

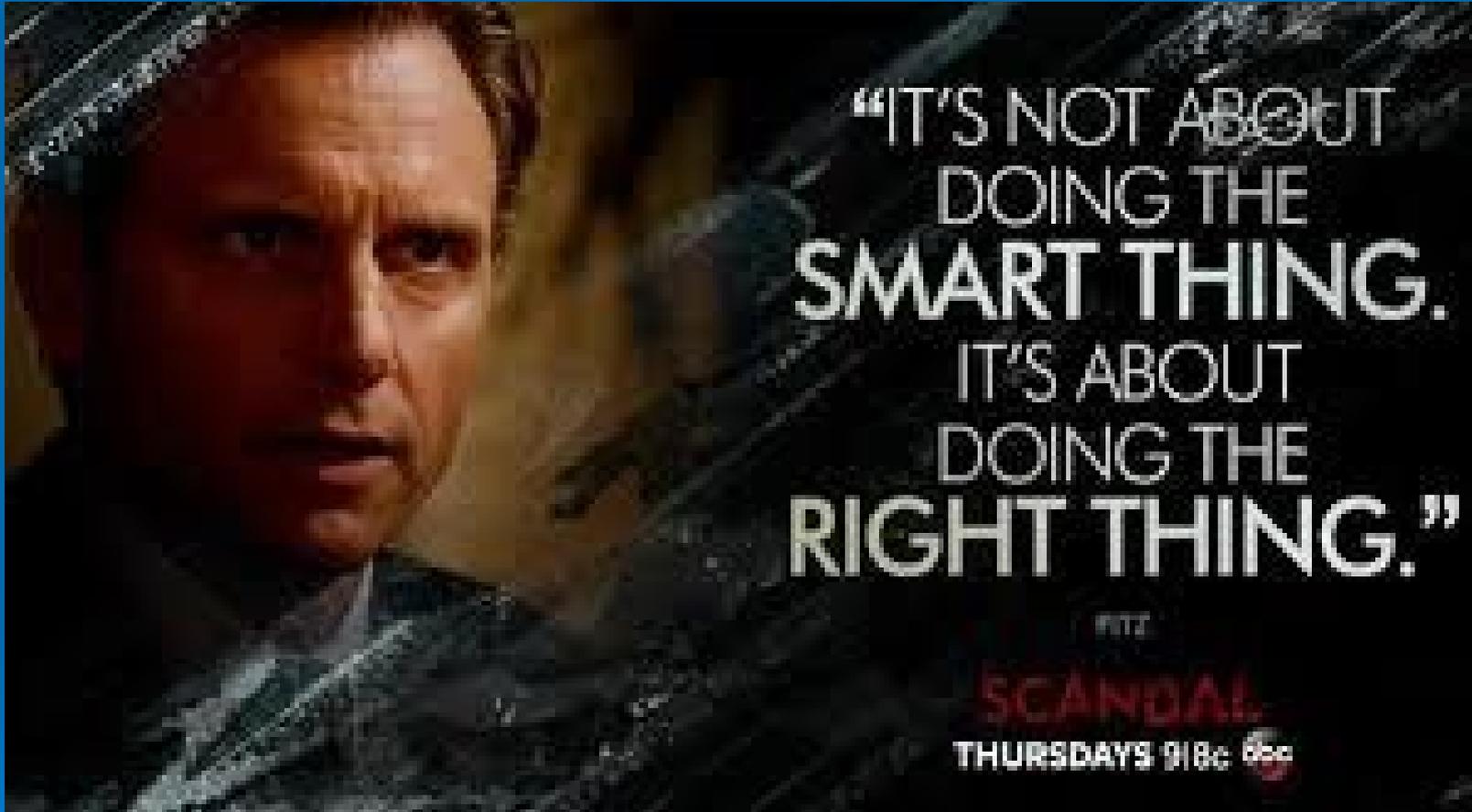


“Truth or Scandal: Ethics Update for the Virgin Islands”

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2019



“IT’S NOT ABOUT
DOING THE
SMART THING.
IT’S ABOUT
DOING THE
RIGHT THING.”

