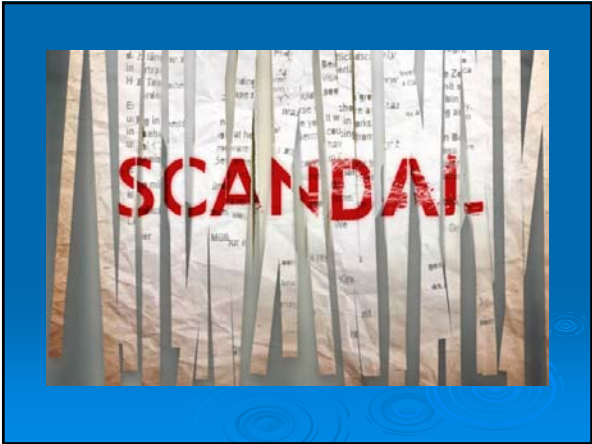




# “Truth or Scandal: Ethics Update for the Virgin Islands”

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Loyola Law School  
2017



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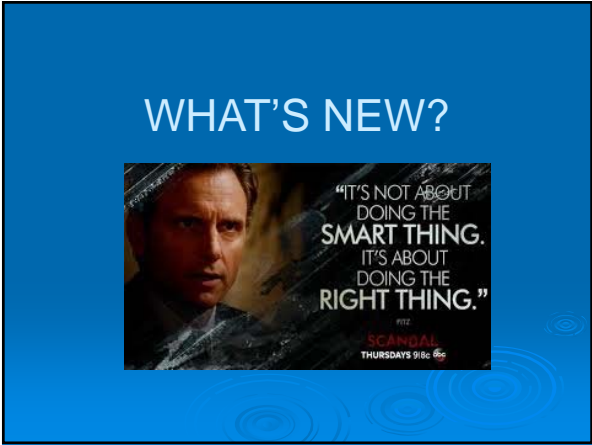
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**Truth or Scandal?  
Hypo #1**

Under 2016 amendments to V.I. Supreme Court Rule 204(i)(1), lawyers from other jurisdictions wishing to practice in the Virgin Islands must:

- (A) Retake the MPRE ethics exam;
- (B) Establish permanent residence in the Virgin Islands;
- (C) Provide 40 hours of pro bono services;
- (D) Complete a Virgin Islands Law Course (VILC);
- (E) None of the above.



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## Truth or Scandal Hypo #2

In 2016, which of the following changes was NOT made to the V.I. IOLTA program?

- (A) Participation became mandatory;
- (B) Oversight was moved to the U.S. District Court
- (C) Interest rate comparability is part of the program;
- (D) The program is expressly tied to the need for legal services for low-income persons.



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## Truth or Scandal Hypo #3

How frequently must a lawyer reconcile his or her trust account records ?

- (A) Annually;
- (B) Monthly;
- (C) Quarterly;
- (D) When audited.



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## Hypo #4 Speaking of Money ...

Effective 2017, what is the deadline for you to pay your Bar dues?

- (A) January 1, 2017;
- (B) March 1, 2017;
- (C) July 1, 2017;
- (D) December 1, 2017;
- (E) When the spirit moves you.



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## Hypo #5 Truth or Scandal

Under new rules adopted by the VI Supreme Court, which group now has its very own Code of Ethics?

- (A) Lawyers with offices on St. Thomas;
- (B) Retired judges;
- (C) Judicial law clerks;
- (D) Prosecutors.



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## Law Clerk Highlights

- No ex parte communications!
- Confidentiality of chambers
- No public comments about cases
- Beware of conflicts
- Limits on extrajudicial activities
- Limits on financial connections
- Limits on gifts
- No practicing law
- Rules on seeking future employment

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## PROGRAM FOR TODAY

### The "7 C's"

1. Confidentiality
2. Conflicts
3. Client control
4. Competence
5. Civility
6. Communication
7. Challenges for the Future



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## CONFIDENTIALITY



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## Hypo #6

- Your firm is trying to attract the great lawyer, George Dugley, to work at the firm. In order to convince him to join you, you talk to him about the hot cases you are handling. You are careful, however, to refer to your clients as "Doe" or "ABC, Corp."
- Do these conversations violate any rules?



