Top 5 Ethical Blunders

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Blunder #5: Everyone Take Cover . . .

Solution:
Buy a Helmet

“I am convinced that there are only two types of companies: those that have been hacked and those that will be. And even they are converging into one category: companies that have been hacked and will be hacked again.”

Robert Muller – FBI Director, 2012



Types of Protected Information

- Client Files/Information (e.g. HIPAA data, PHI information, SSN, trade secrets, analysis, strategies, etc.)
- Financial information (e.g. client and law firm)
- Human Resources Records (e.g. employees, clients, etc.)

Rules of Professional Conduct

ABA Model Rule 1.1 Duty of Competence

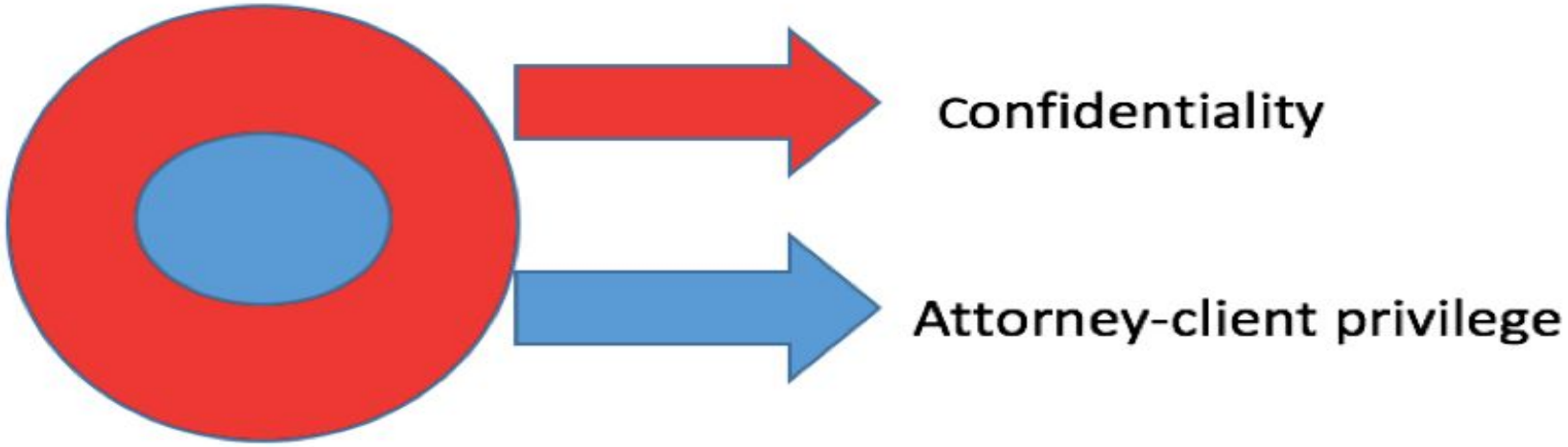
Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [8]: To maintain the requisite knowledge and skill, a lawyer should **keep abreast of changes in the law** and its practice, including the **benefits and risks associated with relevant technology**, . . .

ABA Model Rule 1.6(c) Duty of Confidentiality

A lawyer shall make reasonable efforts to **prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information** relating to the representation of a client

Rule 1.6 Confidentiality



An attorney's duty of confidentiality is far broader than the attorney-client privilege.

In Re Hultquist, 961 N.E.2d 999 (Ind. 2012)

Combine The Rules

A lawyer must act *competently* to preserve/safeguard *confidential* client information against unauthorized disclosure by the lawyer or persons under his/her supervision.

ABA Model Rules, R. 1.6 Comment [18]

Safe Harbor: Unauthorized access is NOT a violation if the lawyers makes reasonable efforts.

Reasonable Efforts

Reasonable Efforts to Prevent Unauthorized Disclosure, Model Rule:

- NOT one size fits all
- Multifactor analysis – (1) information sensitivity, (2) likelihood of disclosure without additional safeguards, (3) costs, (4) difficulty of implementation, (5) adverse effect of safeguards vis-à-vis lawyer's ability to represent clients

ABA Model Rule 1.6, Comment [18]

ABA Formal Opinion 477R (revised May 2017)

- Email encryption and other guidance

Duty to Communicate

A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required, reasonably consult with the client about means of to accomplish objectives, keep the client informed of status of the matter, respond to requests for information, and consult on any relevant limitation on lawyer's conduct.

ABA Model Rule 1.4

Duty to Disclose Risks

Duty to Disclose After Cyberattack (ABA Formal Opinion 483)