FITZ

SCANDAL

THURSDAYS 9|8c 

PROGRAM FOR TODAY

The “7 C’s”

1. Conflicts
2. Competency
3. Candor to the court
4. Civility and client control
5. Confidentiality
6. Communications
7. Professional Compass



But first ... what's new?

➤ Which of the following rules were changed in 2018?

- A. Court conflict rules
- B. Rules for compensation
- C. Rules for handling attorney name changes;
- D. All of the above.



CONFLICTS OF INTEREST



Basics of Conflicts of Interest



Attorney's Duties to Client

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



Types of Conflicts

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



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
- 

Conflicts with Current Client

- Rule 211.1.7: 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).

HYPO #1

[Slippery Slope]

- Amy D. was injured while vacationing in the beautiful Virgin Islands. She claims she slipped because her leased vacation home did not have hand rails.
- P sued both the owner of the vacation home (D1), as well as the property management firm (D2).
- Both D1 and D2 are covered by the same insurance company and are represented by the same law firm, PW&B. D2 claims that only the owner of the home can be liable for a breach of duty.



Which of the following is true?

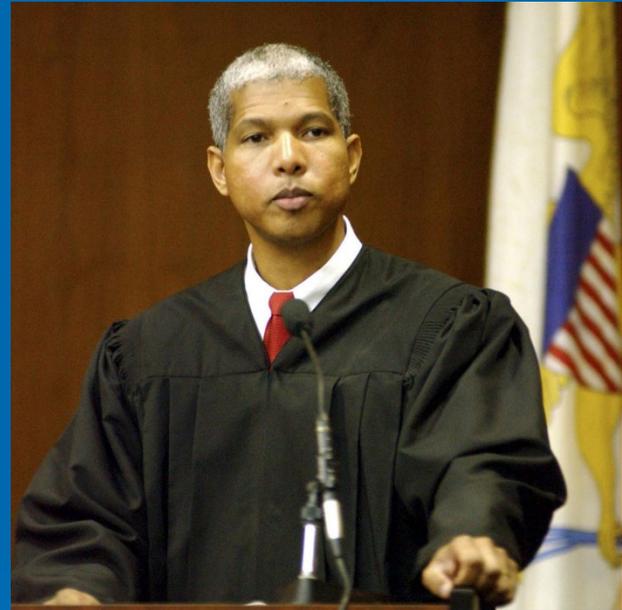
- A. The same firm can represent D1 and D2 if the insurance company pays for counsel;
- B. The firm can represent D1 and D2 if there was a general conflict waiver to the joint representation.
- C. The firm can represent D1 and D2 if separate counsel at the firm represents each defendant.
- D. The firm is not disqualified from representing D1 and D2 because there is only a potential conflict of interest.
- E. None of the above.

Denero v. Palm Horizons Mgmt.

2015 WL 5012126 (D.V.I. 2015)

➤ Analyzing whether there is a conflict of interest:

- Anticipating defenses
- Anticipating trial presentation



Rule 1.7 [Comments]

- [A] lawyer asked to represent several individuals ... is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions.”

Rule 1.7 [Comment]

- “The mere possibility of subsequent harm does not itself require disclosure and consent. **The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.**”

Thinking about the conflict

- What are the likely defenses?
- Who will be called as witnesses?
- Will counsel end up cross-examining its own party-witness?
- What arguments might be raised in settlement discussions?



What about waiver?

Rule 211.1.7(b)

A conflict can be waived if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Requirements for Valid Waiver

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



Remedy if Conflict

➤ Factors:

- Loyalty to client
- Risk of prejudice to client
- Court's interest in protecting integrity of proceedings and confidence in justice system



Disqualified from Representing Either Client!!



Additional Issues

- Does not matter who pays for representation (Rule 211.1.8(f))
- Imputed disqualification for all members of firm (Rule 211.1.10)



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.



