

THE AMERICAN LAW INSTITUTE
Continuing Legal Education

**New UCC Article 12:
Everything You Need to Know**

January 30, 2023

Webcast

Originally Presented January 27, 2023

**The 2022 Amendments to the Uniform Commercial Code:
Article 12 and Related Provisions - Presentation Slides**

By

Juliet M. Moringiello
Widener University Commonwealth Law
Harrisburg, Pennsylvania

Edwin E. Smith
Morgan, Lewis & Bockius LLP
New York, NY

Steven O. Weise
Proskauer Rose LLP
Los Angeles, California

THE 2022 AMENDMENTS TO THE UNIFORM COMMERCIAL CODE: ARTICLE 12 AND RELATED PROVISIONS

Professor Juliet M. Moringiello, Widener U. Commonwealth Law School
Edwin E. Smith, Morgan, Lewis & Bockius LLP
Steven O. Weise, Proskauer Rose LLP

Presentation for American Law Institute Continuing Legal Education
January 27, 2023

Organization (1)

- General
 - Why the project?
 - The ALI/ULC project – background
 - Themes and other observations
- Digital assets
 - What is a digital asset?
 - Scope of amendments relating to digital assets
 - Controllable electronic records
 - Qualifying purchaser
 - Tethering, including controllable accounts and controllable payment intangibles

Organization (2)

- Security interests
- Money
- Definitions
- Limitations, Challenges, Enactments

Note: other 2022 UCC amendments will not be covered in this presentation: chattel paper, negotiable instruments, payment systems, letters of credit, documents of title, investment securities, hybrid sale or lease of goods transactions, and misc. amendments



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Why the Project? (1)

- Virtual currency (not including “money”) before amendments
 - Buyers
 - No rules to cut off third-party property claims unless the virtual currency is held as investment property (held through a custodian or exchange with UCC Article 8 opt-in)
 - Secured parties
 - Virtual currency that is not held as investment property is a general intangible
 - The rules relating to perfection and priority of a security interest in general intangibles apply
 - Perfection by filing
 - Need for release or subordination of earlier filed financing statement covering virtual currency or general intangibles in order to insure priority
 - Monitoring for post-closing changes, especially change of location of an individual debtor
 - Concern even if the virtual currency is investment property
- Electronic money and secured transactions

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Why the Project? (2)

- Trade finance
 - The desire to use electronic promissory notes and electronic bills of exchange
 - UCC Article 3 requirement of a writing
 - Limited role of “transferable records” under E-Sign and the Uniform Electronic Transactions Act
 - Greater clarity of the effect of choice-of-law and choice-of-forum clauses on negotiable instrument status



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The ALI/ULC Project - Background

- The Uniform Commercial Code
- The sponsoring organizations: the American Law Institute & the Uniform Law Commission
- The process
 - Recommendation of the Permanent Editorial Board for the Uniform Commercial Code
 - Study committee (2019)
 - Drafting committee
 - Advisors
 - Observers (approximately 350)
 - Meetings – open, in-person, virtual
 - ULC web site for drafts
 - ALI and ULC approvals obtained
 - American Bar Association approval – expected at mid-year meeting
 - State introductions now beginning in 2023 legislative sessions

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Themes and Observations (1)

- Rapidly changing technology; law trying to catch up
- Examination of the entire UCC, not just those areas where there is acute market pressure
- Technological neutrality
 - Experience with Uniform Electronic Transactions Act
 - No express mention in proposed amendments of blockchain, distributed ledger technology, public key or private key – covered by technology neutral provisions
- No change in policy choices unless justified

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Themes and Observations (2)

- No preference for digital asset being directly or indirectly held; agnostic
- Miscellaneous changes – issues in practice; troublesome court decisions



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Digital Assets



What is a digital asset?

