021) (avoiding wire fraud in real estate transactions); Ohio Bd. of Prof. Conduct Ethics Op. 2022-07 (2022) (handling cryptocurrency); Ohio Bd. of Prof. Conduct Ethics Op. 2017-5 (2017) (virtual law office); Pa. Formal Ethics Op. 2020-300 (2020) (protecting client information while working remotely); Tenn. Ethics Op. 2015-F-159 (2015) (cloud computing); Texas Ethics Op. 680 (2018) (cloud computing); Va. Ethics Op. 1898 (2022) (handling fee paid in cryptocurrency); W. Va. Ethics Op. 2015-02 (2015) (social media).

See generally Jan L. Jacobowitz & John G. Browning, Legal Ethics and Social Media: A Practitioner's Handbook (2d ed. 2022); John G. Browning, The New Duty of Digital Competence: Being Ethical and Competent in the Age of Facebook and Twitter, 44 U. Dayton L. Rev. 179 (2019); Margaret M. DiBianca, Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media, 12 Del. L. Rev. 179 (2011); Katy (Yin Yee) Ho, Defining the Contours of an Ethical Duty of Technological Competence, 30 Geo. J. Legal Ethics 853 (Fall 2017); Renee Knake Jefferson, Lawyer Ethics for Innovation, 35 Notre Dame J.L. Ethics & Pub. Pol'y 1 (2021); Heidi Frostestad Kuehl, Technologically Competent: Ethical Practice for 21st Century Lawyering, 10 Case W. Reserve J.L. Tech. & Internet 1 (2019); Monica McCarroll, Discovery and the Duty of Competence, 26 Regent U. L. Rev. 81 (2013-2014); Amanda Moghaddam, "EZ ESI: Hands-on Advice for Handling and Using ESI in a Legal Malpractice Claim," ABA/BNA Lawyers' Manual on Professional Conduct, 33 Law. Man. Prof. Conduct 561 (Current Reports, Oct. 4, 2017); Ellen Platt, Zooming into A Malpractice Suit: Updating the Model Rules of Professional Conduct in Response to Socially Distanced Lawyering, 53 Tex. Tech L. Rev. 809 (2021); Cheryl B. Preston, Lawyers' Abuse of Technology, 103 Cornell L. Rev. 879 (2018); Lisa Z. Rosenof, The Fate of Comment 8: Analyzing A Lawyer's Ethical Obligation of Technological Competence, 90 U. Cin. L. Rev. 1321 (2022); Nicole Yamane, Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands, 33 Geo. J. Legal Ethics 877(2020).

FAILURE TO COMPLY WITH ETHICS RULES

A lawyer's failure to comply with a duty imposed by another ethics rule may also constitute lack of competence under Rule 1.1. See, e.g., In re Muhammad, 3 So. 3d 458 (La. 2009) (accepting criminal defense matter though lawyer was related to both victim and defendant violated Rules 1.1 and 1.7); Att'y Grievance Comm'n v. Zuckerman, 944 A.2d 525 (Md. 2008) (failing to ensure settlement and judgment monies were promptly accounted for and disbursed facilitated office manager's embezzlement and so violated Rules 1.1 and 1.15); Cincinnati Bar Ass'n v. Lawson, 891 N.E.2d 749 (Ohio 2008) (failing to arrange service on defendant for several months even after being ordered to do so by presiding judge violated Rules 1.1 and 1.3); State ex rel. Okla. Bar Ass'n v. Clausing, 224 P.3d 1268 (Okla. 2009) (taking loan from trust he created for settlor and for which lawyer was trustee violated Rules 1.1, 1.7, and 1.8); In re Sturkey, 657 S.E.2d 465 (S.C. 2008) (conversing with criminal defendant client within earshot of police officers violated Rules 1.1 and 1.6); cf. Rule 1.6, cmt. [18] (lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure"). But *see In re Ward*, 881

N.W.2d 206 (N.D. 2016) (failure to respond to communications or otherwise maintain "cooperative relationship" with bankruptcy trustee violated Rule 1.3 but not Rule 1.1; court noted policy of discouraging "'stacking' or "piling on" charges of rule violations for same conduct).