OTHER CONFLICTS

Atty. vs. Client

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Easy cases

- **Joint transaction or pecuniary interest with client**
 - Rule 211.1.8(a)
- **Literary rights regarding client's case**
 - Rule 211.1.8(d)
- **Financial assistance to client**
 - Rule 211.1.8(e)



Hypo #2

[Bad advice?]

- Plaintiff Fenster is suing defendant deChabert and Walker Legal Group(WLC) over a property dispute.
- P serves a subpoena on deChabert's lawyer for documents regarding the lawyer's legal advice on the sale. P also moves to disqualify deChabert's attorney claiming that the lawyer has a conflict of interest in representing deChabert because counsel will want to defend his prior advice to avoid a malpractice claim.
- How should the court rule?



Hypo #2

- The court should:
 - A. Grant the motion to disqualify because counsel has a personal interest in the case;
 - B. Grant the motion because D's counsel could become a witness in the case;
 - C. Deny the motion to disqualify because P has no standing to move to disqualify counsel and there is not necessarily a conflict of interest;
 - D. None of the above.

Rule 211.1.7

[Comments]

- Lawyer's own interests in a case may create conflict. However, where there is no direct adverseness, a conflict of interest only exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.
- Critical questions:
 - Is it likely that a difference in client's interests and lawyer's interests will eventuate?
 - Is it likely that such a conflict will materially interfere with the lawyer's independent professional judgment in considering alternatives and courses of action to be pursued on client's behalf ?

[Fenster v. Dechabert (2017 V.I. Lexis 149)]

- Conflict had not materialized
- Counsel reminded of duty to get informed, written waiver



But note ...

- **ABA Formal Op. 481 (Apr. 17, 2018):**
 - A lawyer has a duty to inform a current client of he or she has made a material error.
 - No similar requirement for former client if lawyer discovers error after attorney-client relationship has ended.

Hypo #3

- The court is likely to:
 - A. Grant the motion because counsel is a percipient witness;
 - B. Deny the motion because there is no denying that the email was sent;
 - C. Grant the motion because a lawyer cannot be a witness and counsel in the same case;
 - D. Deny the motion because no one believes lawyers when they testify anyway.

Thomas v. Kragel

2018 V.I. LEXIS 132

➤ Rule 211.1.7

- A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - **The testimony relates to an uncontested issue;**
 - The testimony relates to the nature of legal services rendered;
 - Disqualification of the lawyer would work substantial burden on the client.



Hypo #4

[Times Gone By]

➤ For years, counsel represented Bigg Corp., but the relationship has gone dormant.



➤ Now, one of the company's officers asks the lawyer to defend him in a suit by shareholders against the corporation and the officer.



➤ May counsel handle the case?

McGuinness v. Johnson (2015)

- Duty of loyalty to entity
- Issues of confidentiality
- 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.

Hypo #5

[Joint representation]

- Plaintiffs have sued multiple defendants. 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?

Joint Defense Agreements

- Beware!!
- Only work so long as everyone stands by the agreement!



COMPETENCY



Hypo #6

["Too busy for your own good"]

- Counsel was a busy lawyer. Like many other busy lawyers, he works on cases he likes first and procrastinates on cases that are more difficult or involve difficult clients.
- Has counsel violated the ethical rules?



In the Matter of the Suspension of Maynard 68 V.I. 632 (2018)

- Permitted probate to languish for more than a decade
- Failed to communicate with beneficiary regarding liquidation of securities
- Failed to keep property of estate safe





3 Deadly Sins

Incompetence

Lack of diligence

Lack of communication

Rule 211.1.1

Competency

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

Rule 211.1.3

Diligence

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



Rule 211.1.4

Communication

- A lawyer must keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests of information from the client.



Hypo #7

[Competency 8.0]

- 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.



Hypo #7

- 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.

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

CANDOR TO THE COURT



REPUTATION IS EVERYTHING!



