



# ETHICS UPDATE U.S. VIRGIN ISLANDS

Professor Laurie L. Levenson

Loyola Law School

2023

# The Great American ETHICS Show



# Consider this ...

## ➤ Reputational ranking

- Nurses
- Police
- Day care providers
- Auto mechanics
- Professional chefs
- Lawyers



# TOPICS

- 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
- Mediation / Negotiations



# MEDIATION & SWEET RESULTS





# Question #1

- Prue and Mary Berry are business partners in a bakery. When their business fails, they each claim fraud, but agree to mediation.
- During the mediation, the mediator asks Prue's lawyer whether her client always reported to Mary Berry the full cash income of the bakery.
- Prue's lawyer says "yes," although her client had told her in confidence that some cash receipts may have "fallen through the cracks."



## Question #1

Has Prue's lawyer violated the ethics code?

- A. No, because the client told her the other information in confidence;
- B. No, because the ethical rules do not apply in mediations;
- C. Yes, because Prue's client was socking away the dough;
- D. Yes, because the rules of honest disclosures apply in mediations.

# Rules Governing Honest Dealings in Negotiation

- Lawyer must be truthful at all times
- V.I. 211.4.1(a)
  - “In representing a client a lawyer shall not knowingly ... Make a false statement of material fact or law to a third person.”





# Question #2

- Speaking of honesty, George Santos seeks to hire you for a real estate deal. You learn that he plays fast and loose with the truth. He claims to have worked for Citigroup, graduated from NYU, and comes from a well-known Virgin Islands family.



# Question #2

## You should:

- A. Sign him up quickly to be a client because it is clear he will have a lot of business for you;
- B. Refuse to represent him because of his past lies;
- C. Explain to him the need for honesty when you represent him;
- D. Seek counseling for him because he clearly has some issues.

# Ethical Responsibilities

- V.I. 211.4.1:  
Truthfulness to Others
- V.I. 211.1.2(d): Scope  
of representation
- V.I. 211.8.4(b), (c):  
Duty of honesty
- V.I. 211.1.14: Clients  
with impairments



# FINANCIAL ARRANGEMENTS WITH / FOR CLIENTS





# Question #3

- Paul Hollywood's employee, Martha Stewart, has been called to testify before an agency investigating problems in the food industry.
- Stewart does not have money to hire a lawyer.
- Can you arrange for Paul to pay for Martha's lawyer?



# Question #3

## Can Paul pay for Martha's lawyer?

- A. No, because Paul and Martha may have a conflict of interest;
- B. No, because Martha works for Paul;
- C. No, because an attorney's duty is to the person paying the attorney fees;
- D. Yes, but with certain conditions.



# Paying Another's Attorney Fees

## V.I. 211.1.8(f)

- Lawyer shall not accept compensation unless:
  - 1) The client gives informed consent;
  - 2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - 3) Information relating to representation of a client is protected as required by the rules of confidentiality.

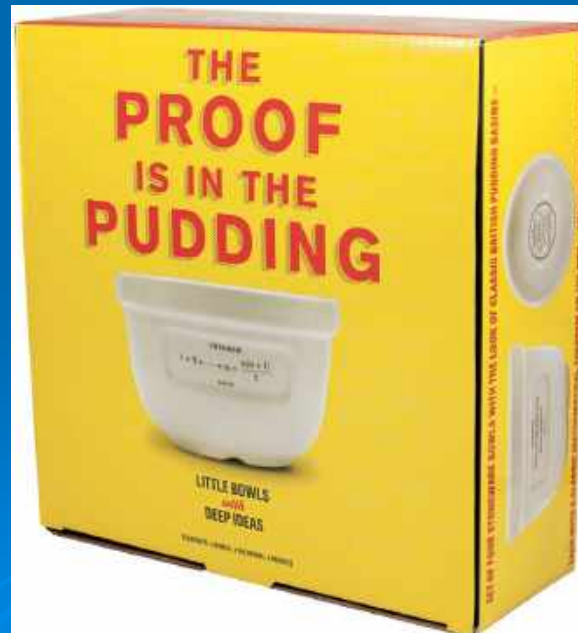


# This is NOT allowed!

**“[A person] let me know you have your deposition tomorrow. He wants me to let you know that he’s thinking about you. He knows you’re loyal, and you’re going to do the right thing when you go in for your deposition.”**