DELEGATION AND SUPERVISION

Because a lawyer is required to supervise subordinate lawyers and nonlawyer staff, the ethical obligation of competence cannot be avoided by referring a matter to another. E.g., In re Herbst, 931 A.2d 1016 (D.C. 2007) (allowing nonlawyer staff member to negotiate settlement of client's case); Att'y Grievance Comm'n v. Moawad, 257 A.3d 611 (Md. 2021)(failure to provide oversight to non-attorney staff resulted in lack of competent representation); In re Saab, 547 N.E.2d 919 (Mass. 1989) (lawyer who had never handled domestic relations appeal turned it over to inexperienced junior associate whom he then failed to supervise); In re Martin, 699 S.E.2d 695 (S.C. 2010) (failure to timely file documents warranted discipline notwithstanding lawyer's assertions that he delegated tasks to nonlawyer staff); ABA Formal Ethics Op. 08-451 (2008) ("lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1"); accord San Diego Cnty. Ethics Op. 2007-1 (2007); Colo. Ethics Op. 121 (2009); N.C. Ethics Op. 2007-12 (2008). See also Cal. Ethics Op. 2021-206 (n.d.) (competence includes mental and emotional ability to perform legal services; impaired lawyer's conduct can trigger obligations for subordinates and supervisors). But see In re Wilkinson, 805 So. 2d 142 (La. 2002) (failure to supervise work of law clerk warranted discipline under Rule 5.1 but not Rule 1.1). See generally Rule 5.1

(Responsibilities of Partners, Managers, and Supervisory Lawyers); Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance).

INEXPERIENCE

- New Lawyers

Lack of competence may be a particular problem for the new or inexperienced lawyer. E.g., Wise v. Washington Cnty., No. 10-1677, 2015 WL 1757730, 2015 BL 110240 (W.D. Pa. Apr. 17, 2015) (failure to adequately investigate or properly counsel client on risks and other substandard practice in civil rights case); In re Landrith, 124 P.3d 467 (Kan. 2005) (lawyer practicing for only four months engaged in egregious and protracted misbehavior); In re Martin, 982 So. 2d 765 (La. 2008) (lawyer mishandled first federal criminal defense case; inexperience cited as mitigating factor); In re Yacavino, 494 A.2d 801 (N.J. 1985) (new lawyer left alone and unsupervised in firm's outlying office failed to complete adoption; court condemned firm's attitude of leaving new lawyers to "sink or swim"); Columbus Bar Ass'n v. Kizer, 915 N.E.2d 314 (Ohio 2009) (lawyer neglected four separate matters within first four years of beginning practice); see also Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers). See generally Christopher Sabis & Daniel Webert, Understanding the ""Knowledge" Requirement of Attorney Competence: A Roadmap for Novice Attorneys, 15 Geo. J. Legal Ethics 915 (Summer 2002).

- Unfamiliarity with Areas of Law

Competence includes the ability to discern when an undertaking requires specialized knowledge or experience that a lawyer does not have and requires that the lawyer either acquire the expertise, associate with a specialist, or decline the undertaking and refer it to a competent specialist. See United States v. Munoz, No. 1:20-MJ-00090-SAB-1, 2022 WL 1430300 (E.D. Cal. May 5, 2022) (inexperience in federal criminal court system no excuse; lawyer failing to rise to responsibility of informing self of rules should not represent federal criminal defendants); In re Fisher, 202 P.3d 1186 (Colo. 2009) (lawyer who had never handled case involving federal pension failed to investigate requirements for securing divorce client's rights to ex-husband's federal pension); In re Blickman, 164 N.E.3d 708 (Ind. 2021) (no violation by lawyer who did timely research before advising client; rule "does not demand perfection or even specialized expertise" but instead "demands competency and explicitly anticipates, both in the text of the rule and its commentary, that preparation and research frequently will be necessary"); In re Terry, 265 P.3d 537 (Kan. 2011) (lawyer with no experience in employment discrimination ""failed to represent [plaintiff] with the legal knowledge, skill, thoroughness, and preparation reasonably necessary"); Att'y Grievance Comm'n of Md. v. Yi, 235 A.3d 963 (Md. 2020) (rejecting inexperience as excuse: "[a] competent attorney recognizes the limits of his or her expertise and does not put the client at risk in venturing beyond it"); In re Kaszynski, 620 N.W.2d 708 (Minn. 2001) (ignorance of immigration law and procedures and failure to supply documentation required to support clients' claims for relief put clients in danger of deportation); Miss. Bar v. Pegram, 167 So. 3d 230 (Miss. 2014) (lawyer acknowledging lack of competence to handle criminal trial should not have agreed to act as sole counsel and should have limited role to negotiating pretrial diversion); State ex rel. Counsel for Discipline v. Orr, 759 N.W.2d 702