Hypo #8

["Just a detail"]

- Attorney Jane submits a request to the court for attorney's fees.
- Although the work was done by a paralegal, she lists the work as "attorney services."
- Is there an ethical problem?



Hypo #8

- Attorney Jane:
 - A. Has not violated the duty of candor if she has a good faith argument for why paralegal fees should be treated as attorney fees;
 - B. Has not violated her duty of candor if the court has not yet for clarification of her submission;
 - C. Has not violated the duty of candor if other lawyers make similar submissions;
 - D. Has violated her duty of candor if she knows that her statement is technically not true.

Roy v. Poleon

2018 V.I. Lexis 136

- District court and Virgin Island courts differ on whether paralegal fees may be included in computation of attorney fees.

Rule 211.3.3

Candor toward the Tribunal

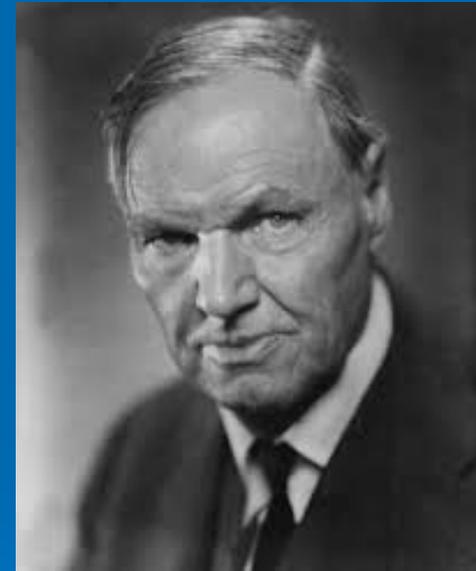
➤ A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer

Hypo #9A

[Little white lies]

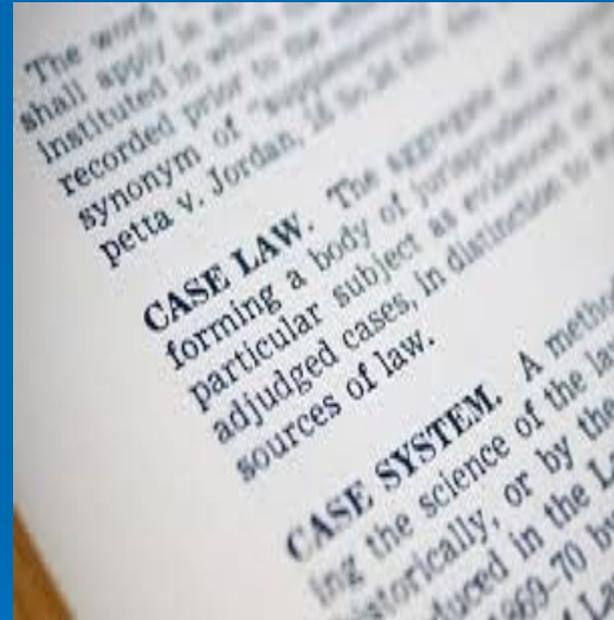
- Clarence Darrow's witness does not appear for trial. Darrow asks the court to continue the matter because the witness has a personal emergency. In truth, Darrow has no idea why the witness has not appeared.
- Does this violate Darrow's ethical duties?



Hypo #9B

[Isn't it supposed to be an adversarial system?]

- In a pleading, Darrow cites only cases that support his position. He is aware that there is contrary law, but he leaves it to opposing counsel to cite.
- Does this violate Darrow's ethical duties?



Rule 211.3.3

Candor toward the Tribunal

➤ A lawyer shall not knowingly:

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

Hypo #9C

[Witnesses say the darndest things]

- Darrow is delighted when his witness suddenly recalls a detail at trial that the witness had denied knowing in their pretrial discussions.
- Does Darrow have to do anything about the surprise testimony?