# FAIRNESS IN LITIGATION



# Question #4

- Your client's repair shop is being sued for engine damage to the plaintiff's car when faulty parts were installed.
- Your client tells you that he still has the boxes for those parts, but they might show he installed pre-used parts.
- Your client wants to clean out his shop so he can make room for more parts.



## Question #4

What should you tell your client?

- A. He can clean his shop so long as he takes a picture of the box;
- B. He should determine if the parts were used and, if they were not, he can destroy the box;
- C. He should destroy the box immediately;
- D. He can clean his shop, but needs to preserve the box.

# SPOILIATION

- V.I. 211.3.4(a): A lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.
- Fedeking v. Triad Aviation (M.D. N.C. 2022)





# Question #5

- You represent the National Bakery Federation. Hearing that their bakers' union has authorized a strike, the NBF has asked you to bring a TRO to enjoin the strike.
- Case law holds that only the NLRB can seek an injunction to prevent an unfair labor practice under the NLRA.



# Question #5

## What should you do?

- A. File the TRO if it will save your client's business;
- B. Tell your client that you cannot file the action because of contrary legal authority;
- C. Agree to file the suit as long as your client agrees to pay any sanctions by the court;
- D. Stock up on pastries before the strike begins.

# Dealing with Adverse Legal Authority

- V.I. 211.3.3: Duty to disclose adverse legal authority
- V.I. 211.3.1: Meritorious claims and contentions
- Need good faith basis for action
- *St. Charles Health System v. Oregon Federation of Nurses and Health Professionals* (D.Ore. 2022)



# THE BASICS

## V.I. Rule 211.3.1

### ➤ Meritorious claims and contentions

- Must have a “basis in law and fact that is not frivolous”
- “Good faith argument” for extension, modification or reversal of existing law.





# DISCOVERY ISSUES



# Question #6

- During discovery, the court orders Paul to provide his accounting records for 2018 – 2022.
- Although Paul labeled the file he provided as covering those years, they really only covered 2019-2022.



## Question #6

Is counsel subject to sanctions for a discovery violation?

- A. No, because the client represented that the records complied with the order;
- B. No, because the court's order was unreasonable;
- C. No, because the court must allow later compliance;
- D. Yes, including possible criminal contempt

# Complying with Court Orders

- V.I. 211.3.4(d): A lawyer shall not knowingly ... fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party.
- N.Y. v. Trump Org. (2022)





