



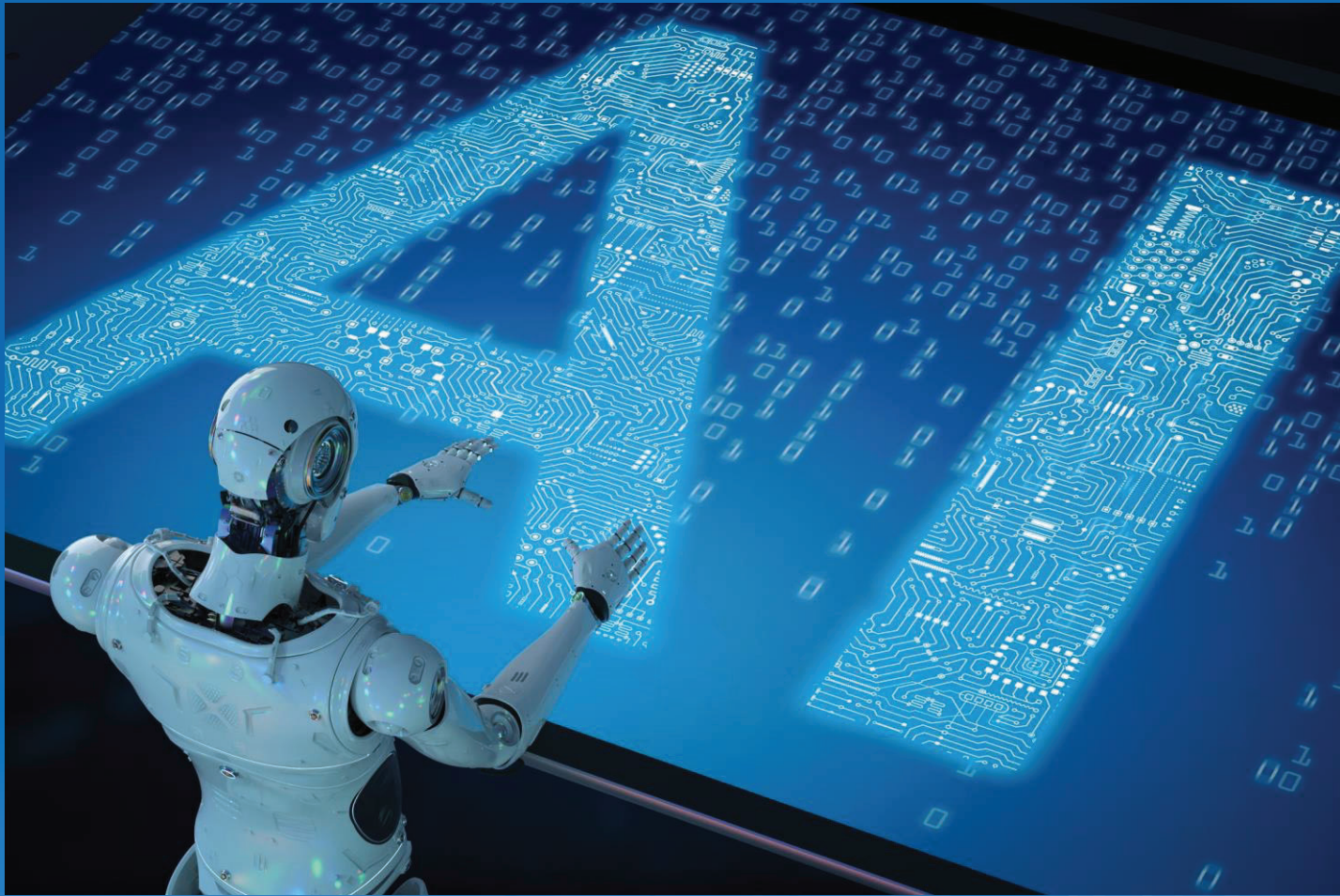
# ETHICS UPDATE U.S. VIRGIN ISLANDS

Professor Laurie L. Levenson

Loyola Law School

2024

# New Challenges for Lawyers

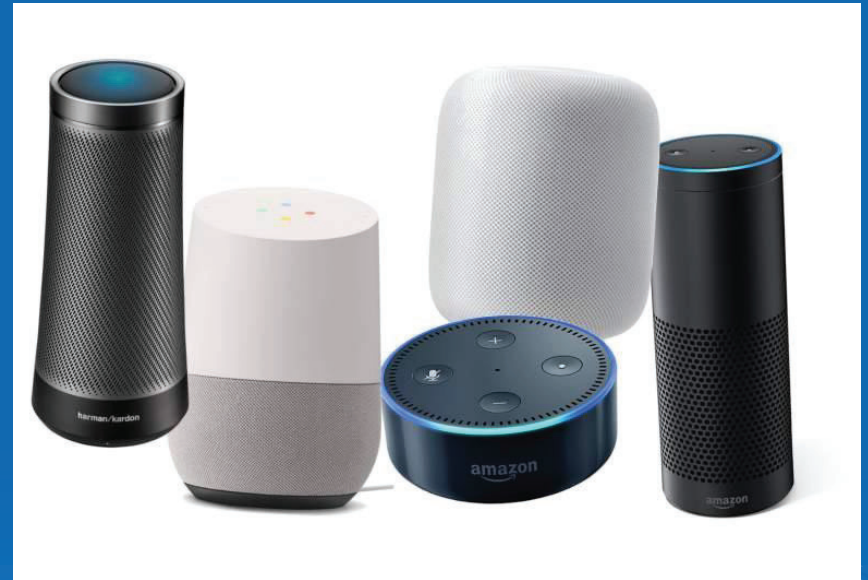




# Formal Opinion 498

## Virtual Practice

- **Virtual practice permitted**
- **Commonly implicated Rules**
  - Competence, Diligence, communication
  - Confidentiality
  - Supervision
  - Technology considerations
  - Clients files and data
  - Virtual meeting platforms
  - Smart speakers (disable!!)