(Neb. 2009) (lawyer should have recognized specialized nature of franchising law and performed research necessary to become competent); Richmond's Case, 872 A.2d 1023 (N.H. 2005) ("Rule 1.1 mandates that a general practitioner must identify areas in which the lawyer is not competent"); In re Yetman, 552 A.2d 121 (N.J. 1989) (failure to refer complex matter beyond lawyer's competence is itself violation of duty of competence); State ex rel. Okla. Bar Ass'n v. Burton, 482 P.3d 739 (Okla. 2021) (no violation by lawyer who did little to further estate and was unaware of rules for payment in probate cases but remained on case only three months before involving more experienced counsel);

Disciplinary Counsel v. Baldwin, 225 A.3d 817 (Pa. 2020) (lawyer lacked criminal law experience, had never represented a client before a grand jury and failed to consult with experienced counsel); In re Peper, 763 S.E.2d 205 (S.C. 2015) (lawyer recognized his lack of competence but failed to limit scope of representation and missed statute of limitations); In re Dumke, 635 N.W.2d 594 (Wis. 2001) (lawyer unfamiliar with sexual predator proceedings failed to hire or seek appointment of expert to evaluate testing methods and risk analysis upon which state based its opinion that client was sexually violent person); see also ABA Formal Ethics Op. 465 (2013) (must limit Groupon or deal-of-the-day offer to services and areas in which lawyer is competent); Cal. Ethics Op. 2020-202 (n.d.) (if lawyer representing cannabis business cannot acquire full range of specialized knowledge through study or consulting with other counsel, lawyer should limit scope of representation to issues within lawyer's competence and ask client to obtain other counsel for remaining issues); cf. N.C. Ethics Op. 2010-6 (2011) (advertising for matters in legal areas in which lawyer is inexperienced is permissible only if advertisement includes statement that lawyer will associate with experienced lawyer). See generally Christine M. Macey, Referral Is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical

Obligations, 22 Geo. J. Legal Ethics 979 (Summer 2009) ("if the first-time advocate is willing to prepare adequately and the well-informed client wants her to remain on the case, the lawyer has no ethical obligation to refer the case to a specialist"); Brad S. McLelland, Attorney Competence or Lack Thereof-- Under What Circumstances May an Attorney Ethically Handle a Matter in Which the Attorney Is Not Competent? Is an Ethical Rule Necessary to Restrain Such an Attorney?, 22 J. Legal Prof. 297 (Spring 1998) (comparing provisions of Model Code and Rules permitting lawyer to provide services on emergency basis in legal field in which lawyer is unfamiliar).

Self-Education in Unfamiliar Area

Although, as Comment [2] notes, it is possible for a lawyer to provide competent representation in a wholly novel field through "necessary study," the lawyer should not expect the client to pay for excessive amounts of time preparing for tasks that with experience become routine, In re Estate of Larson, 694 P.2d 1051 (Wash. 1985), or for "every minute of the lawyer's preparation." Robert L. Wheeler, Inc. v. Scott, 777 P.2d 394 (Okla. 1989) (fee award reduced when first-year associate assigned to case). See generally Rule 1.5 (Fees).

SIXTH AMENDMENT CONSIDERATIONS

Incompetent representation by criminal defense counsel can violate the Sixth Amendment right to effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984). However, the evaluation of competence for Sixth Amendment purposes may differ from the evaluation of competence for Rule 1.1 purposes. See, e.g., In re Wolfram, 847 P.2d 94 (Ariz. 1993) (ineffective assistance may serve as predicate for disciplinary action, but post-conviction relief does not necessarily equate to violation of ethics rules); Fla. Bar v. Sandstrom, 609 So. 2d 583 (Fla. 1992) (representation of murder defendant whose conviction was vacated on ground of ineffective assistance included "such a flagrant lack of preparation and such deficient performance" as to warrant suspension); Att'y Grievance Comm'n v. Middleton, 756 A.2d 565 (Md. 2000) (failure to move to suppress evidence, present favorable evidence, or prepare for cross-examination of prosecution witnesses resulted in post-conviction relief for defendant and discipline for lawyer); In re Agrillo, 604 N.Y.S.2d 171 (App. Div. 1993) (although reversal of client's conviction on ground of ineffective assistance will not always result in determination of professional misconduct, respondent's specific admissions-- that he went to trial unprepared, failed to place his level of unpreparedness on record, and made no record of his alleged inability to hear trial testimony--clearly established ethics violations); In re Longacre, 122 P.3d 710 (Wash. 2005) (that lawyer's representation was previously held ineffective was not dispositive of later Rule 1.1 inquiry).