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## Duty of Confidentiality

- V.I. Rule 211.1.6: Lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.
- ABA Model Rule 1.6, Comment [3]: Confidentiality duty applies to all information relating to representation, even if it could be obtained from public sources.



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## Truth or Scandal? Hypo #7

- David Rosen is hired by a Hedge Fund Manager to defend him against a fraud claim. Client admits he played fast and loose with investors' money earlier in his career, but assures Rosen that he was completely above board in dealing with the investors who are now suing him.



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## Hypo #7A

- While the lawsuit is pending, Rosen finds a blog discussing his client's prior frauds. He forwards it to friends under the heading, "Interesting Reading."
- *Has Rosen violated the duty of confidentiality?*



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## Formal Opinion No. 2016-195

- Even information regarding a client that is learned from public sources may be considered “secret” if disclosure is likely to embarrass or be detrimental to a client.

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## Hypo #7B

- Several months after a non-confidential settlement with the investors, Rosen gets a call from the WSJ. He tells the reporter that he thinks that his firm did “a great job of getting your client out of the lawsuit for only a seven-figure settlement.”
- *Has Rosen violated his duty of confidentiality?*



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## Post-Termination Disclosures

- Duty to protect confidences and secrets continues, even if information available from public source
- V.I. Rule 211.1.6(a): Do not reveal information “relating to representation”
- **ABA Rule 1.6, Comment [20]: Duty of confidentiality continues after client-lawyer relationship has terminated.**

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## Hypo #7C

- Several years later, Hedge Fund Manager is arrested for DUI. Rosen comments on the arrest on his Facebook page, "Drinking and driving is irresponsible."



- Has Rosen acted ethically?

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## No Duty of Confidentiality

### Duty of confidentiality vs. Duty of loyalty

- V.I.L 211.1.9(c)(2): Cannot use information relating to same "matter" against a former client
- Comment [3]: "Substantially related" matters

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## CONFIDENTIALITY & BLOGGING

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## Hypo #8

➤ Tom Volt loves to blog. He writes a daily blog on immigration cases. Sometimes, he promotes the great job he has done on a case. Sometimes, he skewers a judge for what he believes is a bad opinion. And sometimes, he just responds to questions sent to him by curious readers.



➤ Is Tom's blogging ethical?

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## Dangers of Blogging

- Legal advertising?
- False or misleading statements?
- Disclose privileged or confidential statements
- Ex parte communications
- Communications with represented parties
- Inadvertently creating attorney-client relationship
- Unauthorized practice of law
- Violating pretrial publicity rules



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## Recent Advisory Opinion

- Formal Opinion 2016-196:
  - Blogging may constitute advertising
  - Depends on whether blog is "an integrated part of an attorney's or law firm's professional website"
  - Stand-alone blogs are treated differently

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## Hypo #9

- What if Tom blogs with the hope that the judge's clerk in one of his cases will read the blog and be persuaded by his argument?



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## Rule 211.3.5

- A lawyer shall not seek to influence a judge, juror ... or other official by means prohibited by law;
- A lawyer shall not communicate ex parte with the court



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## 10 Tips to Safe Social Networking

1. Remember that the same rules apply
2. Do not betray confidences
3. Avoid inadvertently forming attorney-client relationships
4. Do not solicit
5. Steer clear of unauthorized practice or unintended ex parte communications
6. Consider whether you are indirectly recommending another lawyer's services
7. Remember the rules on pretrial publicity
8. Make no false or misleading statements
9. Become competent on the technology
10. Use common sense

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# CAREFUL!!

## SOCIAL MEDIA AND JURORS

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### Hypo #10

Which of the following does not pose an ethical problem?

- (A) A juror reading a lawyer's blog during trial;
- (B) Surreptitiously "friending" a juror to monitor a juror's post on her Facebook page;
- (C) Googling a prospective juror's background before jury selection.