# What % lawyers believe we are replaceable?

- A. 80%
- B. 50 %
- C. 35%
- D. 19%
- E. 6.4%



# AI Update

## ➤ Are we replaceable?

- 47% lawyers believe paralegals are
- 35% lawyers believe 1L associates are
- 19% lawyers believe 2L and 3L associates are
- 6.4% believe senior associates are





# TOPICS

- AI and Ethical responsibilities
- Competence and credibility
- Professionalism
- Discovery and litigation behavior
- Financial responsibilities to clients
- Attorney fees
- Conflicts
- New Ethics decisions
- Civility
- Confidentiality / Privileges
- Social media
- Client control and communication



# START WITH THE BASICS



# Question #1

## ➤ What is ROSS?

- A. The new “Rules on Synthetic Systems”
- B. The first artificial intelligence (AI) lawyer
- C. Research systems for courts
- D. None of the above

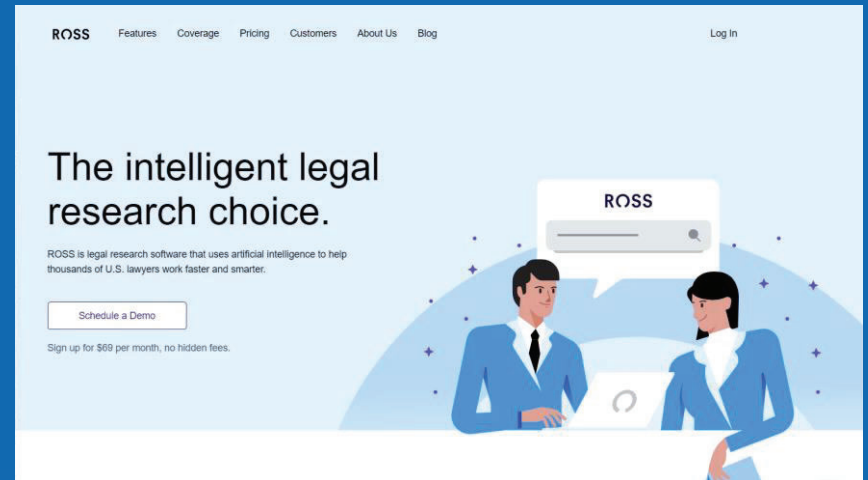






# “ROSS”

- First AI lawyer created
- Combined Legal Cortex with IBM Watson
- Learns as it goes along
- Saves 20-30 hours case



# Question #2:

## Can AI take the place of lawyers?

- A. Yes, because lawyers just tell their clients the law.
- B. Yes, because AI can be programmed to make professional judgments.
- C. No, because lawyers do much more than citing the law.

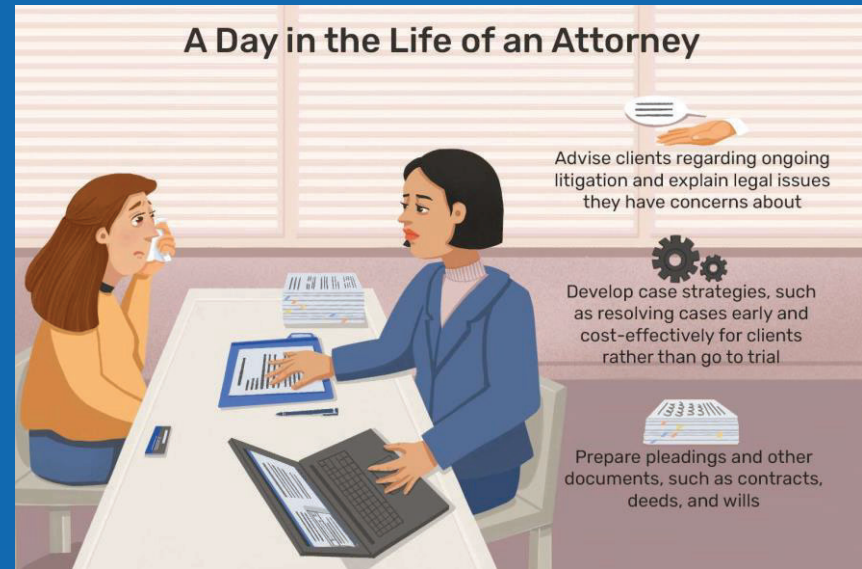


# Duties of Lawyers

➤ Advisors

➤ Advocates

➤ Counselors



# Ethical Issues Involving ChatGPT



# Hypo #1

- You are jammed with too much work and are facing a pressing filing deadline. To expedite your research, you use ChatGPT to conduct your research and use its findings in your brief.



- Is this ethical?
  - A. Yes
  - B. No
  - C. Maybe



# Mata v. Avianca Airlines (S.D.N.Y. 2023)

- V.I. 211.1.1: Competence
- V.I. 211.1.3: Diligence
- V.I. 211.1.6: Confidentiality
- V.I. 211.3.3: Candor Toward Tribunal
- V.I. 211.8.4: Misconduct



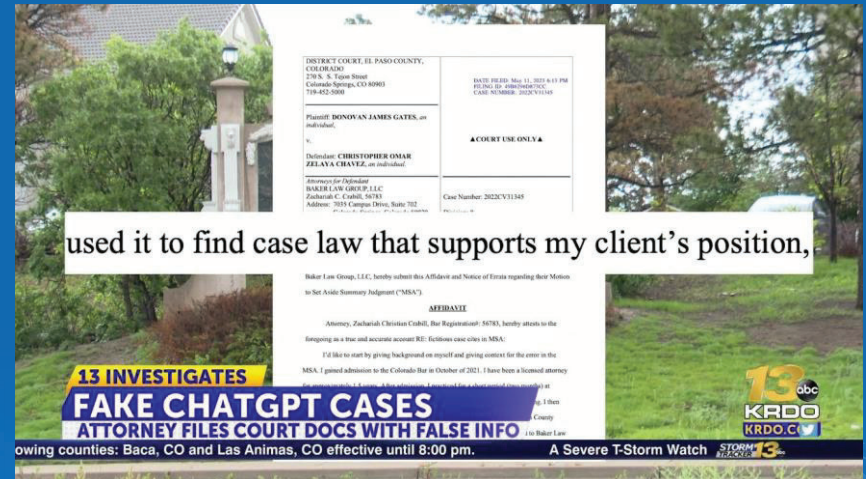
# Duty of Competency

- You have a duty to learn about new technology!!
- And handle it appropriately
- ABA Model Rule 1.1, Comment (8)



# Zachariah C. Crabill (Nov. 22, 2023)

- First suspension of lawyer in Colorado based upon using AI to generate case citations in a legal brief and then lying about it.