# Question #7

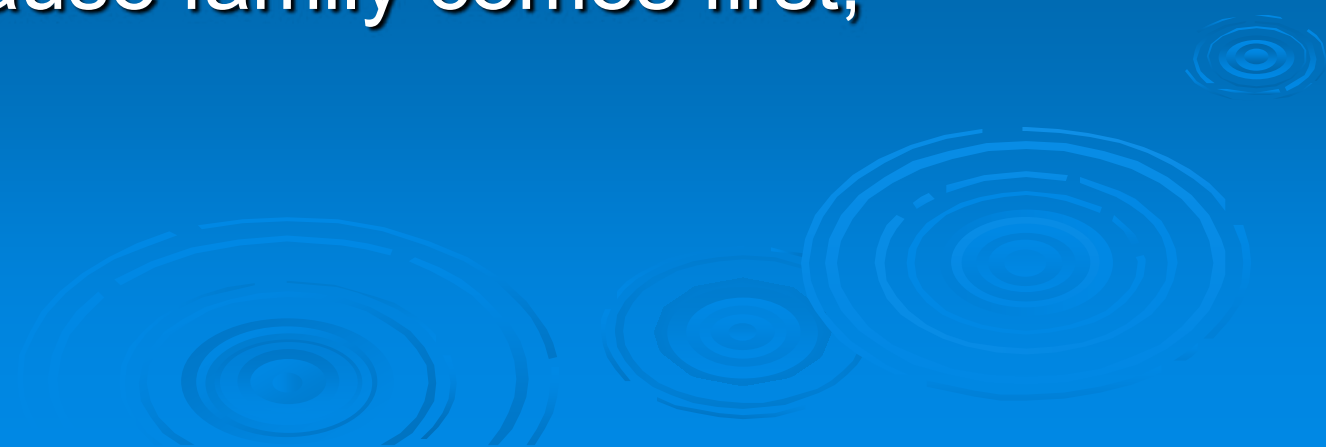
## Keep an Eye on the Timer

- The court has ordered Noel to file his client's motions by the end of the week. However, Noel's child was given an opportunity to play in the national tennis championship, so Noel missed the deadline and filed the motion on Monday.



## Question #7

Is Noel excused from meeting the deadline?

- A. Yes, because he had a good reason for the brief extension;
  - B. Yes, because the court's deadline was unreasonable;
  - C. Yes, because family comes first;
  - D. No.
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# Deadlines are Deadlines

- In re Allen Beal (10<sup>th</sup> Cir. 2022)
  - Counsel missed deadline by 25 minutes because of problems with filing ECF document



# NY Judge Jails Atty for Repeated Delays

- Benthos Master Fund, Ltd. v. Etra (SDNY 2022)
- Delay in producing bank statements and financial records in crypto investor case





# THE BUSINESS OF BEING A LAWYER



# Question #8

- Matt has been chosen to manage the law firm of PPM&N. The firm took on so many insurance cases that they were perpetually behind in handling their matters.
- There have been multiple complaints filed by clients.



## Question #8

Can Matt be disbarred for mismanaging the firm?

- A. No, because all firms can get over-committed on their cases;
- B. No, because clients always complain;
- C. No, so long as the firm pays any sanctions imposed by the court;
- D. Yes.

# Duties to clients

- V.I. 211.1.1: Competence
- V.I. 211.1.3: Diligence
- Florida Bar v. Stremis (2022)





# 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



# Question #9

## Conflicts

- Prue helped to negotiate an agreement by Goli Nutrition and Better Nutritionals to produce nutritional supplements.
- When the deal fell apart, Goli sued Prue and her firm.



## Question #9

Can Prue and her firm be sued for malpractice?

- A. No, because they believed in good faith that both clients wanted the deal;
- B. No, because Goli could have hired independent counsel at any time;
- C. No, because conflicts of interest are not the basis for a malpractice action;
- D. Yes.



# Conflicts of Interest

- **V.I. 211.1.7: Conflict of Interest and Current Clients**
  - Significant risk of conflict?
  - Was lawyer unreasonable in believing that conflict would not be a problem?
  - Was there informed written consent?
- Better Nutritionals LLC v. Goli Nutrition, Inc. (C.D.Cal. 2022)



# Requirements for Valid Waiver

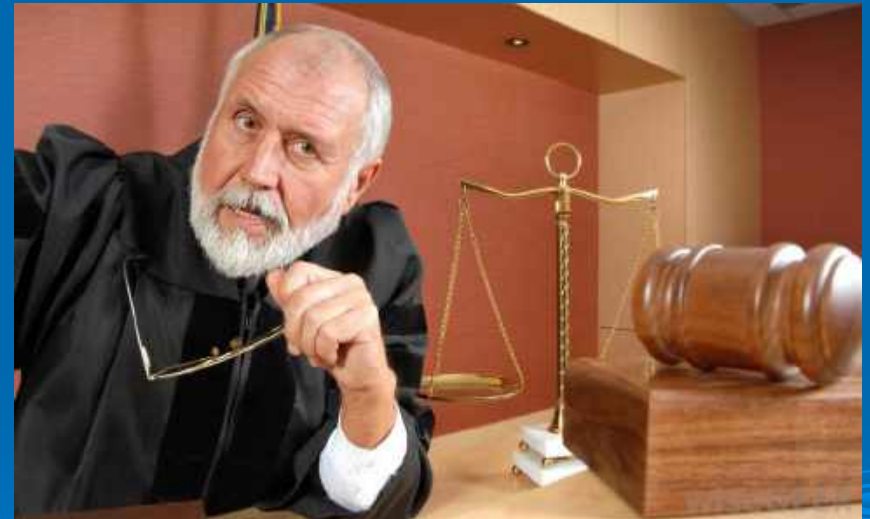
- **Informed consent**
- Consultation with independent counsel
- **Written waiver**