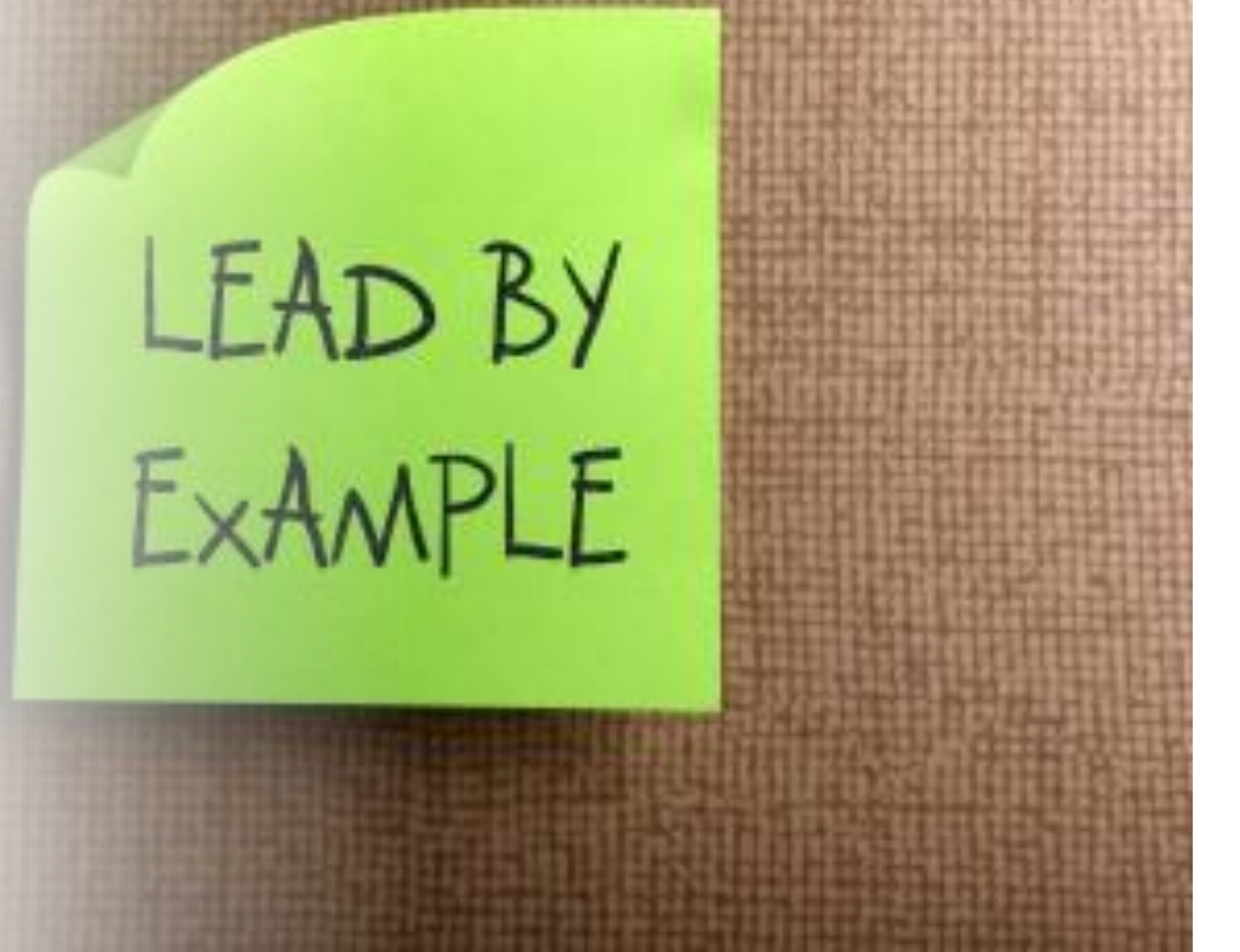


ntact General Counsel

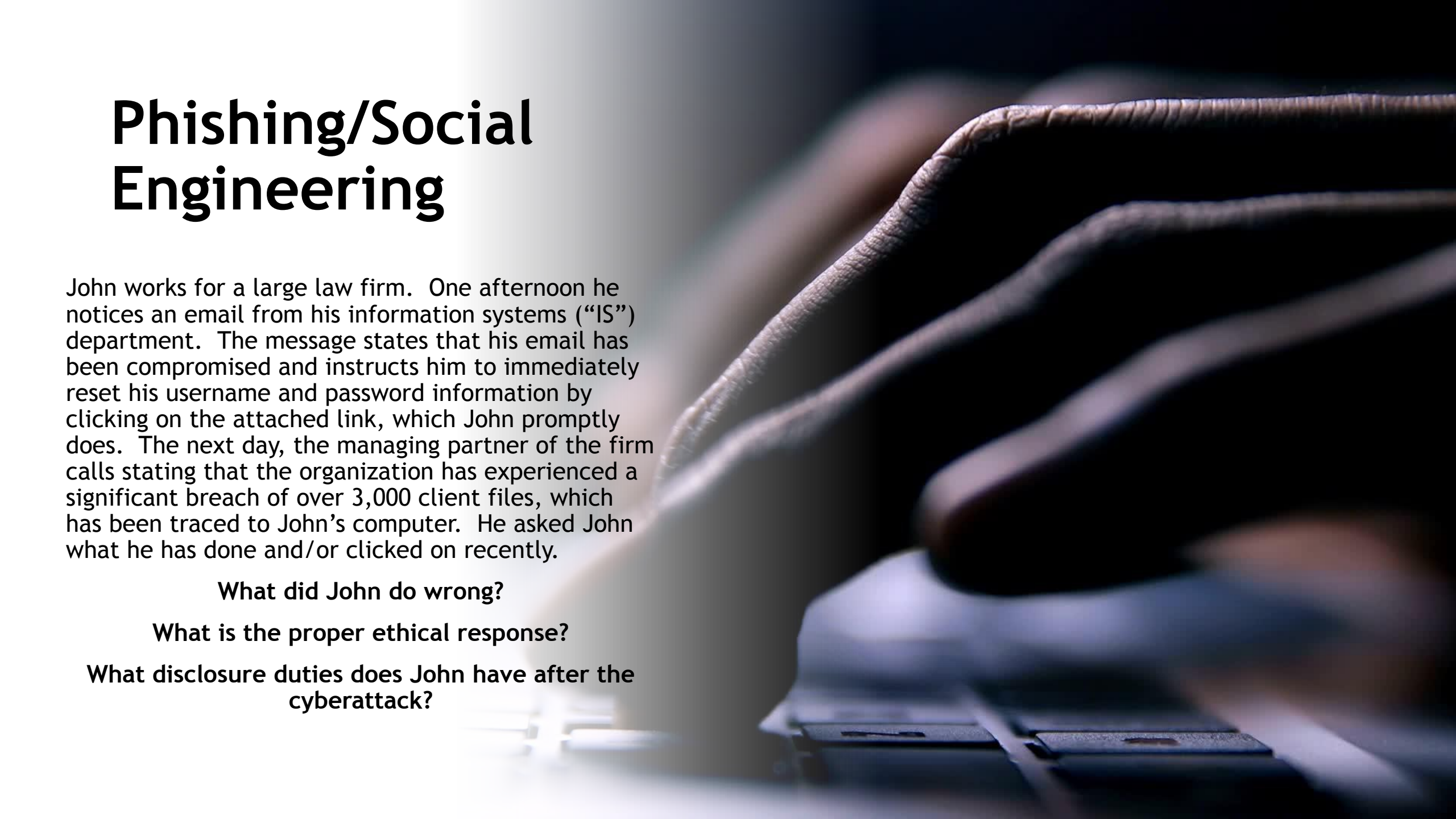
Advise Clients About Potential Disclosure/Communicate Risks:

- Advise clients about risks associated with email communications that may potentially compromise the client confidentiality depending on the server, device and transmission mode. (ABA Standing Comm. on Ethics and Prof. Resp., 11-459 Formal Opinion 2011.)
- When a lawyer reasonably believes that highly sensitive/confidential client information is being transmitted so that extra measures to protect the email are warranted, the lawyer should inform the client about the risks involved. (ABA Model Rules 1.4 (a)(1)&(4))
- The client may insist or require the lawyer to undertake or conduct certain forms of communication (ABA Model Rules 1.6 Comment [18])

Common Scenarios



Phishing/Social Engineering



John works for a large law firm. One afternoon he notices an email from his information systems ("IS") department. The message states that his email has been compromised and instructs him to immediately reset his username and password information by clicking on the attached link, which John promptly does. The next day, the managing partner of the firm calls stating that the organization has experienced a significant breach of over 3,000 client files, which has been traced to John's computer. He asked John what he has done and/or clicked on recently.

What did John do wrong?

What is the proper ethical response?

What disclosure duties does John have after the cyberattack?

Misdirected Email

Todd is an attorney at a large law firm. Todd was in a hurry and didn't properly look at the "auto-fill" email address that populated into an email that he was drafting to his client. Instead of going to Todd's client, the email was misdirected to opposing counsel. The email contained case strategy and evidence that Todd had successfully kept out of discovery that could harm the client.

What did Todd do wrong?

What should Todd do now?

Does the opposing counsel have any obligations?

ABA Model Rule 4.4



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Portable Devices

Dan is a lawyer at a law firm. He is traveling out of town for vacation and took his computer and cell phone with him in order to work some on vacation. Dan's devices have confidential information on them for all of Dan's 250+ clients, including PHI information. Dan inadvertently leaves his laptop in the taxi that dropped him off from the airport to his hotel. He contacts the taxi service, but several customers have been in the cab since Dan got dropped off and Dan's laptop was nowhere to be found. The laptop was no encrypted or password protected.

What did Dan do wrong?

What should Dan do now?

What are Dan's client obligations?



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Blunder #4: Rate Me Please

Social Media/Online Reviews

- May not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Rules of Professional Conduct, **Rule 1.6**
- Must be careful to not give legal advice or create an unwanted attorney-client relationship, **ABA Formal Opinion 457**
- Must not engage in the unauthorized practice of law, **Rule 5.5**
- Must keep ethics online - First Amendment Rights are constrained due to adherence with the Rules of Professional Conduct and your Company, e.g., freedom to post vs. your job/license
- Must not post false statements or engage in conduct prejudicial to the administration of justice
- Responsible for all content posted, liked, retweeted, endorsed, etc. . .

Indiana Disciplinary Commission #1-20 (July 2020); ABA Formal Opinion 480; ABA Formal Opinion 457; Model Rules 1.6, 5.5, and 8.4



Solution: #Professionalism

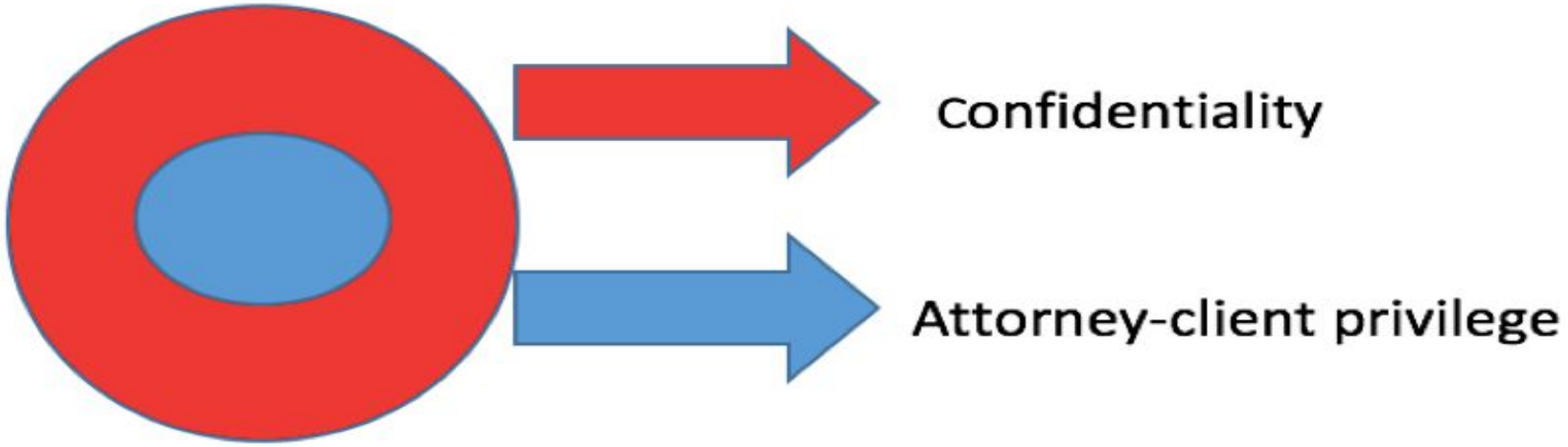
Take the high road . . .