# Michael Cohen's Case (Dec. 12, 2023 - OSC)

- Danya Perry, Cohen's new counsel on supervised release, informed judge in footnote that she could not verify 3 cases prior counsel, David M. Schwartz, had filed in earlier brief.





# V.I. 211.8.3

- Reporting Professional Misconduct
  - Duty to report lawyer who committed a violation of the Rules





# A.I. Hallucinations

**Error**



## What is an AI Hallucination?

An AI hallucination is a false or misleading output generated by an artificial intelligence system. It can be a confident response by an AI that does not seem to be justified by its training data.

### Example:

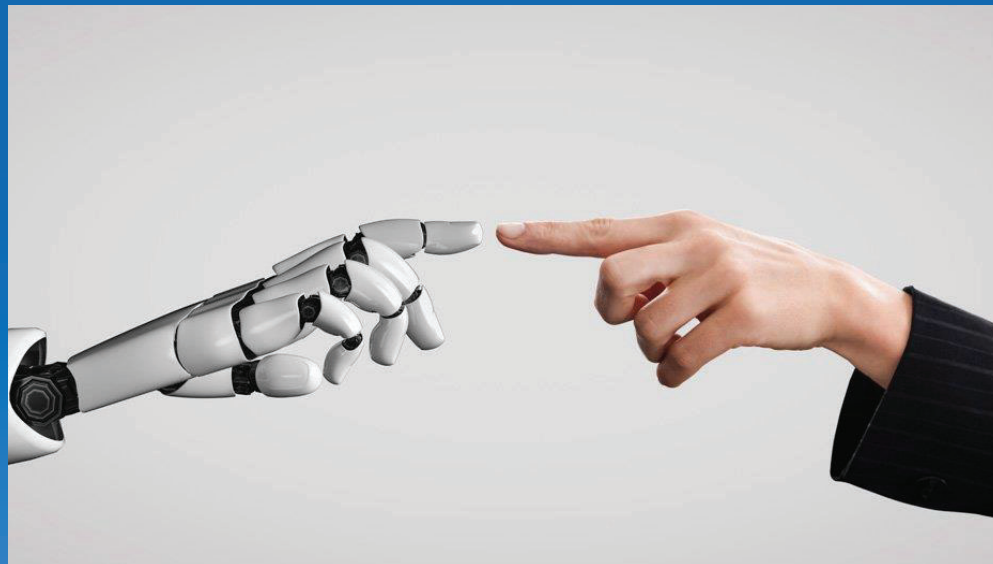
When asked about Microsoft's annual revenue in **2021**, a hallucinating chatbot falsely states that the figure is **\$10 billion** (the right answer should have been **\$168.1 billion**).

# Hypo #2

- You are looking for some clever ways to frame your closing argument.
- You search ChatGPT.
- Are you acting unethically?



# OTHER ISSUES WITH ARTIFICIAL INTELLIGENCE TOOLS



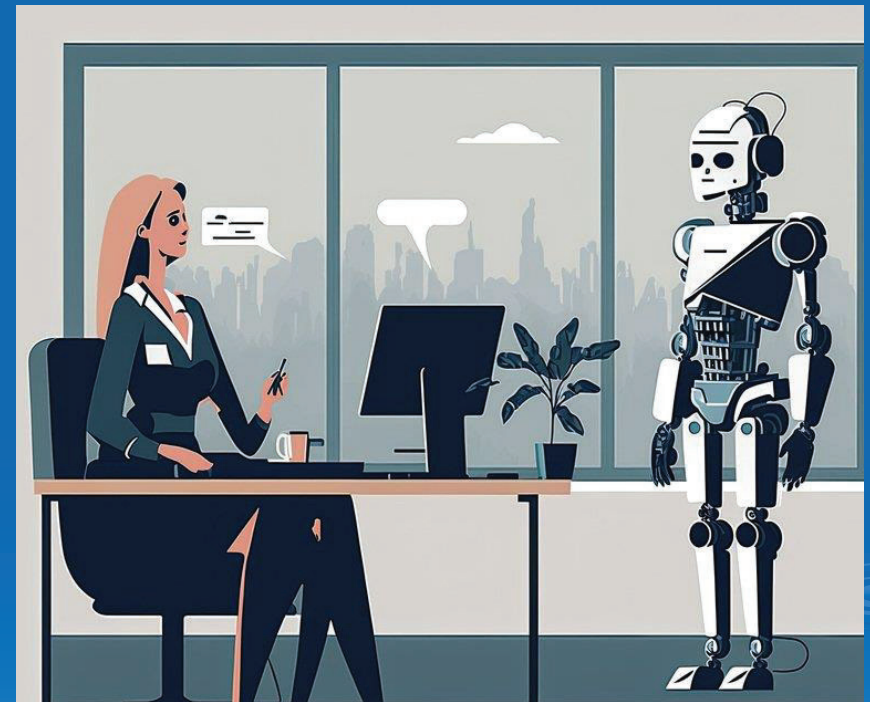
# Hypo #3

- A client tells you that she has a business dispute. You get all the details and have AI prepare a memo to the client with advice as to how to proceed.
- Have you complied with your ethical responsibilities?
  - 1 = Yes
  - 2 = No



# Ethical Duties

- V.I. 211.1.4:  
Communications  
with clients
- V.I. 211.1.5: Fees  
for legal services
- V.I. 211.5.1.:  
Supervision