# Question #10A

## Using Conflicts as a Tactical Weapon

- RC Hotel Co. was not thrilled about the judge assigned to their case, so they had their law firm hire a lawyer who had previously worked with the judge's prior law firm.



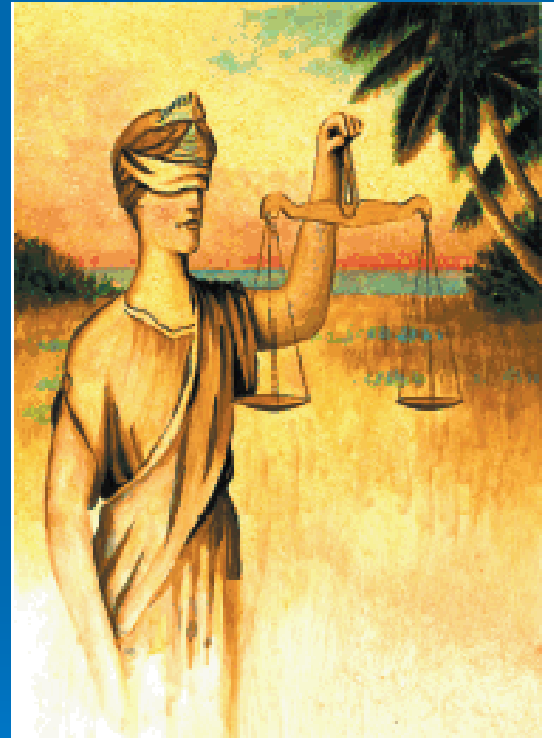
## Question #10A

Can the opposing party seek to disqualify RC's lawyers because of the conflict they created for the judge?

- A. No, because clients are entitled to counsel of their choice;
- B. No, because the conflict was disclosed;'
- C. No, because there is no imputed disqualification;
- D. Yes, because there was no overriding need to hire the lawyer who had the conflict.

# Disqualifying lawyers

- V.I. 211.1.10  
Imputation of  
Conflicts
- V.I. 211.3.5: A lawyer  
shall not engage in  
conduct intended to  
disrupt a tribunal
- Fox v. Ritz-Carlton Hotel  
Co., LLC (S.D.Fla. 2022)





# V.I. 211.3.5

- Lawyer shall not seek to influence judge by means prohibited by law
- Engage in conduct intended to disrupt tribunal

THE  
COMPLETE  
GUIDE TO  
RESPECT



# Question #10B

## Disqualifying Government Lawyers

- The U.S. Attorney's Office is investigating CBS for dangerous labor practices in filming the Great American Baking Show. One of the supervisors in the office was a contestant on the show.
- The targets of the investigation move to disqualify the entire U.S. Attorney's Office.



## Question #10B

### Should the office be disqualified?

- A. Yes, because one of its lawyers has a conflict and the rest have imputed conflicts.
- B. Yes, because government offices should be held to high ethical standards.
- C. Yes, even if there is an ethical screen.
- D. No, because the burden is on the defendant to show that an ethical screen is ineffective.

# United States v. Shah

43 F.4<sup>th</sup> 356 (3<sup>rd</sup> Cir. 2022)

- Ethical screens may be used by government offices
- Burden is on party seeking disqualification to show screen is ineffective





# Ethical Walls Require

1. Put in place before handling case
2. Physical and virtual separation
3. No sharing of profits
4. No access to confidential information
5. **Client consent**






# Question #11A

- Mary Berry is so generous. Not only does she bake pies for all her employees, but she has started sharing legal fees with them.
- Not all her employees are lawyers.