- An “electronic” record in contrast to a paper record
 - UCC 1-201(b)(31) defines “record” as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”
- Despite the word “asset” (in “digital asset”), the electronic record may or not have value
 - An electronic contract to receive goods has the same value as a paper contract to receive goods
 - Merely possessing the paper contract does not entitle the possessing party to the goods
 - Merely receiving and storing the electronic contract does not entitle the receiving party to the goods
 - However, some digital assets do themselves have value
 - Bitcoins and other virtual currencies
 - Non-fungible tokens (“NFTs”)
 - Electronic records in which other rights are evidenced by applicable law, *e.g.*, a transferable record under the Uniform Electronic Transactions Act evidences a payment right

Scope of Amendments Relating to Digital Assets

- Focus on commercial law in relation to digital assets deals with the rights of private parties. The proposed amendments, primarily in proposed Article 12, address such questions as:
 - To what extent does a buyer of a digital asset take the asset free of third-party property claims?
 - Consider virtual (non-fiat) currency
 - How does a secured party perfect a security interest in a digital asset, ensure that the security interest has priority, and enforce the security interest?
- The proposed amendments do not address other law, such as:
 - Whether a digital asset is a security or a commodity for regulatory purposes
 - Taxation of digital assets
 - Money transmission laws
 - Anti-money laundering laws

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Relation to Other ULC Projects on Digital Assets (1)

- Relation to other ULC Acts
 - Uniform Regulation of Virtual Currency Businesses Act
 - Regulatory act where the digital asset is a virtual currency held on an exchange or with a custodian
 - Proposed Article 12 is not a regulatory statute and is agnostic as to whether digital asset is held through an exchange or custodian or is held directly
 - Supplemental Commercial Act (to Uniform Regulation of Virtual Currency Businesses Act)
 - Required opt-in to Article 8 to get a license
 - Nothing in proposed Article 12 prevents parties from opting-in to Article 8
 - If opt-in, the security entitlement is outside the scope of proposed Article 12

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Relation to Other ULC Projects on Digital Assets (2)

- Relation to other ULC Acts
 - Uniform Electronic Transactions Act
 - No current intention to “sunset” transferable records under UETA
 - If transferable record, outside the scope of proposed Article 12
 - Uniform Fiduciary Access to Digital Assets Act
 - Governs the relationship between a personal representative, such as an executor, trustee, or guardian, to the service provider maintaining digital assets for the represented person or estate
 - Broad definition of “digital assets”

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Controllable Electronic Records (CERs)

- Definition of “record”
- Definition of “electronic”
- Can be subject to “control” (more later)
 - A digital asset that can not be subject to “control” is outside of the scope of the proposed amendments
- Exclusions
 - Electronic copy of record evidencing chattel paper
 - Electronic documents
 - Investment property (including UCC Article 8 opt-in)
 - CER held by securities intermediary is still a “CER”
 - Transferable records (UETA and E-SIGN)
 - Deposit accounts (in some cases outside of Article 9, might come within definition of “money”; more later)
 - Electronic (fiat) money (more later)

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“Control” of a CER (1)

- Elements
 - Power to enjoy “substantially all the benefit” of the CER (does not have to be “exclusive”)
 - The electronic record must have some “use” that one person can enjoy to the exclusion of all others, *e.g.*, the power to “spend” a Bitcoin
 - Exclusive power to prevent others from enjoying “substantially all the benefit” of the CER
 - Exclusive power to transfer
 - A person must be able to transfer to another person this exclusive power to use the electronic record. To remain exclusive, the transfer must divest the transferor of the power to use the electronic record
 - Identification
 - The person must be able to identify itself to a third party as the person having these powers (can be done by cryptographic key or account number)
 - Rebuttable presumption of exclusivity

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“Control” of a CER (2)

- Control for another
 - A has control but acknowledges that B has control for B. B also has control.
- Exclusivity requirement is satisfied even if certain sharing/multi-sig arrangements have been agreed to by the parties or are built into the system in which the CER is recorded
- Examples of multi-sig arrangements
 - CER cannot be transferred, or others prevented, without the consent of A and B. A and B have control.
 - CER cannot be transferred, or others prevented, without the consent of three of A, B, C or D. A, B, C and D have control.
 - A can transfer control, or prevent others, without the consent of B. B can transfer control, or prevent others, without the consent of A. A and B have control.
 - A can transfer control, or prevent others, without the consent of B. B can transfer control, or prevent others, only with the consent of A. Only A has control.