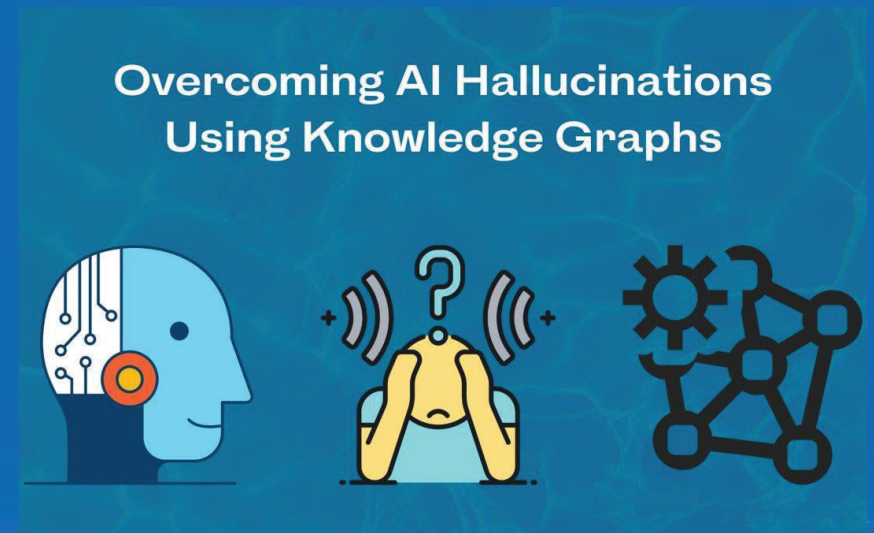




# V.I. 211.5.3

## Supervising Nonlawyer Assistants

- Duty to make reasonable efforts to ensure nonlawyer's conduct is compatible with the professional obligations of lawyer



# Question #4

➤ Can courts ethically use AI tools?

1 = Yes

2 = No



# Forthcoming Approaches to AI Use

## ➤ Local rules:

- Requiring of disclosure of when AI has been used or certifying that AI has not been used



# Courts Use of AI

- Redacting minors' Info
- Sentencing logarithms
- Technology-assisted research



# ETHICAL ISSUES AND ELECTRONIC COMMUNICATIONS



# Hypo #5

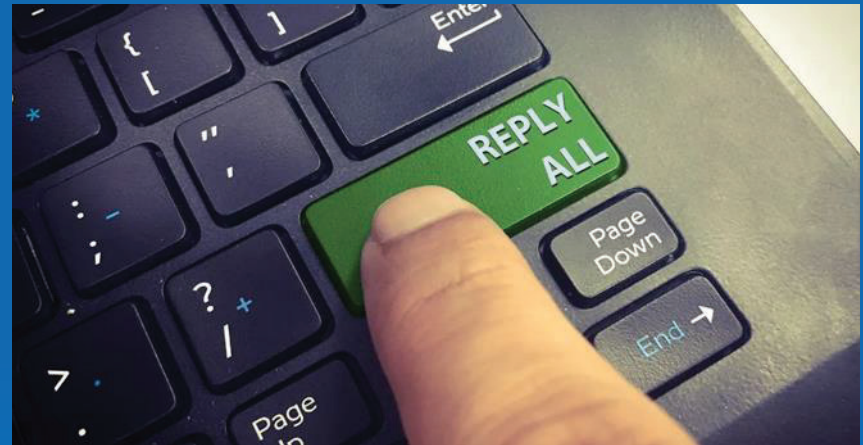
➤ **You send an email to another lawyer regarding your client's matter and openly copy your client on the message. Is that the proper way to handle the communication?**

- A. Yes, because you have a duty to keep your client informed.
- B. Yes, because it will make it easier for opposing counsel to communicate with you and your client.
- C. No, because it can lead to a violation of the ethical rules on direct client contact.



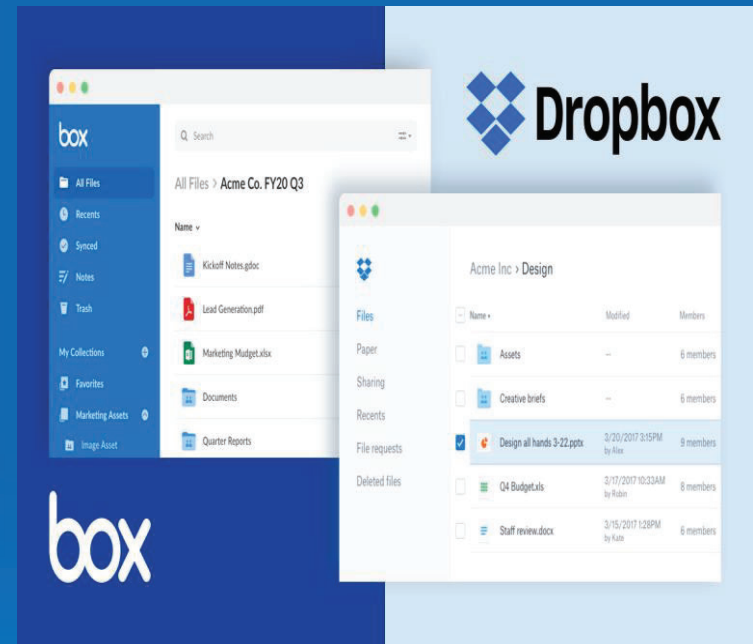
# ABA FORMAL OP. 503

- Including your client in reply creates group communication
- Implied consent for other lawyer to send communications to your client.
- Alternative: Forward you emails to your client!



# Hypo #6

- You have been given access to your litigation opponent's Dropbox after a third-party vendor accidentally reveals the link during discovery.
- You should:
  - (A) Quickly review the contents of the Dropbox to ensure you have received all appropriate discovery;
  - (B) Pull additional documents but notify counsel you have done so;
  - (C) Not look at anything that may be protected by attorney-client privileges
  - (D) None of the above.