## Question #11A

Has Mary Berry acted properly?

- A. Yes, because her employees are subject to the same ethical duties as she is;
  - B. Yes, so long as the legal fees to the client are not increased;
  - C. Yes, if the clients agree;
  - D. No.
- 
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# V.I. 211.5.4

- No sharing of legal fees with a nonlawyer
- Some states allow
- Nonlawyers work for lawyers



# Gianna Orlandi

- Disbarred for forming law firm with nonlawyer who did most of the legal work



# Question #11B

## Fee Disputes

- Noel decides to take a break from baking to work as a lawyer. He ends up in a fee dispute with a client because he only served in a supporting role for lead counsel, Matt. The only notes Noel kept of his work were scrap notes.





## Question #11B

### Can Noel get his attorney fees?

- A. No, because only the lead attorney can get fees.
- B. No, because there is no way to figure out the quantum meruit he has earned.
- C. No, because he obviously was not smart enough to be lead counsel.
- D. Yes, but he will have the burden of showing a written agreement with the client, reasonable fees, and the amount he has earned.

# V.I. 211.1.5

## Fees

- Fees must be
  - Reasonable
  - Rate and expenses communicated in writing to client before or within reasonable time of starting work
  - Regulations on contingency work
  - Division of fees proportional to each lawyer's work and client agrees in writing



# Question #11C

## No Solicitation

- Paul has been hustling for clients. He hears of a group of bakers that recently lost fingers from a defective mixer. Paul asks his assistant to contact them to see if Paul can represent them in a class action.



# Question #11C

## Has Paul violated the rules?

- A. Yes, this is improper solicitation;
- B. No, this is not solicitation so long as someone else is promoting Paul's services;
- C. Yes, because Paul mixed his hobby with his work;
- D. No, because he promised to do a good job with their case.



# ABA Formal Opinion 501 (Apr. 13, 2022)

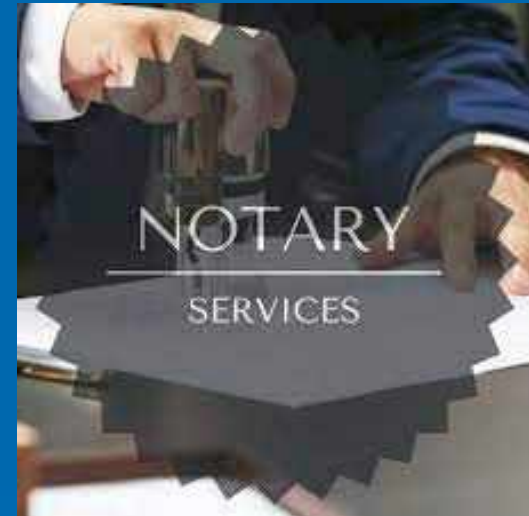
- Prohibition on face-to-face solicitation applies to third parties asking on lawyer's behalf
- Applies to current employees, marketing firms, existing clients, former clients, friends, family, and professional colleagues





# V.I. Rule 211.5.3

- Responsibilities Regarding Nonlawyer Assistants
  - “Reasonable efforts to ensure person’s conduct is compatible with professional obligations”