1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

ANNOTATION

NATURE OF DUTY

LAWYER NOT RELIEVED OF ETHICAL OBLIGATION BY DELEGATING WORK

A lawyer who agrees to represent a client is not relieved of ethical obligations by delegating the work to others. See, e.g., Gomez v. Am. Med. Sys. Inc., No. CV-20-00393-PHX-ROS, 2021 WL 763838, 2021 BL 70125 (D. Ariz. Feb. 26, 2021) (lawyer may not blame paralegal for missed deadline when it was lawyer's duty to represent client diligently;) In re Dickens, 174 A.3d 283 (D.C. 2017)(ignoring "clear warning

signs" that firm partner was mismanaging trust and estate client's assets); In re Robinson, 495 S.E.2d 28 (Ga. 1998) (lawyer undertook representation and then, without formally withdrawing, assigned cases to legal assistants or other lawyers who did not pursue claims); Att'y Grievance Comm'n v. Moawad, 257 A.3d 611 (Md. 2021) (failure to oversee non-attorney staff); Att'y Grievance Comm'n v. Narasimhan, 92 A.3d 512 (Md. 2014) (immigration lawyer forwarded clients' requests for information to associate but never followed up after associate responded inadequately); Sheridan's Case, 781 A.2d 7 (N.H. 2001)

(lawyer who delegated oversight of estate to associate but remained counsel and commissioner of record was responsible for untimely filings of accounts for estate); State ex rel. Okla. Bar Ass'n v. Sheridan, 84 P.3d 710 (Okla. 2003) (although office manager's behavior exacerbated violations, lawyer himself "was the one who failed to fulfill his responsibilities to his clients";) In re Johnson, 689 S.E.2d 623 (S.C. 2010) (failing to attend real estate closing and allowing nonlawyer office assistant to conduct it instead); cf. In re Bailey, 115 So. 3d 458 (La. 2013) (lawyer's failure to have his wife, who served as his office manager and trustee of client's settlement funds, file timely accountings and tax returns resulted from conflict of interest and failure to supervise, not lack of diligence). See also ABA Formal Op. 498

(2021) (lawyer practicing virtually must supervise subordinate lawyers and nonlawyer assistants); Cal. Ethics Op. 2021-206 (n.d.) (law firm supervisors of impaired lawyer must take reasonable action to protect clients and ensure compliance with ethics rules). See the annotations to Rule 5.1

(Responsibilities of Partners, Managers, and Supervisory Lawyers) and Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance).

1.4 Communication

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer

asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

ANNOTATION

Paragraph (b): Duty to Explain Matters to Client

Rule 1.4(b) requires a lawyer to explain a matter to a client to the extent reasonably necessary for the client to make informed decisions concerning the representation. See In re Johnson, 275 A.3d 268 (D.C. 2022) (failure to disclose that fee in workers compensation matter exceeded and violated statute); In re Welke, 131 N.E.3d 161 (Ind. 2019) (failure to retain interpreter to communicate with client); In re Kupka, 458 P.3d 242 (Kan. 2020) (providing false information on status of clients' matters); Ky. Bar Ass'n v. Helmers, 353 S.W.3d 599 (Ky. 2011) (failing to inform mass tort clients of aggregate settlement terms before obtaining signed releases); Att'y Grievance Comm'n v. Portillo, 251 A.3d 1131 (Md. 2021) (failure to explain consequences of not appearing for immigration hearings); Att'y Grievance Comm'n v. Riely, 242 A.3d 206 (Md. 2020) (sending correspondence in English without confirming that clients, recent arrivals to U.S., had means of comprehending); Att'y Grievance Comm'n v. Framm, 144 A.3d 827 (Md. 2016) (failing to provide mentally impaired client with written explanation of advice); D.C. Ethics Op. 377

(2019) (duty of firm's managerial lawyer to explain departing impaired lawyer's circumstances sufficiently to allow clients to make informed decisions); D.C. Ethics Op. 373 (2017) (appointed criminal defense lawyer must explain scope of representation to defendant, including matters excluded); Miss. Ethics Op. 265 (2022) (lawyer may counsel clients in compliance with Medical Cannabis Act but must advise of relevant federal law); N.Y. City Ethics Op. 2017-7 (2017) (lawyer may take into consideration joint clients' sophistication and experience in deciding whether particular disclosure or explanation is required); Wis. Ethics Op. E-84-7 (revised 2021) (lawyer must consult client on risks and benefits of remaining silent about error by others benefitting client); see also Att'y Grievance Comm'n v. Rand, 57

A.3d 976 (Md. 2012) (lawyer who advised client at initial meeting of consequences of failing to file employment grievance did not violate Rule 1.4 by not reiterating advice over three-year period).