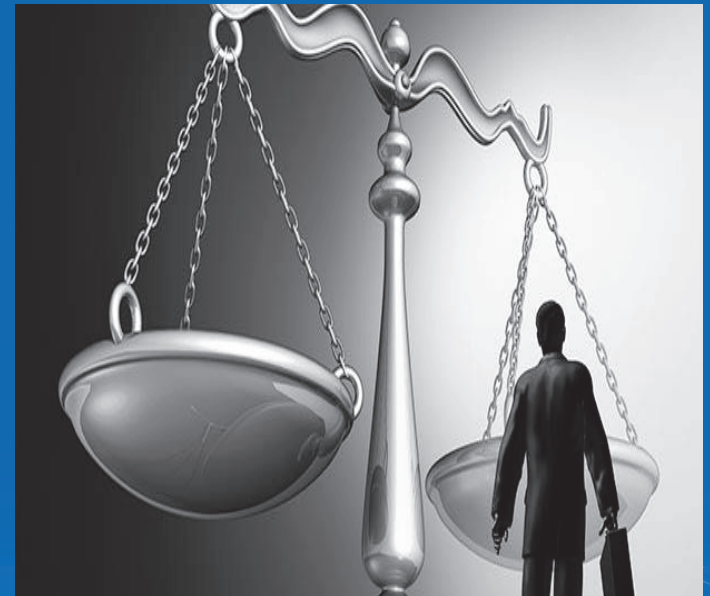




# ETHICAL RULES FOR LAWYERS PRACTICING IN MORE THAN ONE JURISDICTION

# Hypo #7

- You practice in more than one jurisdiction. Whose ethical rules do you need to comply with?
  - A. The jurisdictions where you are licensed, regardless of where the conduct occurred.
  - B. The jurisdictions where the conduct occurred.
  - C. Either jurisdiction, but not both.
  - D. Both jurisdictions -- where you are licensed and where the conduct occurred.





# ABA Formal Op. 504 (March 1, 2023)

- Lawyers subject to discipline in both jurisdictions
- V.I. 211.8.5.  
Disciplinary  
Authority: Choice  
of Law



# V.I. 211.8.5

**(b) Choice of Law.** [T]he rules of professional conduct [apply] as follows:

(1) For conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits;

(2) For any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

# Fee Agreements

- Lawyer is admitted in State X; Client lives in State X; Will file action in State Y
- In drafting fee agreement, comply with Rules of State X



# Law Firm Ownership

- State A permits Lawyer to have nonlawyer partners; State B does not. Lawyer is seeking to appear pro hac vice in State B.
- State A rules govern because firm structure is not “conduct in connection with tribunal.”





# Reporting Professional Misconduct

- Lawyer is admitted in V.I.; Prior lawyer lives in another state that only allows reporting if client consents to disclosures
- Follow V.I. 211.8.4





# Confidential Duties

- Lawyer is licensed in V.I. and practices in V.I.
- Representing buyer who threatens to harm seller if he doesn't sell.
- If jurisdictions differ on disclosure of confidential information, which follow?



# Screening for Lateral Lawyers

- What if hiring lawyer who will impute conflicts?

Whose screening rules govern?

- Follow the more restrictive rule!!





# MORE ON FEES

# Hypo #8

- Your client gives you a substantial retainer for your services. What should you do with it?
  
- A. Go to Tahiti
- B. Put it in your bank account
- C. Give it back
- D. Comply with V.I. 211.1.5 and 211.1.15 and 211.1.15-1



# The Basics

## ABA Formal Op. 505

### May 3, 2023

- Advances vs. Retainers
- Retainer vs. “general” or “true” retainer
- “Nonrefundable retainer” (cannot be used to depart from safekeeping policies)



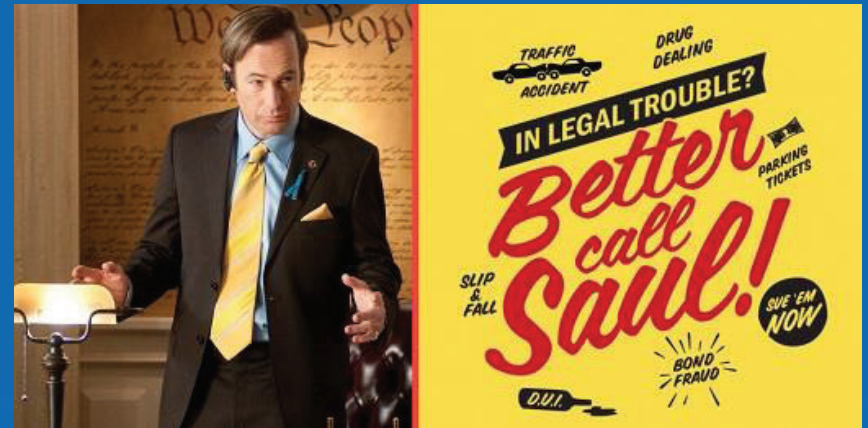
# Hypo #9

- Client pays lawyer a \$6,000 “retainer” to cover filing of divorce at rate of \$300 per hour
- Client decides to reconcile with spouse after lawyer spends 2 hours
- Lawyer must refund the remainder of fee



# Hypo #10

- Client pays lawyer \$5,000 non-refundable engagement fee to be available for a matter.
- Lawyer spends 2 hours on matter
- Does lawyer need to refund any of the fee?



# NONLAWYER ASSISTANTS

ABA FORMAL OPINION 506

June 7, 2023

The background features several faint, concentric circular patterns in a lighter shade of blue, resembling ripples in water, scattered across the bottom half of the slide.

# Hypo #11

- You hire a nonlawyer assistant to help you screen prospective clients.
- What are your responsibilities for what the nonlawyer does?