civility



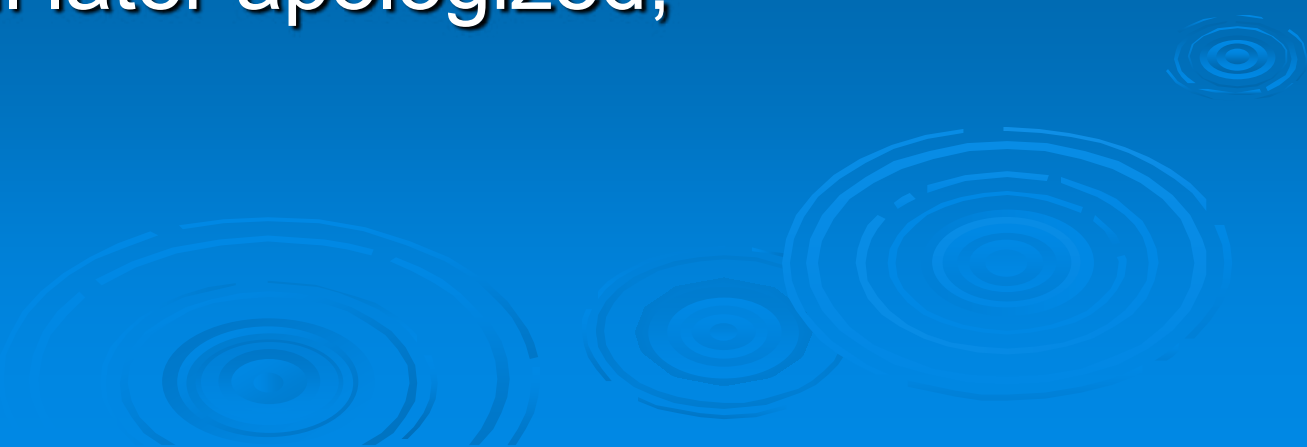
# Question #12

- Paul is so angry. He believes opposing counsel intentionally humiliated him before the judge.
- After the hearing, when opposing counsel refused to apologize, Paul slapped him.



## Question #12

Did Paul violate the ethics rules?

- A. No, if opposing counsel deserved the slap;
  - B. No, if the slap didn't occur in the courtroom;
  - C. No, if Paul later apologized;
  - D. Yes.
- 

# V.I. 211.84. Misconduct

- Ethical rule prohibits any conduct that is unlawful, reflects on a lawyer's fitness, or is prejudicial to the administration of justice





# Question #13

## But what about sex?

- Lawyer Cassanova is accused of having sex with clients on a live office video, as he waited for his online case to be called.



## Question #13

Did Cassanova do anything wrong?

- A. No, so long as he was ready for his hearing;
- B. Yes, because clients are off limits;
- C. No, unless he forgot to turn his camera off;
- D. Yes, if the actions were not consensual

# V.I. Rule 211.1.8(j)

- A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.



# Star Loser

- Kentucky prosecutor, who admitted impregnating a criminal defendant and having an affair with a dismissed juror, decided to run for a circuit court judgeship.



# PRIVILEGES





# Question #14

## Keeping up with the Joneses

- Alex's lawyer accidentally produced a batch of texts and emails between him and his client that would help skewer Jones on cross-examination at trial.
- When he learned of the accident, he didn't do anything to recover the documents.



## Question #14

Has Jones' lawyer done anything wrong?

- A. No, because Jones deserved it;
- B. No, because the disclosure was accidental;
- C. No, because the court should have blocked their use;
- D. Yes, Jones' lawyer should have taken action to protect the confidential communications.

# Protecting Attorney-Client Privilege

- Mark all communications as privileged/confidential;
- Be extra careful during discovery
- Take corrective action



# Question #15

- Julia Childs approaches her lawyer for help with her business. You discuss her legal and business affairs.



# Question #15

## Are the discussions privileged?

- In re Grand Jury (USSC 2023)





# CONTACT WITH OPPOSING PARTY



# Question #16

## Do we have a problem here?

- Paul and Prue are suing each other. Prue's lawyer is representing her pro se. Paul has retained counsel.
- Can Prue's lawyer contact Paul?



# V.I. 211.4.2

- No contact with represented party applies to pro se lawyers
- ABA Formal Opinion 502 (Sept. 2022)