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Qualifying Purchaser

- A purchaser acquires all rights in the CER that the transferor had
- A *qualifying purchaser* *also* takes free of any property claim to the CER
- A “qualifying purchaser” is a purchaser who obtains control of a CER for value, in good faith, and without notice of a property claim to the CER
 - The filing of a financing statement of itself is not notice of a property claim to the CER
- Relation to CER maintained through a custodian or exchange



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“Tethering” – General Rule

- What rights are evidenced by the CER and whether “take-free” rules apply to those rights upon a transfer of the CER are all determined by other law
 - *Examples*
 - A non-fungible token where copyright law may be well be applicable
 - A token evidencing a real estate interest where real estate law may be applicable
 - Exception for “controllable accounts” and “controllable payment intangibles” (more later)



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“Tethering” – Exception for Certain Payment Rights Evidenced by the CER (1)

- An “account” or “payment intangible” evidenced by a CER is a “controllable account” or “controllable payment intangible” if the account debtor has agreed to pay the person in control of the CER
- A controllable account or a controllable payment intangible travels with the CER, and the transferee of the controllable account or controllable payment intangible benefits from the same “take-free” rule as are available with the CER
- The effect is to create an electronic instrument
- If the terms of the controllable account or controllable payment intangible provide that the account debtor will not assert claims or defenses against the transferee of the controllable account or controllable payment intangible (see UCC § 9-403), then the effect is to create an electronic *negotiable* instrument

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“Tethering” – Exception for Certain Payment Rights Evidenced by the CER (2)

- Account debtor discharge rule (similar to UCC §§ 3-602 and 9-406)
 - Account debtor agrees to pay the person in control
 - After a transfer of control and absent notification of the transfer and a payment direction, the account debtor may obtain a discharge by paying the person formerly in control
 - Once the account debtor receives a notification of the transfer and a payment direction, the account debtor may obtain a discharge by paying the transferee and may not obtain a discharge by paying the person formerly in control
 - The account debtor may request “reasonable proof” that control of the CER has been transferred to the transferee
 - **The notification is ineffective unless the account debtor has agreed in a signed record with the person at the time in control to a method by which the transferee can provide “reasonable proof” that control has been transferred to it**

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“Tethering” – Exception for Certain Payment Rights Evidenced by the CER (3)

- Account debtor discharge rule – practical issues
 - Likelihood that there will be no change in payment directions
 - Likelihood that there will be no request for “reasonable proof”
 - Agreement as to how to provide “reasonable proof” is the last safeguard for the protection of the account debtor



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Choice of Law (1)

- Look to the law where the CER is located
- The CER is located in the jurisdiction by which the CER is expressly stated to be governed
- If the CER is not expressly stated to be governed by the law of a jurisdiction, the CER is located in the jurisdiction which is stated to govern the system in which the CER is recorded
- Otherwise, the CER is located in the District of Columbia or, if DC has not adopted the amendments, the Official Text applies



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Choice of Law (2)

- But for the account debtor discharge rule, look to
 - The law governing the agreement under which the controllable account or controllable payment intangible arose if that agreement is effective under applicable law
 - Otherwise, look to the law of the location of the CER



Secured Transactions

Secured Transactions (CERs)

- Collateral categorization: no need to change collateral descriptions in security agreements or collateral indications on financing statements
 - A CER is a “general intangible”
 - A controllable account is an “account”
 - A controllable payment intangible is a “payment intangible”
- Attachment: normal rules apply
- Perfection
 - By filing, *or*
 - By control
- Priority: Non-temporal priority for a secured party who perfects by control (as defined in Article 12)
- Choice-of-law for perfection and priority: generally follows the choice-of-law rule for Article 12 except for perfection by filing where the normal debtor location rules apply

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Money

Money (1)

- "Money" is currently defined in the UCC as a medium of exchange authorized by a domestic or foreign government
- Given the adoption of Bitcoin as fiat currency by El Salvador and the Central African Republic, today Bitcoin is arguably "money" under the UCC definition, leading to unanticipated outcomes
- Definition of "money" revised to exclude a medium of exchange in an electronic record (such as Bitcoin) that existed before it was authorized or adopted as a medium of exchange by a government
- A medium of exchange in an electronic record so excluded might still qualify as a CER