# Lawyer's Duties

- Communicate with client and set objectives and strategies
- Explain fee agreement
- Train and supervise nonlawyers (V.I. 211.5.3)





# Nonlawyers' delegated duties

- Obtain initial information (e.g., parties, dates of incident, nature of legal matter)
- Run conflict checks
- Determine whether matter falls within practice
- Answer general questions regarding fees



# OFFICE SHARING ARRANGEMENTS

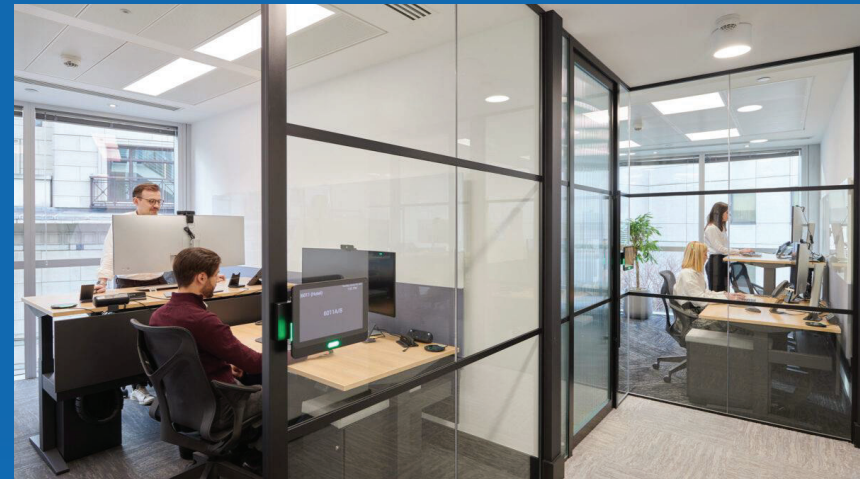
ABA FORMAL OPINION 507

(July 12, 2023)



# Hypo #12

- Office space is expensive, so you decide to rent unused office space from unaffiliated lawyers.
- What ethical duties do you have?

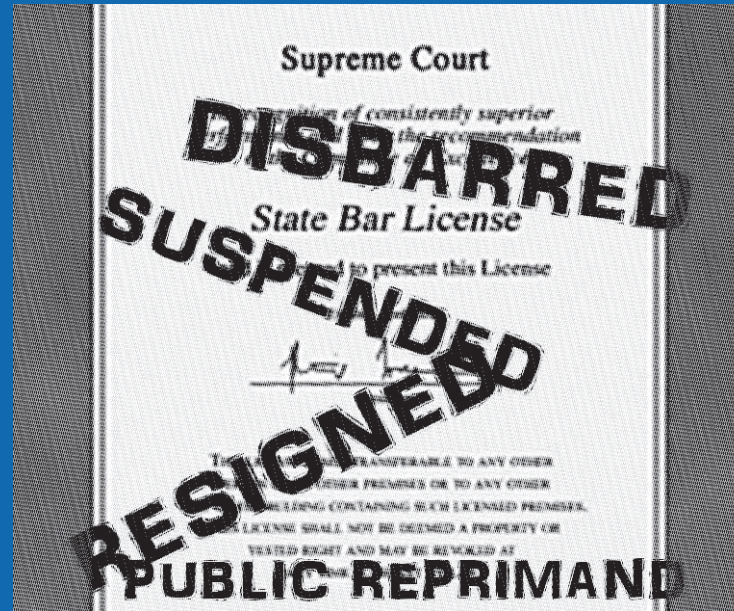


# ABA Formal Opinion 507

## ➤ Minimal ethical requirements

- Protect client information (restrict access in cabinets, computer systems)
- Don't leave clients files out in common rooms
- Train common personnel
- Provide clear signage
- Avoid imputation of conflicts
- Any shared staff cannot have access to information for adverse clients (ethical screen)





# FAIRNESS IN LITIGATION



# Hypo #13

- You are preparing a witness for trial. Before you ask the witness questions, you tell the witness what the strategy of your case will be. You keep reminding the witness throughout the prep.
- Is this permissible?



# Ethical Preparatory Conduct

- Remind witness they will be under oath
- Emphasize importance of telling the truth
- Explain truth can be “I do not recall”
- Explain case strategy and procedure
- Suggest proper attire and demeanor
- Provide context for witness’s testimony
- Inquire into witness’s recollection
- Identify other testimony that is expected and explore witness’s version of events in light of that testimony
- Review documents
- Anticipate cross-x
- Suggest choice of words to make testimony clearer
- Tell witness not to answer question until it is completely asked
- Emphasize importance of remaining calm; don’t argue with lawyer
- Tell witness to testify only about what they remember; don’t speculate
- Tell witness to focus on question and don’t speculate

# Unethical Pre-Testimony Coaching

1. Counseling a witness to give false testimony
2. Assisting a witness in giving false testimony
3. Advising a client to disobey a court order regulating discovery or trial process
4. Offering unlawful inducement to a witness
5. Procuring a witness's absence
6. Telling witness to "downplay" number of times lawyer and witness met to prepare for trial
7. Programming a witness's testimony
8. Knowingly violating sequestration order
9. Encouraging a witness to present fabricated testimony
10. Pay a lay witness for the substance of their testimony (or promise to give a payment to another, including a charity)
11. Offering a witness money or incentives not to testify

# Unethical Conduct During Witness Testimony

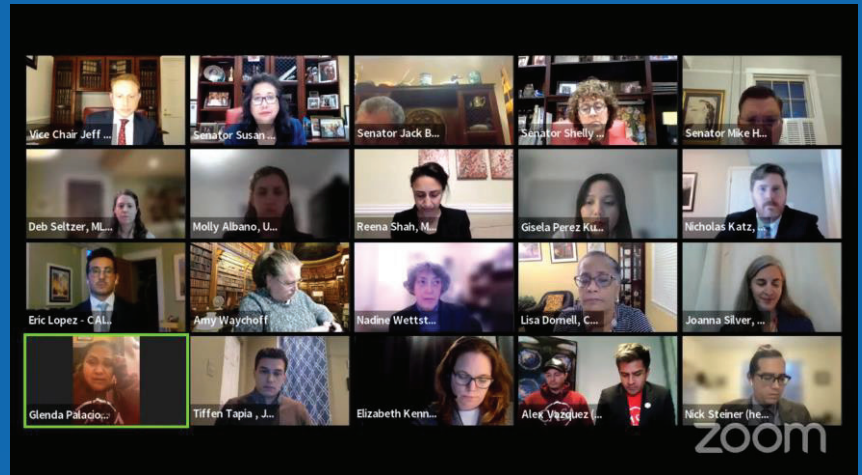
- Winking, kicking deponent under the table, passing notes, signaling, speaking objections that coach the witness, coaching witness during breaks