1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.

ANNOTATION

- Relationship of Rule 1.6 to Attorney-Client Privilege

The attorney-client evidentiary privilege is so closely related to the ethical duty of confidentiality that the terms “privileged” and “confidential” are often used interchangeably. But the two are entirely separate concepts, applicable under different sets of circumstances and using different standards. The ethical duty is extremely broad: it protects from disclosure “all information relating to the representation,” and applies at all times. The attorney-client privilege, however, is more limited: it protects from compelled disclosure the substance of a lawyer-client communication made for the purpose of obtaining or imparting legal advice or assistance, and applies only in the context of a legal proceeding governed by the rules of evidence.

APPENDIX B

LEGAL ADDENDUM

A. *Alison v. Jerome*, 715 Seaview 38 (2004) (excerpt)

To prove a legal malpractice case a plaintiff must prove by a preponderance of the evidence that the defendant's failure to exercise that degree of care, skill, and diligence that is exercised by prudent practicing attorneys in the jurisdiction in which he is licensed to practice law was a substantial factor in causing the harm to the plaintiff that plaintiff alleges and seeks to prove.

A "substantial factor" is one that a reasonable person would consider would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

B. *Milstein v. Kay & Young, P.C.*, 705 Seaview 444 (1999) (excerpt)

A violation of the NRPC is not negligence *per se* in a legal malpractice case. However, the NRPC, and any violation thereof, are relevant evidence in determining whether a lawyer has committed legal malpractice and may be considered by the trier of fact as an aid in understanding and applying the standard of negligence, to the extent that: (a) the rule was designed for the protection of persons in the position of the plaintiff, and (b) proof of the content and construction of such a rule is relevant to the plaintiff's claim.

C. *Point v. Dunstable*, 727 Seaview 1 (2010) (excerpt)

Appellant Point was convicted of perjury arising out her testimony in an arbitration. Appellee Dunstable represented Point in both the arbitration and the perjury trial. The present suit sounds in malpractice, Point claiming that Dunstable's erroneous advice or failure to advise in the perjury trial caused her to suffer the conviction. The case arrives here after Point's malpractice action was dismissed for failure to state a claim upon which relief can be granted, NRCP 12(b)(6). Both the trial court and the Seaview Court of Appeals held that her failure to plead actual innocence, together with her failure to pursue the criminal-law remedy of a petition for ineffective assistance of counsel, were fatal gaps in her pleading. Permission was not granted to amend her complaint, on the reasoning that she asseverated neiher an intention to plead and prove actual innocence nor to file an ineffectiveness petition.

Under Seaview law, a malpractice plaintiff's burden on causation is to show that the defendant's action or inaction, if proved to have fallen below the applicable standard of care, "was a substantial factor in causing the harm to the plaintiff that plaintiff alleges and seeks to prove." *Alison v. Jerome*, 715 Seaview 38 (2004). While this rule was announced in a case arising out of claimed malpractice in an underlying *civil* case, we do not consider that a different standard should apply in a *criminal* case, as here. First, there is no logical rationale we have seen discussed or briefed to us that would make such a distinction. Second, to require proof of actual innocence would cause such criminal-trial- based malpractice actions to become bi-level trials: a re-trial of the underlying criminal case, then a trial of the malpractice case. Judicial economy this is not. Third, such a different standard of proof would allow criminal-law defense counsel to commit malpractice with little fear of monetary retribution, given the high burden of proof the rule would place on plaintiffs. One purpose of malpractice law, like much of the rest of tort law, is to encourage proper conduct by penalizing improper conduct. "The law seeks to elicit competent and diligent representation through civil liability …." *Restatement of the Law (3d) Governing Lawyers, § 16, Comment d.* That purpose would be cancelled out, in large part at least, by the rule argued for by appellee.

We hold also that filing a claim of ineffective assistance of counsel (IAC) is not a prerequisite to the bringing of a malpractice case sounding in tort. The choice between the two avenues of relief is open to the plaintiff (i.e., the defendant in the underlying criminal case) to make; the criminal law of IAC and the civil law of negligence are independent, albeit related (see Seaview Model Rules of Professional Conduct 1.1, *Comment – Sixth Amendment Considerations*). A decision not to pursue an IAC claim does not foreclose a claim for relief via a legal malpractice suit.

Reversed.