An excellent rule of thumb for social media is if the attorney cannot do it in person, he/she cannot do it online.

Ind. Disciplinary Commission, Advisory Opinion #1-20, July 2020

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Revisit: Rule 1.6 Confidentiality



An attorney's duty of confidentiality is far broader than the attorney-client privilege.

In Re Hultquist, 961 N.E.2d 999 (Ind. 2012)

Key Confidentiality Concepts

- There is no exception for “public information”. Rule 1.6(b)(listing the exceptions)
- “Generally Known” only applies to former clients under Rule 1.9, very narrow exception.
- Get client consent, preferably in writing, if you want to use the client or case as a reference, website “win”, etc. . .
- **Be careful with social media. ABA Op. 480 (03/06/18)**





Attorney Examples

The Incarcerated Client

An attorney decided to take to her blog to discuss an active matter. While blogging the attorney revealed confidential client information and client proceedings. The attorney revealed information that made the client identifiable, sometimes even using their names. The attorney's blog was public, and the attorney made no attempt to make the blog private. The attorney even posted information that indicated that the attorney may have knowingly failed to prevent a client from making a misrepresentation to the court.

Result: 60 Day Suspension

Illinois Disciplinary Board v. Peshek, No. M.R. 23794 (Ill. May 18, 2010)

Reciprocal suspension by Wisconsin in *In re Peshek*, 798 N.W.2d 879 (2011).

ABA Formal Opinion 480

Dating Profile Gone Wrong

A male attorney was representing the father in a domestic/divorce matter. The female attorney for the mother was winning all the arguments in court. The male attorney did not care for losing and was becoming highly frustrated and angry. This female attorney was a frequent opponent.

The male attorney's frustration and anger grew to the point of needing released. So, the male attorney decided to get back at the female attorney for beating him in court. The male attorney created a "fake" online dating profile (Match.com) for the female attorney, even though she was married. The male attorney also subscribed the female attorney to several magazine subscriptions that were less than desirable and wrote negative reviews about her and her firm online.

Result:

Suspended for minimum 6 months, and until further order from the Court (indefinitely)

Pled guilty to misdemeanor disorderly conduct

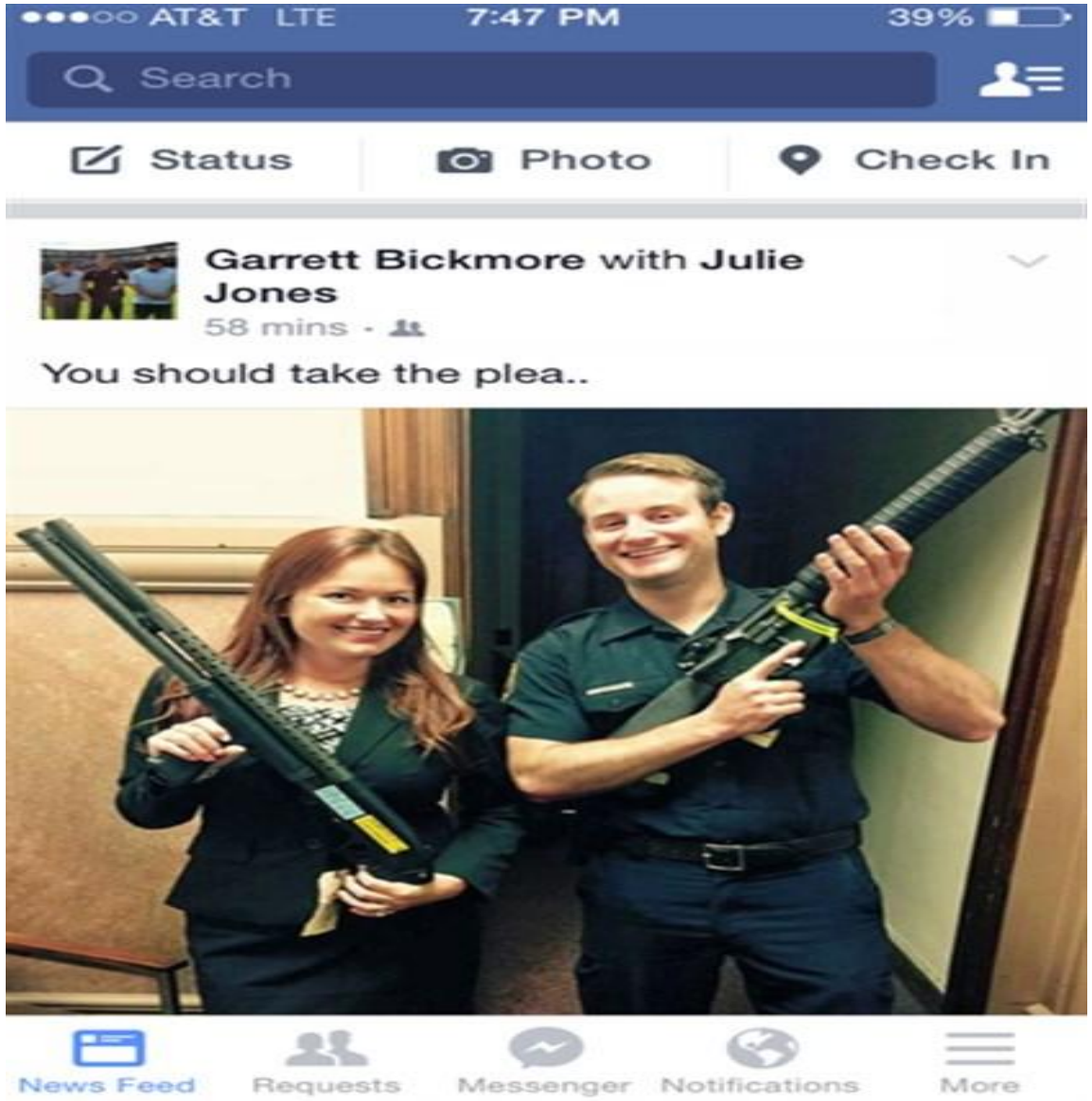
Cash Settlement of $100,000 paid to female attorney

In re: Drew Randolph Quitschau, 1:18-mc-01026 (Ill. 2018)

Pictures Can Cost You A Job

Julie Jones, a young assistant district attorney in Allegheny County, Pennsylvania thought it would be humorous to pose with a Pittsburgh police officer, each of them holding a large gun that was evidence in a case the two worked on together. The police officer posted the photo to Facebook with the caption, “You should take the plea.”