# Misconduct in Remote Settings

- Text-messaging during deposition
- Giving client answers off camera



- *In re Jeffrey Rosin* (Mass. 2023) (sanctioned for whispering answers to client during Zoom deposition)

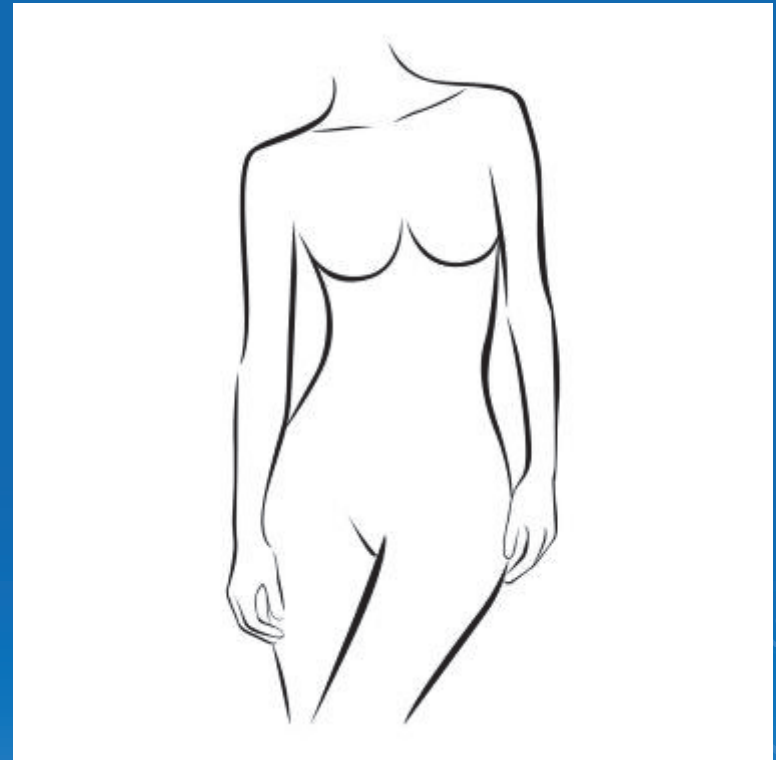


# OTHER UNFAIR LITIGATION TACTICS



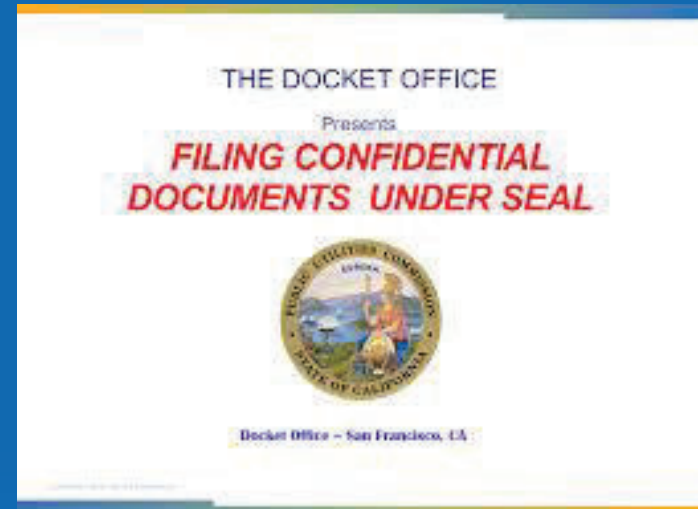
# Hypo #14

- Plaintiff sues former employees for stealing millions of dollars. Employees countersue, claiming the employer asked them to engage in illegal acts.
- Defendants file a motion to stay the case and include an exhibit with photographs of the plaintiff nude or semi-nude.
- Have the defendants acted properly?



# Schottenstein et al. v. Lee et al. (22-cv-011970)

- Even if photos were relevant to counterclaim, they should not have been included in public filing
- File under seal!!



# Hypo #15

- You have been in heated litigation against one of the most obnoxious lawyers of your career. He constantly makes snide remarks and calls you "a spineless, pathetic loser" in front of your client.
- One day, you have had enough and just give the guy a push while you are leaving the courthouse.
- Does this violate the ethical rules?



# CONDUCT IN ATTORNEY'S PRIVATE LIVES





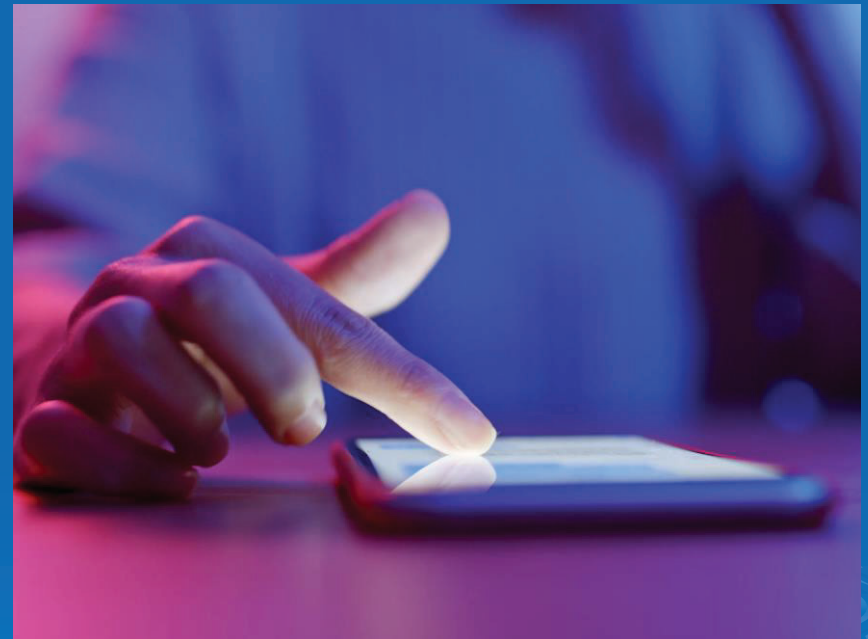
# V.I. 211.8.4

## Misconduct

- It is professional misconduct for a lawyer to:
  - Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
  - Engage in conduct that is prejudicial to the administration of justice.
  - Comment [1]: “A violation of this rule can occur when a lawyer is not practicing law or acting in a professional capacity.”