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Money (2)

- The current definition of "money" in the UCC is sufficiently broad to include a virtual currency authorized or adopted by a government - what the proposed amendments (for Article 9 purposes) refer to as "electronic money"
 - Electronic money may be token-based or account-based
- Under current Article 9 a security interest in money can perfected only by possession.
 - Electronic money is not susceptible to possession
- The amendments
 - If money (under the Article 1 definition) is a deposit account (even one at a central bank), then the deposit account is not "money" under the Article 9 definition and the normal deposit account rules apply
 - If electronic money is not a deposit account, a security interest may be perfected only by "control" similar to control for a CER (but only if the electronic money is susceptible to control)
 - Except for UCC § 9-332, any "take-free" rule would be determined by the law governing the money

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Definitions

Definitions

- A number of "writing" requirements in the UCC to be changed to "record" requirements where the effect is to facilitate electronic commerce.
 - The requirements for an "instrument" in UCC Articles 3 and 9 to be in a writing would not be changed.
 - Definition of "signed" to be expanded to apply not only to a signature in a writing, as in the current definition, but also to an electronic signature.
 - This definition to apply throughout the UCC where an electronic record is permitted
 - Deletion in Article 9 of "authenticate"
- Definition of "conspicuous" to be revised to remove paper examples and to use a "totality of the circumstances" test
 - Expanded comments will provide further guidance

Transitional Rules

Transitional Rules (1)

- Designed to protect the expectations to parties to pre-amendments effective date transactions and to provide for sufficient time for parties to plan transactions post-amendments effective date
- Will not contain a uniform effective date for the amendments because some states appear ready to enact the amendments as early as possible

Transitional Rules (2)

- However, the transition rules will contain a uniform adjustment date of the later of July 1, 2025 and one year from the effective date
 - The adjustment date to give transacting parties a grace period to preserve priorities already established on the effective date if the amendments would otherwise affect those priorities.
 - Example:
 - Pre-ED, SP1 perfects by filing. Pre-ED SP2 takes what would be control but does not file. SP1 has priority over SP2
 - On the ED, absent the adjustment date, SP2 has control and therefore priority over SP1

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**Limitations,
Challenges,
Enactments**

Limitations and Challenges

- Uniform state enactment
- Cross-border transactions
 - Need for a uniform choice-of-law rule
 - Active organizations
 - UNCITRAL
 - UNIDROIT
 - U.K. Law Commission
 - G7 Digital and Technology – Ministerial Declaration (28 April 2021)
- Timing and market pressure



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Enactment and Official Comments

- Enactment process beginning now for 2023 legislative sessions
- The Official Comments

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Early Action by Some States Before Promulgation

- Wyoming (Wyo. Stat. § 34-29-101 *et seq.*), followed by Idaho (HB 583)
 - Broad scope for digital assets
 - Treats virtual currency as money
 - Treats control (broad definition) as possession
 - Adverse claim cut-off rule applies after two years
 - Aggressive choice-of-law rules
- New Hampshire (HB 1503) adopted earlier version of entire UCC amendments
- Iowa (H. 2445), Nebraska (LB 649) and Indiana (HB 351): adopted earlier versions of CER proposal
- Arkansas (HB 1926) and Texas (HB 4474): adopted earlier version CER proposal just for virtual currencies

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Bills Already Filed in States; Current as of January 20, 2023

- California
- District of Columbia
- Hawaii
- Indiana (update)
- Maine
- Massachusetts
- Nebraska (update)
- New Hampshire (update)
- New Mexico
- Oklahoma
- Washington

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STATE MCLE CONTACTS

Alabama

Ms. Angela Parks
Alabama State Bar
415 Dexter Ave
Montgomery, AL 36101
334.269.1515 x2122
334.261.6310 FAX
angela.parks@alabar.org/
www.alabar.org