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### JUROR SCANDALS

> **Rules on interacting with Jurors**

- NO social medial contact during trial
- Can research jurors during voir dire, but may not falsely pose as "friend" to get access
- Duty to report juror misconduct if disclosed publicly on internet. [ABA Rule 3.3]



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# CONFLICTS OF INTEREST

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## Hypo #11

➤ Karyn Benz has a thriving criminal practice. Federal prosecutors have just indicted her client for money laundering. Her former client has been designated as the key witness in the case. Benz represented that client on tax issues, although not regarding transactions involving the current case.



- Does Benz have a conflict of interest?
- Can the prosecution move to disqualify Benz?

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## Conflicts in Criminal Cases

- 211.1.9: Duties to Former Clients
- Federal Rule of Criminal Procedure 44
- *Wheat v. United States*, 486 U.S. 153 (1988).

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## Hypo #12

➤ Plaintiffs are suing Manny, Moe & Jack for fraud. Jack agrees to testify for plaintiff if he is allowed to settle for the amount of his insurance policy. However, Jack still faces sentencing on a related criminal charge to which he pled guilty. Matt represents Jack in the criminal case. Now that Jack has settled, Plaintiffs want Matt's partner to represent them in the civil trial against the remaining defendants.



➤ Is there a conflict of interest?

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## Conflicts with Current Client

- Rule 211.17: A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.
  - State Compensation Insurance Fund v. Drobot, SACV 13-0956 AG (C.D. 2016).

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## Imputed Disqualification

- Rule 211.1.10:
- While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.



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## Hypo #13

➤ Your client is suing defendant, SM, for alleged patent violations. You once represented SM's former lawyers in a fee dispute against SM for their work involving another SM patent case.



- Do you have a conflict of interest?
- Can your partner handle the case?

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## Acacia Patent Acquisition, LLC v. Superior Court

- Attorney recusal was warranted
- Prior representation on fee matter gave counsel access to thousands of privilege documents
- Imputed disqualification (Rule 211.1.10(a))

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## Hypo #14

➤ The firm of Gelfand & Steinberg represented Bigg Corp. for years, but the relationship has gone dormant. Now, one of the company's owners has asked the firm to represent him in a matter involving the shareholders.



- May the firm handle the case?

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## McGuinness v. Johnson

- Law firm's dormant but continuing attorney-client relationship with a corporation prevents the firm from representing one of the company's owners in litigation among the entity and its shareholders.

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## Ontiveros v. Constable

- Same lawyers cannot represent both a corporation and its majority shareholder/president/CEO in a derivative action accusing him of defrauding the company.

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## Hypo #15

- Plaintiffs have sued multiple defendants in a complex diversity case. Defense counsel jointly represents all of the defendants, although one defendant now wants to settle out and testify for the plaintiffs.
- Can counsel continue to represent the other defendants?



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## V.I. Rule 211.17 - 211.1.9

- Cannot represent current clients who have conflicting interests
- Cannot represent new client against former client on “substantially related” matter

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## COMPETENCE

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## Hypo #16A

- Attorney Pesci ordinarily handles business deals, but his client asks him to handle a multi-party securities trial.
- Is Pesci competent to handle the case?



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## Rule 211.1.1 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.”

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## Hypo #16B

- Clarence Darrow is a great lawyer, but not very knowledgeable about technology. He doesn't really understand how electronically stored information works or the changing technology affecting emails and other use of the internet.



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## Hypo #16B

- Assuming this lack of knowledge, what are Darrow's options in continuing to practice?
  - (A) Hire some smart associates who understand technology;
  - (B) Take a course regarding new uses of technology in legal practices;
  - (C) Retain a technical consultant;
  - (D) Fake his technological knowledge;
  - (E) Send the case to a friend;
  - (F) All of the above.