The district attorney’s office called Jones’ behavior “contrary to office protocol with respect to handling of evidence,” and “her appearance in the photo was now a personnel matter.”



Result:
Fired

A Witch Judge

Florida Lawyer Sean Conway decided that he had a bad experience in a local judge's courtroom. Lawyer Conway decided to take to a popular, public legal blog (*Jaablog*) and post about his feelings and experience. Lawyer Conway posted that the judge was an "Evil, Unfair Witch".

Result: Public Reprimand

Fined $1,200

The Florida Bar v. Sean William Conway

Supreme Court Case No. SC08-326,

Florida Bar File No. 2007-51,308(17B)



Personal Comments

A corporate lawyer thought that only her “friends” would see a post on Facebook. So, in the wake of the October mass shooting in Las Vegas she wrote in a comment thread discussing the deadly attack on concertgoers. She wrote, “I’m actually not even sympathetic bc country music fans are Republican gun toters.”

Result: Fired

Egregious career-killing misjudgment on social media

Public apology from the company that the lawyer’s views were not the views of the company.


FIRED
Hayley Geftman-Gold
If they wouldn't do anything when children were murdered I have no hope that the Repugs will ever do the right thing. I'm actually not even sympathetic bc country music fans often are republican gun toters.
54m Like Reply
2

Stretching the Truth (too far)

A judge checked a lawyer's Facebook page after the lawyer requested a continuance because of the death of her father. The young lawyer's Facebook posts revealed that "there wasn't a lot of grief expressed online". Instead, the lawyer's posts described a week of partying and drinking with friends. When the lawyer asked for a second continuance, the judge declined and disclosed the results of her research to the senior partner at the young lawyer's law firm.

Model Rule 3.3 – prohibits false statements to a tribunal

Lesson learned?

Ethical Rule violation?

Ethics: Attorney Responses to Negative Online Reviews



There is no exception under Rule 1.6(b)(5)

Negative online reviews do not fall within the self-defense [Model Rule 1.6(b)(5)] or any other confidentiality exception under Rule 1.6

- A reply to a negative comment is not:
  (1) a proceeding;
  (2) establishment of a defense; or
  (3) a controversy



ABA Formal Opinion 496

Do Not Respond In This Manner

- Do not respond with your side of the story
- Do not set the record straight
- Set aside any urge you have to respond where you would reveal any client confidential information, *e.g.*, name of the client or anything public record



Example Responses

- Respond that due to ethical obligations you are prevented from providing a detailed response.

- State that you have reviewed the comment/claim and would be happy to discuss via telephone and provide your information where the poster can call you privately.

- If you know the name of the poster/contact information (former or current client), you can state that you are reviewing the comments/claim and will be reaching out shortly if he/she wanted to discuss and resolve the issue.



Other Options

Request the search engine/website/platform remove the post

Counter-balance the negative review: a positive review



Be cautious about responding because it could draw more criticism and move up the page on the “google search” query



Additional Attorney Examples

AVVO Ratings

Among other violations, a lawyer, by his own description, "actively manipulate[ing his] Avvo reviews by monetarily incentivizing positive reviews and punishing clients who wr[o]te negative reviews by publicly exposing confidential information about them" and including numerous false statements in the responses to the negative reviews.

Result: Disbarred

In re David J. Steele, No. 49S00-1509-DI-527 (Ind. 2015)

Self-Defense , Is Not A Defense

Tsamis' client was a flight attendant who hired Tsamis in an unsuccessful effort to secure unemployment benefits. The attendant had been fired for allegedly assaulting a co-worker. The attendant was not happy with the services of Tsamis and posted a negative AVVO review.

Tsamis asked the former client to remove the review that was posted in February 2013. The attendant responded that he would do so if Tsamis returned his files and the $1,500 he had paid in attorney fees. However, in the interim, AVVO removed the post spurring a second negative review by the attendant. This time, Tsamis responded:

"I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about."

Result: Public Reprimand

What went wrong here?

How can you defend yourself without a violation?

In re Tsamis, Commission No. 2013PR00095 (Ill. 2014)



Blunder #3:

Which of the following statements are true?

A. Email is a wonderful tool for the successful practice of law.

B. Email not only saves time and money, but also allows for prompt communication with clients, colleagues, and opposing counsel.

C. Email is overused, often results in incomplete or inaccurate responses to inquiries, and fills up your Inbox with useless information.

D. Careless use of email can subject the sending lawyer to embarrassment, unhappy clients, lost income, breach of the duty of confidentiality, discipline, or claims of malpractice.

E. All of the above



E. All of the Above

Solution: Respect Each Email

Best Practices:

1. Think of consequences of each email before hitting “send”
2. Remove excessive “strings” – only include necessary content
3. Remove unnecessary attachments – Know what is on EACH page of the attachments before sending, forwarding, etc. (also strip metadata)
4. Rename message when appropriate – Delete Excessive “FW” and “RE”
5. Turn off “Suggested Names” Option (aka “auto-fill” addresses)
6. Enable “spell check” for outgoing messages

7. Consider drafting emails WITHOUT the “To”, “Cc” or “Bcc” fields completed

8. Hitting “reply to all” is ALWAYS a disfavored practice and should be used as last resort

9. If you are the recipient of a “bcc” message, DO NOT HIT “Reply to All” because you may be disclosing something the sender wanted to keep confidential

10. Clean out your inbox by filing or printing relevant emails and deleting extraneous messages.

11. Mark messages that require your attention as “unread” to differentiate them

12. Disclaimers: Add “attorney-client privileged” label to all communications

13. Watch out of litigation/legal “holds” – back-up/archive systems

14. Watch out for the Rules of Ethics, e.g. Rule 1.6, Rule 1.7 and Rule 8.4

15. Watch your tone, grammar and content.

Remember:

NOTHING is *funny* when it is used as "Exhibit A" in a disciplinary action or lawsuit.