Alaska

Ms. Ingrid Varenbrink
MCLE Administrator
Alaska Bar Association
PO Box 100279
Anchorage, AK 99501
907.272.7469
907.272.2932 FAX
ingrid@alaskabar.org
www.alaskabar.org

Arizona

Ms. Sarah Corpening
State Bar of Arizona
4201 N 24th St Ste 100
Phoenix, AZ 85016-6266
602.340.7327
602.271.4930 FAX
sarah.corpening@staff.azbar.org
www.myazbar.org/MCLE/

Arkansas

Ms. Dana L. Rowlett
Arkansas Supreme Court
2100 Riverfront Dr Ste 110
Little Rock, AR 72202-1747
501.374.1855
501.374.1853 FAX
dana.rowlett@arkansas.gov
www.courts.arkansas.gov

California - 2631

Mr. George Leal
The State Bar of California
Office of Certification
180 Howard Street
San Francisco, CA 94105
415.538.2126
415.538.2180 FAX
providers@calbar.ca.gov
www.calbar.ca.gov

Colorado

Ms. Dawn M. McKnight
Deputy Regulation Counsel
Colorado Supreme Court
Board of Continuing Legal &
Judicial Education
1300 Broadway Ste 510
Denver, CO 80203
303/928-7771
www.coloradosupremecourt.com

Connecticut

Mr. Lawrence Morizio
Connecticut MCLE Commission
Supreme Court Building
231 Capital Avenue
Hartford, CT 06106
mcle@jud.ct.gov
www.jud.ct.gov/mcle

Delaware

Ms. Margot Millar
Commission on CLE of the
Supreme Court of Delaware
The Renaissance Centre
405 N King St Ste 420
Wilmington, DE 19801
302.651.3941
302.651.3939 FAX
margot.millar@state.de.us
www.courts.delaware.gov/cle

Florida - 0411922

Ms. Jessica R. Malloy
The Florida Bar
651 E Jefferson Street
Tallahassee, FL 32399-2300
850.561.3180
850.561.5660 FAX
jmalloy@flabar.org
www.floridabar.org/cle

Georgia - 4

Ms. DeeDee Worley
State Bar of Georgia
MCLE Programs
104 Marietta St NW, Ste 100
Atlanta, GA 30303
404.527.8710
404.527.8717 FAX
<http://www.gabar.org>

Hawaii

Ms. Debbie Blanton
Hawaii State Bar Association
1100 Alakea St, Ste 1000
Honolulu, HI 96813
808.537.1868
808.527.7936 FAX
dblanton@HSBA.org
www.hsba.org

Idaho

Ms. Calle Belodoff
Idaho State Bar
PO Box 895
Boise, ID 83701-0895
208.334.4500 x1886
208.334.4515 FAX
cbelodoff@isb.idaho.gov
www.isb.idaho.gov

Illinois

Ms. Karen Litscher Johnson
MCLE Board of the Supreme
Court of Illinois
200 W Madison St Ste 3420
Chicago, IL 60606
312.924.2420
mcle@mcleboard.org
www.mcleboard.org

Indiana – ALI0002

Mr. Bradley Skolnik
Executive Director
Indiana Supreme Court
Office of Admissions &
Continuing Education
251 N Illinois St Ste 550
Indianapolis, IN 46204
317.232.1943
317.233.1442 FAX
Ace@courts.in.gov
www.state.in.us

Iowa

Ms. Trinity M. Braun-Arana
Office of Professional Regulation
1111 E Court Ave
Des Moines, IA 50319
515.348.4670
515.246.8032 FAX
Trinity.braun-arana@iowacourts.gov
www.iowacourts.gov

Kansas - 4989

Ms. Shelly Sutton
Kansas CLE
Kansas Judicial Center
301 SW 10th Avenue
Topeka, KS 66612
785.368.8201
shelly.sutton@kscourts.org
www.kscl.org

Kentucky - 8601

Mr. Clifford Timberlake
Kentucky Bar Association
514 W Main St
Frankfort, KY 40601-1883
502.564.3795 x231
502.564.3225
ctimberlake@kybar.org
www.kybar.org