Rule 211.3.3

Candor toward the Tribunal

➤ A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

CIVILITY



**KEEP
CALM
AND
RESPECT
OTHERS**

Hypo #10A

[Being civil to your client]

- A New Jersey lawyer sent the following text to his nonpaying client who was facing charges of sexual assault on minors: “Have fun in prison.”
- Is this an ethical problem?



In re: Logan Terry (N.J. Supreme Ct. Nov. 6, 2018)

- Rule 8.4(b): It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.
- Conduct also created conflict of interest because attorney placed his own interests above the client's interests.

Hypo #10B

[Being civil to opposing counsel]

- Opposing counsel sends a hostile letter to opposing counsel claiming that he is going to “bury him at trial” and make him “beg for mercy.”



What is the best way to handle this situation?

- A. Threaten counsel with Bar discipline.
- B. Tell opposing counsel that he is a jerk.
- C. File the letter with the court.
- D. Post the letters on social media
- E. Respond with two words: "I disagree."
- F. Don't respond at all.

Rule 211.8.3

Reporting Professional Misconduct

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



Hypo #10C

[You won't believe this one!]

- Which of the following events has led to a lawyer and his firm being kicked off a case?
 - (A) The lawyer scheduling a deposition at Dunkin' Donuts;
 - (B) The lawyer attending the deposition in t-shirt and shorts;
 - (C) The lawyer drawing penis pictures and playing Angry Birds during the deposition testimony;
 - (D) All of the above.



Richard Celler Morgan & Morgan

- Disqualified from fair labor class action because of “flagrant disrespect” of opposing counsel.



Hypo #10D

“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?



Raise your hand if ...

➤ You or someone you know has been subject to an inappropriate remark because of your:

- Gender
- Race
- Sexual orientation
- Ethnicity
- Dress
- Weight
- Age



“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!!!”

ABA Rule 8.4 (Adopted 2018)

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

Moving Forward

Judge Jack Weinstein, EDNY
(Aug. 23, 2017):

Revised rule of court: “Junior members of legal teams” are “invited to argue motions they have helped prepare and to question witnesses with whom they have worked.”



Consider how you treat your employees



Hypo #11

[Aggressive lawyering]

- Attorney A tells the officer of a company he is suing that, “you can afford a better lawyer and I will never settle with the lawyer you have now.”
- Does this action violate the ethical rules?
 - (A) No, if it is the truth;
 - (B) No, because he is concerned about opposing counsel’s competence;
 - (C) No, if opposing counsel was standing nearby when the comment was made;
 - (D) Yes.



Rule 211.4.2

- “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

NO faking it!

- In re Malofiy (3rd Cir. 2016) (unpublished)
 - Attorney cannot foster impression in speaking with unrepresented defendant that attorney is a witness rather than representing a party in the case.



Hypo #12

Aggressive Clients

- 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?



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.”

What is the best way to deal with the issue?

- A. Withdraw from the case?
- B. Have the media interview the lawyer?
- C. Join the client in the media interviews?
- D. Provide a disclaimer?
- E. Consider another profession?



CLIENT CONTROL



Hypo #13

[Controlling the Client]

- You have a difficult client who calls you constantly, insults the opposing party and is not respectful to the court.
- The best thing to do is:
 - (A) Find a new client;
 - (B) Apologize to the court and counsel;
 - (C) Gag your client;
 - (D) Increase your rate.
 - (E) All of the above.



Mandatory Withdrawal

Rule 211.1.16(a)

➤ Lawyer shall withdraw if:

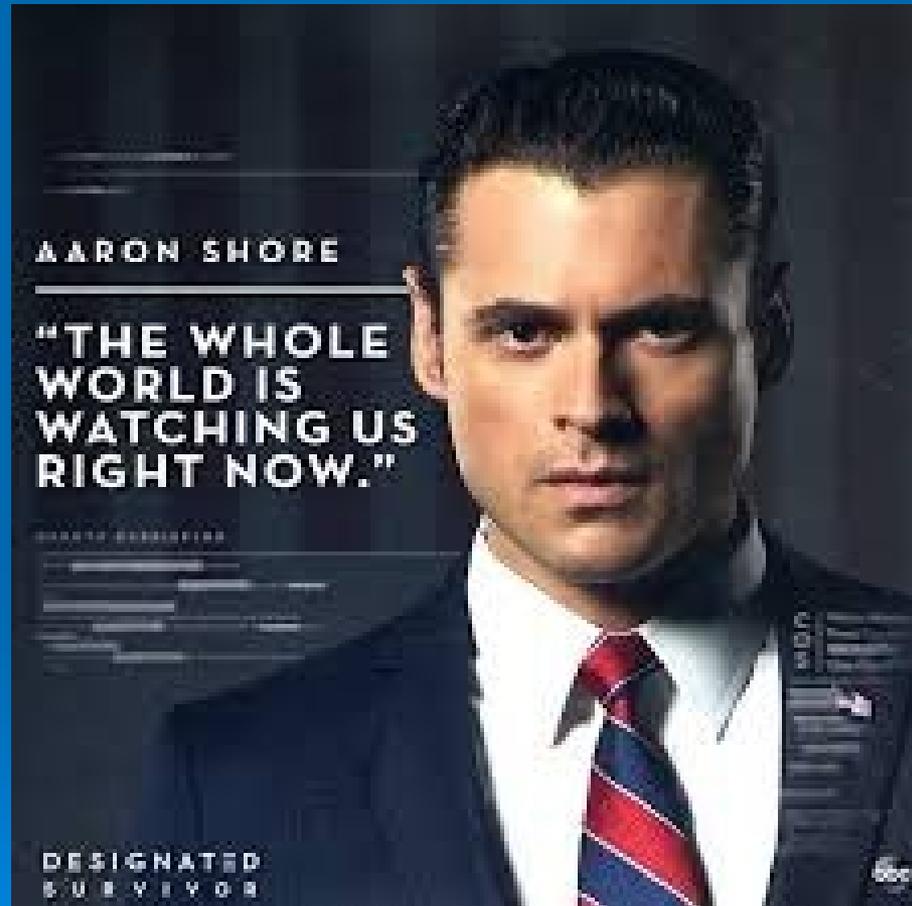
(1) the representation will result in violation of the Rules of Professional Conduct

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.

CONFIDENTIALITY



Hypo #14A

[KYMS]

- John Jones is being sued by his secretary for sexual harassment. John's wife calls you to ask whether there is any truth to the allegations. She and John have been your friends for year and you are not sure how much John has told her.



- May you tell her your assessment of the case?

Rule 211.1.6

- A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Paragraph (b)

- Prevent reasonably certain death or substantial bodily harm
- Prevent client from committing a crime or fraud
- Rectify substantial injury to financial interest or property of another
- Secure legal advice about lawyer's compliance with the Rules
- Establish a claim or defense on behalf of the lawyer in controversy between lawyer and client
- Comply with court order

Hypo #14B

[Romantic discussions]

- Is there an exception to the rules of confidentiality if you share information with someone with whom you have a romantic relationship?
- In re Kerr and Holmes (2018)



Hypo #15

[But it is public record ...]

- Rumor has it that your firm is representing an individual in a major political investigation. Your representation is public record. If reporters call to confirm your representation, may you do so?



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.
- ABA Formal op. 479 (2017)



Hypo #16

[Blog, blah, blah]

- While the investigation is pending, counsel discusses in a blog a hypothetical that matches her client's situation.
- Does blogging violate the ethical rules?



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.



ABA Formal Opinion No. 480

[Mar. 6, 2018]

- Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by the rules or client.