ABA Formal Opinions
447R (securing protected client info.) and 06-442 (metadata)

Blunder #2: Slip-n-Fall into an Attorney-Client Relationship



Example 1:

Phoenix Attorney Douglas L. Irish represented Motorola Inc. in a legal dispute over the possible sale of its machine shop to another company.

M. Dean Corley, a retired Motorola employee who had managed the shop, believed that Irish and his firm, Lewis & Roca, also represented him. Corley even stated this in a deposition, and Irish did not correct him.

When Motorola threatened to sue Corley for talking to the prospective buyer about working with the company after the sale, he tried to disqualify Irish and his firm from representing Motorola.

Irish responded that he never represented Motorola.

Was it too late?

Was the Attorney-Client Relationship established, even if inadvertently?

Advanced Manuf. Technologies Inc. v. Motorola Inc., No. CIV99-01219PH XMHMLOA (D. Ariz. July 2, 2002)

Example 2:

An attorney at Shady Case Law Firm was asked to represent employees in a lawsuit against their employer, Bracelet, Inc.

Another lawyer at Shady Case Law Firm had a current, active representation of Earrings, Ltd. a wholly owned subsidiary of Bracelet, Inc. in an unrelated matter. The engagement letter was silent on whether the parent company, Bracelet, Inc., was also considered a client.

Bracelet, Inc. moved to disqualify Shady Case Law Firm from representing the employees on the grounds of a conflict of interest.

Result? Could there be varying results based on facts? Factors/documents to be considered?

What if the matter for Earrings, Ltd. had concluded, but had not been closed yet (or was closed) – change outcome?

See generally, *Jones v. Rabanco Ltd.*, No. C03-3195P (W.D. Wash., Aug. 3, 2006)(discussing need to close files as well or leave client relationship still open)

Solution:

Don’t Be Vague!

- Use engagement letters and contracts
- Use declination letters
- Use non-engagement letters
- Avoid creating unintentional evidence that you are someone else’s lawyer
  - Person manifests an intent that a lawyer provide legal services
  - The lawyer (a) manifests consents; or (b) fails to manifest lack of consent and knows or reasonably should know the person reasonably relied on the lawyer to provide the services.
  - No requirement to sign engagement, shake hands, discuss rates or even send an engagement letter.
- Act in accordance with the scope of the representation documents

Attorney-Client Traps Just Keep On Coming

- Parent Company/Subsidiaries/Affiliates [Rule 1.7 (comments); and 1.13]
  - Watch out for Outside Counsel Guidelines
  - Be Clear in Engagement Letter
- Someone else paying the legal bills [Rule 1.8(f)]
- Small company with single owner (the "c/o" person)
  - Both the client? Or just one?
  - Joint Representation Considerations if Both Clients
- Husband/Wife Scenario
  - *Parker v. Carnahan, et. al.*, 772 S.W.2d 151 (1989).
- "The Family" Attorney / Spouses in Estate Planning



Identifying Conflicts of Interest

Always be able to answer: Who is your client?

****Watch out for Outside Counsel Guidelines!**

- Rule 1.7, Current Conflicts of Interest
- Rule 1.8, Specific Conflict Scenarios
- Rule 1.9, Former Client Conflicts
  - "Same or Substantially Related"
- Rule 1.10, Imputation of Conflicts
  - Lateral Attorney Scenarios / Screens
- Rule 1.13, Corporation/Organization as Client

Joint Representation

What is the informed consent to joint representation?

1) Explain material risks of, and reasonably available alternatives to, the proposed course of conduct.

2) Explain possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.

3) Spell out the advantages

4) Confirm in writing.



Blunder #1: Civility is Alive and Well!



"All this talk about civility is interfering with my constitutional right to yell at my co-workers."



. . . I commit myself to service without prejudice, integrity without compromise, and to civility and professionalism in all my interactions. I will promote the principles of justice handed down by the generations of attorneys who have gone before me. This pledge I take freely and upon my honor.

Illinois Supreme Court Commission on Professionalism - Pledge of Civility

Administered to All Illinois Law Students

Movement Toward Systemic Solutions

Different jurisdictions addressing in pledges, rules, and oaths.

E.g. South Carolina amended pledge/oath to include:
"to opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."

E.g. Indiana ". . . I will abstain from offensive personality . . ."
Indiana Oath of Attorneys



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<u>Solution</u>:
Be A Civilized Human-Being



You are free to disagree. You are not free to be disagreeable.

What is civility? Broad word.