Louisiana – 0101 spon id

Org id: 112795
Ms. Mindi Hunter
Director of MCLE
Louisiana State Bar Association
601 St. Charles Ave
New Orleans, LA 70130
800.341.2647 Toll Free
504.619.0154
504.619-0179 FAX
mindi.hunter@lsba.org
www.lsba.org/mcle

Maine

Ms. Susan Adams
Maine Board of Overseers of the Bar
PO Box 527
Augusta, ME 04332-0527
207.623.1121
207.623.4175 FAX
sadams@mebaroverseers.org
www.mecle.com

Minnesota - 82

Ms. Liz Vanderbeek
Minnesota State Board of CLE
180 E 5th St Ste 950
St. Paul, MN 55101
651.297.7100
651.296.5866 FAX
clestaff@mbcle.state.mn.us
www.mbcle.state.mn.us

Mississippi

Ms. Tracy Graves
Mississippi Commission on CLE
PO Box 369
Jackson, MS 39205-0369
601.576.4622
601.576.4733
tgraves@courts.ms.us
www.courts.ms.gov/cle/

Missouri

Mr. Christopher C. Janku
The Missouri Bar
PO Box 119
Jefferson City, MO 65102-2355
573.638.2233
573.635.2811 FAX
cjanku@mobar.org
mcle@mobar.org
www.mobar.org

Montana

Ms. Kathy Powers, x2207
Montana Commission of CLE
7 W 6th Ave Ste 2B
PO Box 577
Helena, MT 59624
406.442.7660
406.442.7763 FAX
cle@montanabar.org
www.mtcle.org

Nebraska

Ms. Carole McMahon-Boies
521 S 14th St Ste 200
Lincoln, NE 68508
402.471.3072
402.471.3071 FAX
carol.mcmahon-boies@nebraska.gov
www.mcle.ne.gov

STATE MCLE CONTACTS

Nevada

Ms. Toni Sarocka
Nevada CLE Board
457 Court St 2nd FL
Reno, NV 89501
775.329.4443
775.329.4291 FAX
nevadacleboard@sbcglobal.net
www.nvcleboard.org

New Hampshire

Joanne M. Hinnendael
New Hampshire Bar Association
2 Pillsbury St Ste 300
Concord, NH 03301-3502
603.224.6942
603.224.2910 FAX
jhinnendael@nhbar.org
www.nhbar.org

New Jersey - 768

Supreme Court of New Jersey Board
of Attorney Certification CLE
25 Market St
Trenton, NJ 08625-0979
609.815.2930
sctcle.mailbox@njcourts.gov
www.judiciary.state.nj.us/cle

New Mexico

Ms. Debra Hern
MCLE Administrator
State Bar of New Mexico MCLE
PO Box 92860
Albuquerque, NM 87199-2860
505.797-6000
505.828-3765 FAX
800-876-6227 TOLL FREE
dhern@nmbar.org
www.nmbar.org

New York

Ms. Elise Anne Geltzer
New York State Unified Court System
25 Beaver St Rm 888
New York, NY 10004
877.697.4253
212.428.2974 FAX
cle@courts.state.ny.us
www.nycourts.gov/attorneys/cle

North Carolina - 5

Ms. Loriann Nicolicchia
North Carolina State Bar
PO Box 26148
Raleigh, NC 27611
919.733.0123
919.821.9168 FAX
lnicolicchia@ncbar.gov
www.nccle.org

North Dakota

Ms. Carrie Molander
Director of CLE
State Bar Association of ND
1661 Capitol Way, Ste 104LL.
Bismarck, ND 58501
701.255.1404
701.224.1621 FAX
info@sband.org
www.sband.org

Ohio

Gina White Palmer, Director
Continuing Legal Education
Supreme Court of Ohio
65 S Front St FL5
Columbus, OH 43215-3431
614.387.9320
614.387.9323 FAX
www.supremecourt.ohio.gov/attorneyservices/cle.default.asp

Oklahoma

Ms. Beverly S. Petry
Oklahoma Bar Association
PO Box 53036
Oklahoma City, OK 73152
405.416.7009
405.416.7089 FAX
beverlyp@okbar.org
www.okbar.org