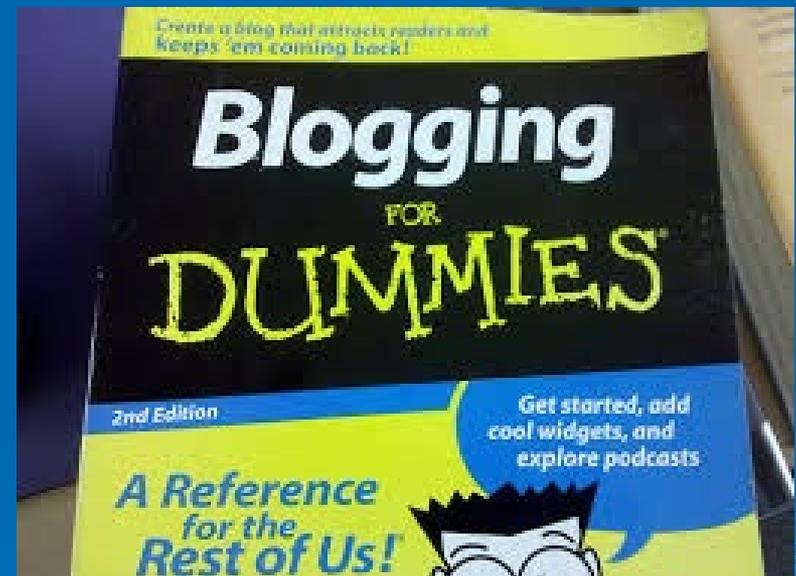
Dangers of Blogging

- 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



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



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
1. Consider whether you are indirectly recommending another lawyer's services
2. Remember the rules on pretrial publicity
3. Make no false or misleading statements
4. Become competent on the technology
5. Use common sense

Special Warning for Prosecutors

- Anonymous online posts about a case may lead to disbarment
- In re Sal Perricone (Dec. 5, 218)



Hypo #17

[Conference speeches]

- After counsel finishes her work for the client, she decides to speak at a conference regarding his case.
- Does this violate the duty of confidentiality?



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.**

COMMUNICATIONS



Hypo #18

Ex Parte Communications

- Bob Ruller is at a bar conference when he runs into a judge presiding over one of his cases. During the conference, Ruller tells the judge that he and opposing counsel have been trying to settle the case, but that opposing counsel is having a hard time convincing his client that they will lose on summary judgment.
- Do these actions pose any ethical problems?



Ethical Concerns

- Ex parte communications
- Recusal of judge if “impartiality might reasonably be questioned.” Canon 3C

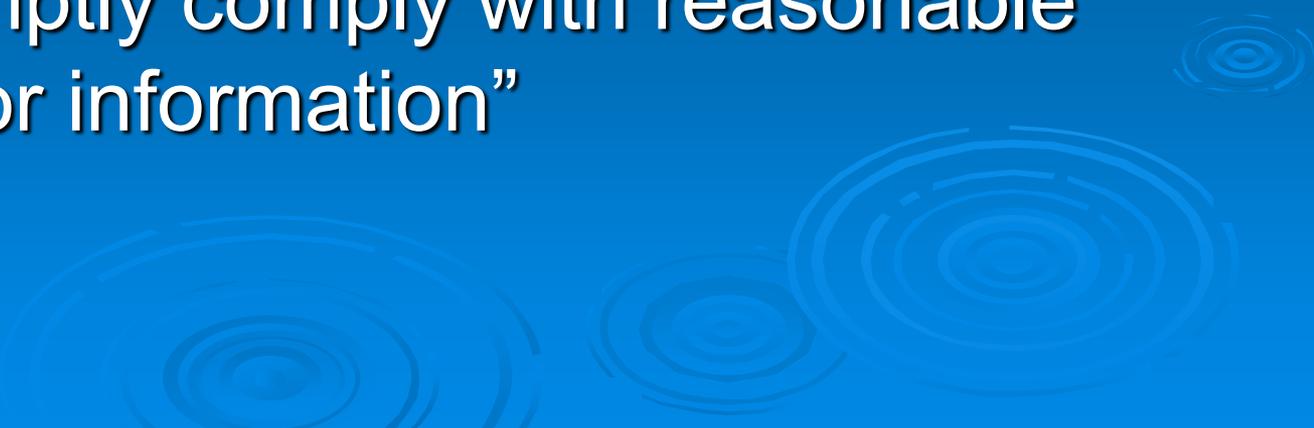
Hypo #19

Client communications

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



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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CAREFUL!!