Exhibit good behavior for the good of a community or profession. Code of decency that characterizes a civilized society

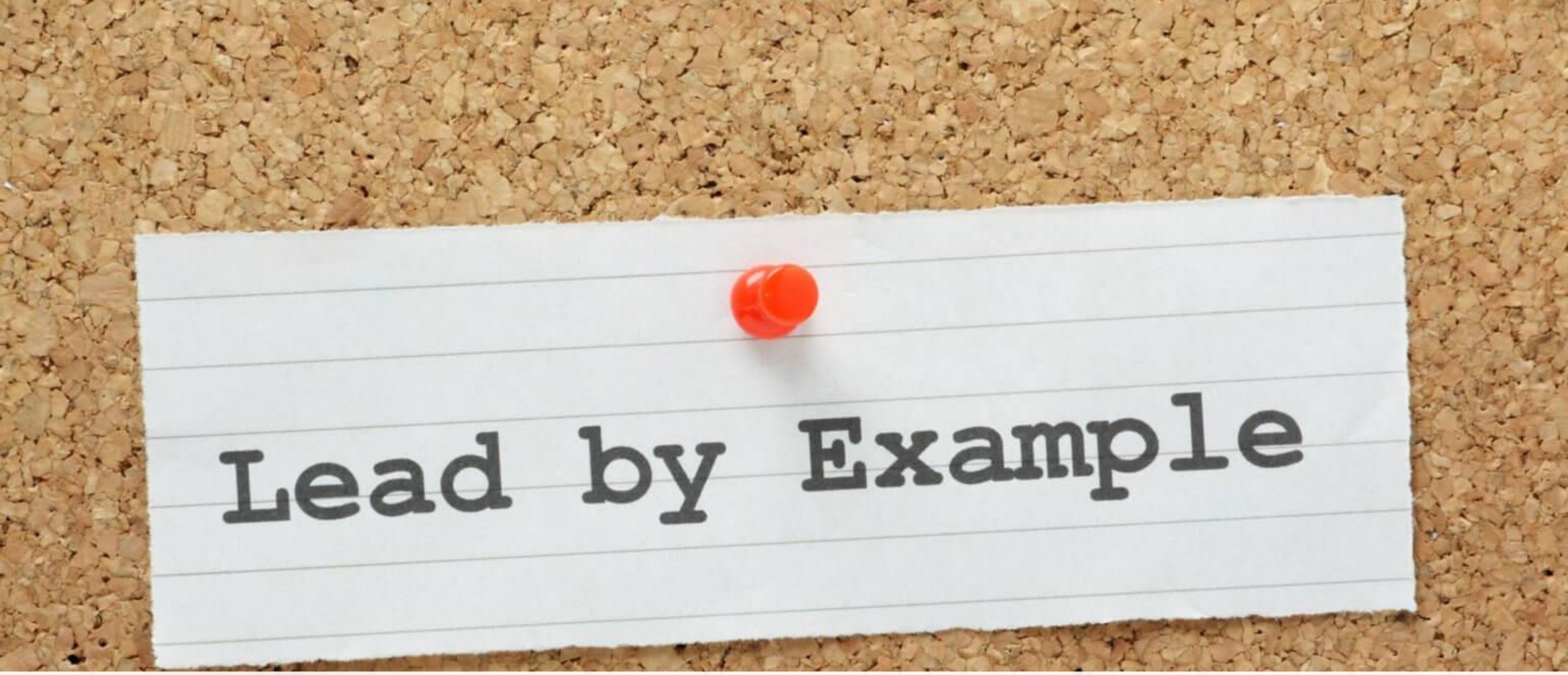
Consequences of Incivility

What happens to uncivil lawyers?

- Rule 8.3 Reporting Other Lawyers/Self-Reporting

What rules do you violate, or could you be reported under?

- Rule 8.4 (catch all)
- Specifically Rule 8.4(d), (g) or (j) depending on the jurisdiction
- Potentially Rules 1.2, 1.3, 1.4, 3.2, 3.3, 3.4, 4.1 and several others



Real Life Scenarios

Robo-Calls / Telemarketers

Stacy L. Kelley, Esq. claimed to be her husband's attorney when she called a telemarketer who had been trying to reach someone else with her husband's name. While on the phone with the telemarketer, she asked the representative if he was "gay" or "sweet" because she thought the male representative had a feminine-sounding voice.

Public Reprimand

***In the Matter of Stacy L. Kelley*, No. 49S00-0910-DI-438 (Ind. 2010).**



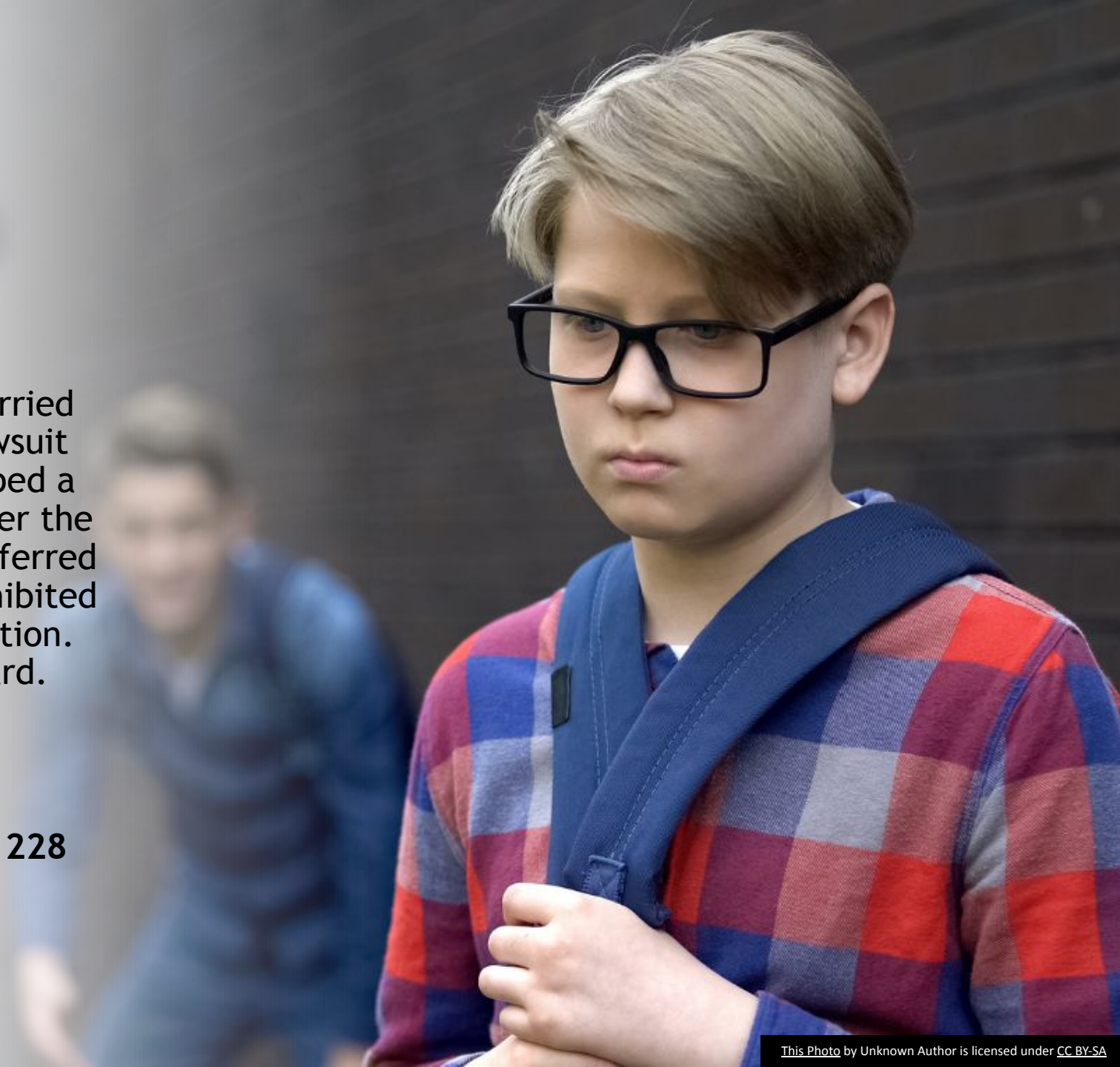
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Sexual Orientation