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## Formal Op. 2015-193

➤ Attorney lacking technical knowledge has three alternatives:

- (1) learn it before you need it,
- (2) retain technical consultant or co-counsel,
- (3) decline the representation

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## CLIENT CONTROL

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## Truth or Scandal? Hypo #17

➤ You have a difficult client who seeks to recuse the judge for bias after the client makes insulting remarks about the judge's ethnicity.



- The best thing to do is:
- (A) Find a new client;
  - (B) Apologize to the court;
  - (C) Gag your client;
  - (D) Increase your rate.
  - (E) All of the above.

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## Mandatory Withdrawal Rule 211.1.16(a)

➤ Lawyer shall withdraw if:

(1) the representation will result in violation of the Rules of Professional Conduct

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## Permissive Withdrawal Rule 211.1.16(b)

➤ Client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

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## CIVILITY



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## Truth or Scandal? Hypo #18

- True or False?
- The Rules of Professional Conduct prohibit lawyers from unlawfully harassing or unlawfully discriminating against persons on the basis of race, religious creed, color, national origin, sex, gender, sexual orientation and mental disability.



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## Proposed Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

- Rule bars law firms from discriminating or permitting unlawful harassment
- Approved by ABA House of Delegates

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## Hypo #19 “Don’t Honey Me”

- During a deposition, Mr. Macho keeps interrupting Ms. Business. Finally, she asks him to stop. He then replies, “Don’t raise your voice at me. It’s not becoming a woman.”
- Does this remark violate the proposed ethical rule?



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### “Lawyer Babe”

Illinois Bar Complaint Jan. 28, 2016

- Ethics complaint filed in Illinois
- Opposing lawyer sent email: “I’m fucking done communicating with you .... Lawyer babe.”
- He ended with, “Good fucking luck, Sweetie!!!”

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### Hypo #20

- Attorney sues a bank for cheating his mother out of her annuity. He is not happy when the judge doesn’t see things his way.



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### Could the court impose terminating sanctions for the following behavior?

1. Calling the judge “a former DA masquerading as a Superior Court Judge.”
2. Walking out on a deposition
3. Failing to pay discovery sanctions
4. Pointing pepper spray and a stun gun at opposing counsel during the reconvened deposition (while remarking, “if you get out of hand”)



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## Crawford v. JP Morgan Chase Bank

➤ *“Far from the trial court abusing its discretion, it would have been an abuse of discretion not to impose a terminating sanction.”*

- Justice Arthur Gilbert



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## But, wait ... There's more

➤ Crawford also:

- Emailing opposing counsel and saying he would trigger an IRS audit of the opposing party if the case did not settle
- 90-day suspension for violating Rule 8.3



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## But wait .. There is even more

- Crawford moved to disqualify judge from his case because “her permanent disability as a Negro racist.” He later admitted she was otherwise a “good judge” and that motion was not “personal.”
- P.S. Judge Trapp was president of the NAACP local chapter before joining the bench.



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## And here is the kicker!!

- Crawford ran in 2014 for election to the San Diego County Superior Court. He received 17.86 percent of the vote.

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## Hypo #21 Ready For Your Close Up?

- Client is speaking to local television and Tweeting about your case. He attacks the other side and the judge.
- Does this pose an ethical problem for his lawyer?



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## What is the best way to deal with the issue?

1. Withdraw from the case?
2. Have the media interview the lawyer?
3. Join the client in the media interviews?
4. Provide a disclaimer?
5. Consider another profession?



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## Virgin Islands Rules of Prof. Conduct

- 211:3.6 -- Trial publicity
  - "Shall not make an extrajudicial statement that the lawyer knows or reasonable should know ... will have a substantial likelihood of materially prejudicing adjudicative proceeding."
- 211:3.5 -- Impartiality and Decorum of Tribunal
  - "Shall not seek to influence a judge, juror, prospective juror, or other official by means prohibited by law."