**COMMUNICATIONS
WITH JURORS**



Hypo #20

[Juror contact]

Which of the following communications does not pose an ethical problem?

- (A) Surreptitiously “friending” a juror to monitor a juror’s post on her Facebook page;
- (B) Googling a prospective juror’s background before jury selection.
- (C) Posting on-line comments about the case while the case is pending.



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]



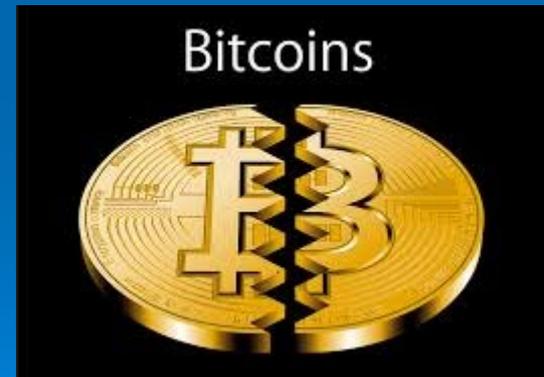
CHALLENGES FOR THE FUTURE



Hypo #21

[Creative fees]

- May a lawyer represent a client who is paying with crowdfunding or Bitcoin?



Hypo #22

[Companies financing fees]

➤ Can a lawyer refer a client to a company or broker to finance the lawyer's fees?



➤ ABA Formal Opinion 484

Hypo #23

[Outsourcing]

- 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.



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))
- 

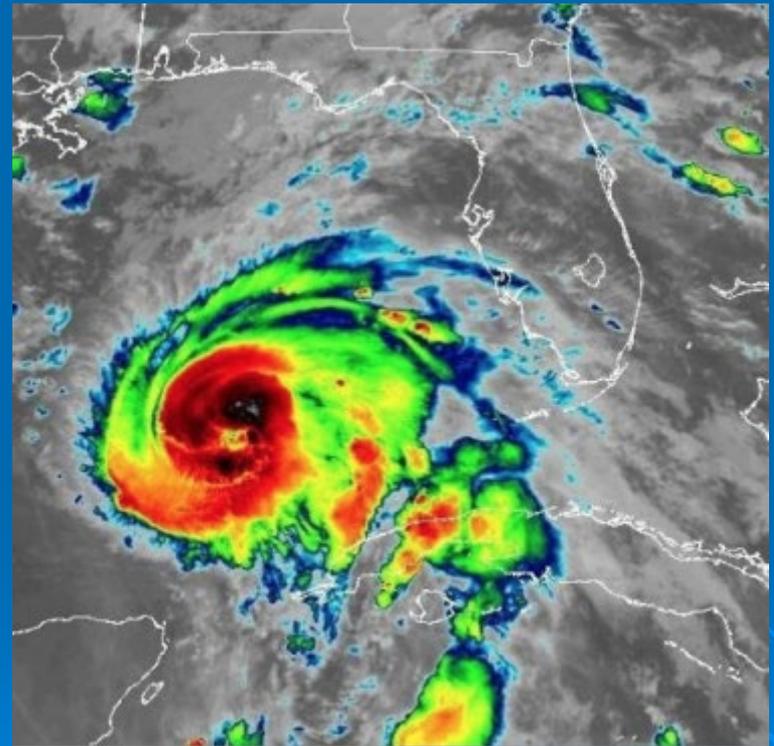
Bonus Questions



Hypo #24

[Preparing for Disaster]

- Does a lawyer have any ethical obligations related to disasters?
- Formal Op. 482



Formal Opinion 482

- **Prepare for disaster!!**
 - Safeguard client contact information
 - Store files electronically
 - Ensure access to funds held in trust
 - Plans to relocate
 - Solicitation and advertisement rules still apply



Hypo #25

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



How did you score?

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

THANK YOU