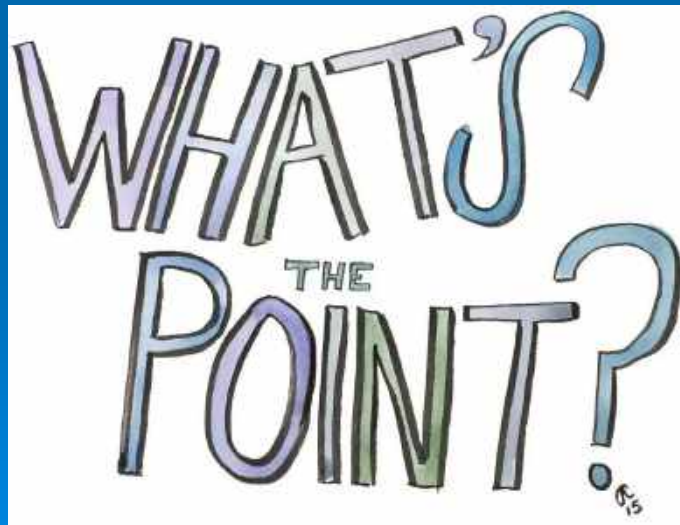
# Matter of Robertelli

## 258 A.3d 1059 (N.J. 2021)

- Lawyers cannot attempt to communicate with opposing parties if they have set privacy settings on social media without consent of user's counsel



# WHY THIS ALL MATTERS?





# Consequences

- Bar discipline
- Court sanctions
- Criminal prosecution
- Malpractice
- Civil action
- **REPUTATION**



# REPUTATION IS EVERYTHING!



# UPDATE ON ETHICS RULES

- In the Matter of:  
Jeffrey B.C.  
Moorhead, Esq.  
(Nov. 2022)
  - Summary  
reciprocal discipline  
for lawyers  
disciplined in other  
jurisdictions



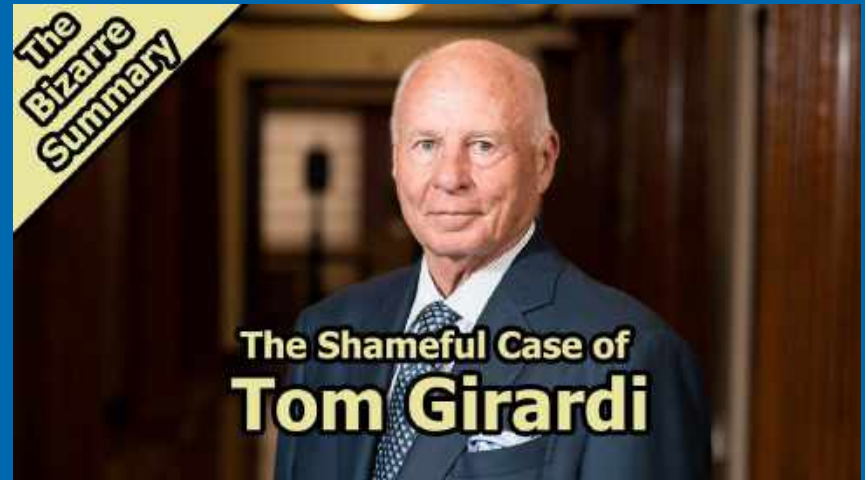
# MCLE

- In re Fuller, 2022 VI 17 (Aug. 25, 2022)
  - Mandatory CLE requirements under Rule 208 are enforceable



# FINAL WARNINGS

- 9 major law firms this year were hit with million-dollar lawsuits
- Lawyers were also the target of criminal prosecutions
  - Michael Avenatti (stealing clients' funds)
  - Willie Dennis (K&L Gates) (cyberstalking)
  - Tom Girardi (you name it!!)





# V.I. Rule 211.1.15

## Safekeeping Property

- Lawyer shall hold property of client or third persons separate from lawyer's own property
- Promptly notify and deliver funds to clients or third parties
- Client must keep strict client trust account records (V.I. Rule 211.1.15-1)

# V.I. Rule111.8.3

## Reporting Professional Misconduct

- Duty to report violation of Rules of Professional Conduct to Bar
- “Raises substantial question as to lawyer’s honesty, trustworthiness or fitness”
- But can get confidential help!!



# LOOKING TO THE FUTURE

- Artificial intelligence in law firms
- Advise clients regarding cyberthreats
- Oversee AI



# 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!!)



# Virgin Islands Bar Association Established 1956

Lawyers Assistance Program





# 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:** You are definitely NOT star baker!!)

# THANK YOU

## QUESTIONS?