Robert E. Abrams, Esq. represented a married couple to file a construction contract lawsuit against a former builder. Abrams developed a negative opinion of the judge presiding over the case. In an email to his clients, Abrams referred to the judge using derogatory slur that exhibited bias or prejudice based on sexual orientation. Clients reported him to disciplinary board.

Suspended 3 months

***People v. Robert E. Abrams*, 459 P.3d 1228 (Colo. O.P.D.J. 2020).**



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Tone/Civility is Important

Lawyer, McCarthy, represented a title company, was involved in a dispute regarding a cloud on a title of property, the agent representing the seller of that property had his secretary send an e-mail to McCarthy to arrange a meeting of all involved.

McCarthy sent an e-mail response stating, *"I know you must do your bosses [sic] bidding at his direction, but I am here to tell you that I am neither you [sic] or his n-----. You do not tell me what to do. You ask. If you ever act like that again, it will be the last time I give any thought to your existence and your boss will have to talk to me. Do we understand each other?"*

The Supreme Court order stated, "The hearing officer found that the word n----- is a derogatory racist insult, that Respondent's use of the term was not simply a historical reference to slavery but rather manifested racial bias, that he was acting as an attorney when he sent the email, and that his use of the term was not connected to legitimate advocacy," the order stated.

30 Day Suspension WITHOUT automatic reinstatement

***In the Matter of Daniel C. McCarthy*, No. 41S00-0910-DI-437 (Ind. 2011).**



Learn to Bite Your Tongue

Plaintiff Lawyer stopped a deposition to duck her head under the conference room table. Why?

When opposing counsel asked what she was doing, she indicated that she was ***"looking to see if there was anything between [his] legs."***

Ms. Leonhardt later apologized for her conduct, and stated she lost her composure from being "chronically and persistently exposed to condescending behavior by [the opposing counsel]."

Could this be a violation of Rule 8.4(g) in Connecticut?



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Twerking Lawyer

During a mediation, a lead defense counsel “shook his butt” at plaintiff’s counsel while uttering profanity (use your imagination). The conduct was described as “lascivious gyrating of the lower fleshy extremities”.

Plaintiff filed for sanctions (monetary), and defense counsel (unfortunately) responded to the court that he wanted to “put this unfortunate episode in the rearview mirror”.

Judge found no sanctions and said “he [the attorney] has suffered enough”

National Attention/Terminated from Case

Texas Rule 8.04(4) - prejudicial to the administration of justice



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Various Conduct

- Attorney made faces at opposing counsel, stuck out his tongue at her, and told her that she was a "stupid idiot" and should "go back to Puerto Rico". *Florida Bar v. Martocci*, 2001 Fla. LEXIS 843 (public reprimand, 2 – year probation).

- "I don't have to talk to you, little lady," "Tell that little mouse over there to pipe down," "Be quiet, little girl," and "Go away, little girl." – *Principe v. Assay Partners, HRO Int'l Ltd.*, 154 N.Y. Misc. 2d 702 (Sup. Ct. N.Y. County, 1992).

- "Just get your foul, odious body on the other side," and "Don't use your little sheeny, Hebrew tricks on me." – *In re Williams*, 414 N.W.2d 394 (MN. 1987)(suspension from the practice of law).

Tips For Civility

- Check your own biases and stereotypes at the door
- If the opposing party gets to you, they win.
- Smile, or better yet, ignore them – Do not engage
- Always fight up, never fight down
- Have compassion
- Believe in professionalism karma
- Keep communication open; TALK to opposing counsel
- Outsmart – Stay ahead
- All communications be placed in writing
- Kill them with kindness – respect your opposing counsel
- Play the waiting game – wait until opposing counsel civil
- Know and Follow the Rules
- Check your own attitude routinely



Combined Blunders: Failure to Identify Ethical Issues

Lawyer's assume they know more than they actually do about complex legal ethical issues. [Rule 1.1 Competency]

Example: Would an antitrust lawyer who ran into a complicated intellectual property question make an educated guess at the answer?

NO!



Solution:

Consult Your Local Conflict/Ethics Counsel



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QUESTIONS?