Oregon

Ms. Jade Priest-Moaz
MCLE Program Manager
Oregon State Bar
16037 SW Upper Boones Ferry Rd
Tigard, OR 97281-1935
503.431.6346
503.598.6915 FAX
jpriest@osbar.org
www.osbar.org

Pennsylvania - 14

Mr. Nate Graham
Pennsylvania CLE Board
601 Commonwealth Ave
Ste 3400
Harrisburg, PA 17106-2495
717.231.3230
717.231.3251 FAX
800.497.2253
ngraham@pacle.org
www.pacle.org

Puerto Rico

Ms. Michelle Perez Maldonado
CLE Programs
Supreme Court of Puerto Rico
PO Box 190917
San Juan PR 00919-0917
787.641.6600 x5782
787.641.6602 FAX

Rhode Island

Ms. Donna Mesolella
Executive Director, MCLE
Rhode Island Supreme Court
John E. Fogarty Judicial Annex
24 Weybosset St., 3rd Floor
Providence, RI 02903
401.222.4942
401.222.4302 FAX
mcleinfo@courts.ri.gov
www.courts.ri.gov

South Carolina

Ms. Mary A. Germack
The Supreme Court of South
Carolina Commission on CLE &
Specialization
PO Box 2138
Columbia, SC 29202
803.799.5578
803.799.4118 FAX
commcle@bellsouth.net
www.commcle.org

Tennessee

Ms. Judy Bond-McKissack
Tennessee Commission on CLE
1321 Murfreesboro Pk Ste 810
Nashville, TN 37217
615.741.3096 (3 then 0)
615.532.2477 FAX
info@cletn.com
www.cletn.com
Tiffany Drew

Texas - 23

State Bar of Texas
MCLE Department
PO Box 13007
Austin, TX 78711-3007
512.427.1806
800.204.2222 x1806
512.427.4423 FAX
mcle@texasbar.com
www.texasbar.com/mcle

Utah

Ms. Sydnie W. Kuhre
Utah Supreme Court Board of CLE
Utah Law & Justice Center
645 South 200 East, Ste. 312
Salt Lake City, UT 84111-3834
801.531.9077
801.531.0660 FAX
skuhre@utahbar.org
www.utahbar.org

Vermont

Ms. Martha I. Hicks-Robinson, Director
Vermont Judiciary
Board of Bar Examiners,
Character & Fitness
MCLE
111 State Street, Suite 9B
Montpelier VT 05609-0701

802.828.3281
802.828.6550 FAX
Martha.Hicks-Robinson@state.vt.us
www.vermontjudiciary.org

Virginia

Mr. Demetrios J. Melis
Director of Member Compliance
Virginia State Bar
1111 E. Main St., Ste. 700
Richmond, VA 23219-0026
804.775.0578
804.775.0544 FAX
dmelis@vsb.org, mcle@vsb.org
www.vsb.org

Virgin Islands

Ms. Hinda Carbon
Virgin Islands Bar Association
PO Box 4108
Christiansted, VI 00822
340.778.7497
340.773.5060 FAX
executivedirector@vibar.org

Washington

Ms. Renata Garcia
Washington State Bar
Association
1325 4th Ave., Ste 600
Seattle, WA 98101-2539
206.727.5987
206.727.8313 FAX
renatag@wsba.org
www.wsba.org

West Virginia

Ms. Hope L. Gresham
The West Virginia State Bar
2000 Deitrick Blvd
Charleston, WV 25311-1231
304.553.7238
304.558.2467 FAX
greshamh@wvbar.org
www.wvbar.org

Wisconsin

Ms. Jacquelyn B. Rothstein
Director
Supreme Court of Wisconsin
Board of Bar Examiners
PO Box 2748
Madison, WI 53701-2748
608.266.9760
608.266.1196 FAX
bbe@wicourts.gov
tammy.mcmillen@wicourts.gov
www.wicourts.gov

Wyoming

Ms. Marie Ellis
Wyoming State Bar
4124 Laramie St
PO Box 109
Cheyenne, WY 82003-0109
307.632.9061, 307.632.3737 FAX
mellis@wyomingbar.org
www.wyomingbar.org