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## BEWARE

- Were you ever trained to speak to the press?
- Press gets to edit you.
- Reveals your strategy.
- Ramps up the controversy.
- Diversion
- Loss of good will with court



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## COMMUNICATIONS

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## Hypo #22

➤ Johnny Justice considers himself one of the best lawyers in the courthouse. To show off to his client, he calls the judge's clerk by her first name and makes a point of saying hi to all of the judges as he sees them in the hallway. He even invites one of the judges to his daughter's wedding. When Johnny is frustrated, he tells the judge's reporter that, "I could type faster with my eyes closed."



➤ Do these actions pose any ethical problems?

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## Ethical Concerns

- Respect due to the court and its staff
- Recusal of judge if "impartiality might reasonably be questioned." Canon 3C
- Ex parte communications
- V.I. 211.8.4: Implying ability to influence court by means that violate the Rules

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## Hypo #23

➤ Your client is driving you crazy so you just stop answering his calls. Is this an ethical violation?



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## Rule 211.1.4

- Duty to communicate with client
- Must keep client “reasonably informed” about matter
- Must “promptly comply with reasonable requests for information”

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## CHALLENGES FOR THE FUTURE

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## Hypo #24

- A law firm may outsource its work to overseas lawyers so long as:
  - (A) Its clients agree;
  - (B) Only the Virgin Island lawyer submits pleadings to the court;
  - (C) The foreign lawyers charge reasonable fees;
  - (D) The foreign firm acts under the supervision of the Virgin Island lawyer.



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## Outsourcing Ethical Issues

- Conflicts of interest
- Confidentiality
- Unauthorized Practice of Law
  - Types of tasks (research, typing, proofreading, doc review)
- Disclosure to clients
- Billing practices
- Fee-sharing (V.I. 211.1.5(e))

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## Hypo #25

- True or False:
  - A firm's virtual office satisfies a federal court rule requiring applicants for pro hac vice admission to associate with local counsel who "maintains an office" within the district?



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## Hypo #26 Tweeting from the Courtroom

- Is Tweeting from a federal courtroom permissible?



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## Fed. R. Crim. P. 53

- No electronic broadcasting from courtroom
- *United States v. Shelnutt* (MD. Ga. 2009)



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## Hypo #27 Rate Your Judge

- Is it proper for lawyers to use Avvo LinkedIn or other websites to rate opposing counsel and judges?



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## No Social Media Campaigns Against Judges

- *In re McCool*, 2015 BL 210264 (June 30, 2015)
  - A lawyer's use of the Internet to disseminate false and misleading information about a judge's handling of a pending case amounts to an unethical attempt to influence future rulings
  - ABA rule 8.4(d)



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## So. Carolina Ethics Op. 09-10

- Ratings subject to all ethical rules
  - False statements
  - Solicitation
  - Vouching for cases
  - Creating unjust expectations



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## Hypo #28 Judicial Speech



- Judge Lewis is concerned about misinformation in his case.
- What can she do?

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## Options

1. Talk "off the record" with reporters or have clerk do so;
2. Publish an op-ed;
3. Have local Bar Association defend him;
4. Write a scathing opinion addressing issues;
5. Speak at a symposium;
6. None of the above.

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## Limitations on Judicial Speech

- Code of Judicial Conduct, Canon A (Appearance of impropriety)
- Canon 3A (“A judge should not make public comment on the merits of a matter pending or impending in any court.”)



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## Hypo #29 Warning Shot

- In an effort to stop opposing counsels from engaging in inappropriate behavior, you threaten to report opposing counsel to the Bar authorities.
- Does such a threat violate the ethical rules?



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## Rule 211.8.3 Reporting Professional Misconduct

- Can report, but not “threaten” to report
- Careful with the “warning”



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## Bonus Question

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## What are 5 most common ethical mistakes by lawyers?

1. Failing to communicate effectively;
2. Trust account problems.
3. Not disclosing fee-sharing arrangements
4. Investing with former clients
5. Improper notarizing



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## How did you score?

- **All 30 correct:** You're lying.
- **20-30 correct:** We might believe you
- **10-20 correct:** Put 1-800-ETHICS on your speed dial
- **0-10 correct:** You've been voted off the island.

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THANK YOU

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