# Hypo #16

- You are hooked on social media and post derogatory comments about women with tattoos and incendiary statements after the murder of George Floyd.
- You also tell a friend who hates her ex-spouse that the best way to get rid him would be to lure him to her home and claim that she feared for her life when he broke in.
- Could these posts violate the ethical rules?



# Discipline for Conduct in Attorneys' Private Lives

- South Carolina Attorney suspended -- statements meant to incite racial and gender-based conflict
- Tennessee Attorney disciplined even though comments deleted.



# *But See*

- In re Maria Anne Brown
  - Posted on Twitter account statements calling on people to shoot BLM demonstrators



# Basics of Conflicts of Interest





# Types of Conflicts

- Client v. Client  
(concurrent)
- Client v. Client  
(former)
  - “substantially related”
- Client v. Attorney  
(financial or  
personal interests)



# Attorney's Duties to Client

- 2 Basic Duties:
  - Duty of Loyalty
  - Duty of Confidentiality



# Hypo #17

- Your client enters into a joint defense agreement with other defendants in a case. One of the other defendants decides to take a deal and cooperate with the prosecution.
- Can you use information that you learned when that defendant was still part of the JDA?



# U.S. v. Vuteff (S.D.Fla. 2023)

- No ethical obligation not to use information
- To avoid problem:  
Get it in writing!!



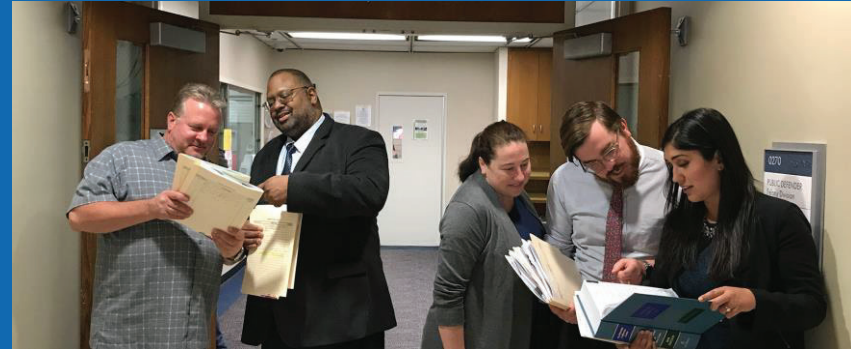
# Duty of Loyalty





# Hypo #18

- You are a sole practitioner. You contract to represent indigent clients in criminal proceedings, but you have bit off more than you can chew and let your work for them lapse.
- Is this an ethical violation?



# Duties to Indigent Clients

- V.I. 211.1.1:  
Competence
- V.I. 211.1.3:  
Diligence
- V.I. 211.1.4:  
Communication



# Hypo #19

- You have agreed to accept court-ordered appointments, but you are assigned a child molester case and you find it repugnant to interact with the defendant.
- Can you withdraw?
  - V.I. 211.1.16 (so repugnant as to impair lawyers' ability to represent?)



# UNAUTHORIZED PRACTICE OF LAW



# Hypo #20

- Barte, a Virgin Islands limited liability company, files a breach of contract against Jewell Bay. The complaint is signed by a project manager for Barte. Jewell Bay moves to dismiss. The court gives Barte 30 days to hire an attorney licensed in the Virgin Islands. Barte hires such a lawyer but does not refile the complaint.
- Is the complaint valid?
- *Bart Enterprises, LLC, v. Sapphire Bay Condominiums West*, Sup.Ct. V.I. (Nov. 21, 2023)





# V.I. 211.5.5

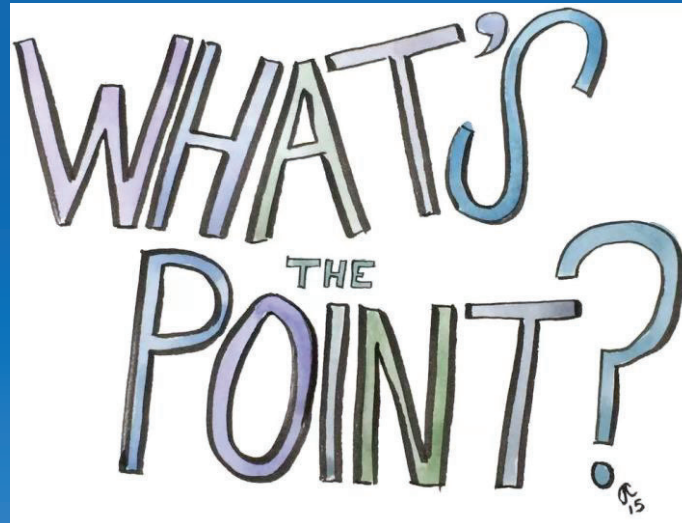
## Unauthorized practice of law

- “The unauthorized practice of law means: the doing of any act by a person who is not a member in good standing of the Virgin Islands Bar association for another person usually done by attorneys-at-law in the course of their profession, and shall include but not be limited to: ... The preparation and/or filing of pleadings or other legal papers incident to any action...”

# FINAL THOUGHTS



# WHY THIS ALL MATTERS?



# REPUTATION IS EVERYTHING!



# Zealous representation does not mean that “anything goes”





# OTHER NEW DEVELOPMENTS



# Supreme Court Ethics Code

- Aspirational
- No real enforcement mechanism



# How did you score?

- **All 20 correct:** You're lying.
- **15-20 correct:** We might believe you
- **10-15 correct:** Put your malpractice carrier on your speed dial
- **0-10 correct:** STOP relying on ChatGPT

THANK YOU

QUESTIONS?

