stuartteicher esq
I teach lawyers

**CLE Performer & Ethics Educator**
stuart.teicher@iCloud.com
www.stuartteicher.com
732-522-0371


**Ethics Lessons from a Jersey Guy**
Program Written Materials

There are three parts to this program. First we're going to talk about the fundamental concepts of the rules of ethics (and where they came from); Second, we'll talk about the biggest issue that's facing the ways lawyers ethically behave today (zealous advocacy); and the hottest ethics issues in technology.

## Part I -- How Watergate Changed Ethics Forever

There is no better way to understand ethics and professionalism than by learning the story of the Watergate lawyers and the Enron debacle. That's because the sophisticated, accomplished lawyers who were embroiled in both scandals violated nearly every professionalism standard imaginable…and contributed to the creation of a key rule in our ethics code.

### 1. The break-in

Take the metro in Washington DC to the Foggy Bottom station. When you emerge from the station, step off the escalators and make a right. Walk to the first corner, then make another right. A few blocks later you'll find yourself at a traffic circle. If you look across the street, on the other side of that traffic circle, you'll see one of the most famous buildings in United States history. Actually, it's a series of buildings. Right there, on the banks of the Potomac River, is the Watergate Hotel and Office complex.

The Watergate hotel is an attractive property. I stayed there a few years ago when I was in town speaking at an event not too far away. The owners renovated the hotel not too long ago, and they did a great job. It's got well appointed rooms with beautiful views of the river. But most people don't think of the accommodations when they hear the word "Watergate." They don't think about the residences which are located in other buildings in that same complex. They don't think of the retail stores located on the first level, facing the courtyard. No, when people think about Watergate, they think of the office buildings. Well, there's one particular office that comes to mind. And it entered the national consciousness in 1972.

In 1972, Republican President Richard Nixon was up for reelection. As the election drew closer, some of Nixon's closest aides switched from governmental roles, to campaign roles. The President's Attorney General, John Mitchell, was one of those aides. Earlier that year. Mitchell left his post in the cabinet to lead the Committee to Reelect the President (CREEP), a group who was charged with raising money for the campaign and otherwise defeating the challenger from the Democratic Party. The group certainly engaged in the type of election-year tactics that were pursued by countless other political campaigns throughout history. But there was one effort they pursued that would set them out from their predecessors, and make them notorious. But none of it would have been possible without the help of a key political operative.

G. Gordon Liddy[1] was an East Coast Boy. Born in Brooklyn, he was raised in New Jersey, served with the Army in the city of his birth, and eventually got a law degree from Fordham University. After a stinting the FBI, Liddy became a district attorney, and eventually entered the world of politics. After losing a primary race for a Congressional seat, Liddy ran the Duchess County (NY) campaign for Richard Nixon's 1968 Presidential race. After Nixon's election, Liddy worked in the Department of Treasury.

[1] Background information from https://www.britannica.com/biography/G-Gordon-Liddy last checked 9/27/2023.

While working in Washington, Liddy met a man named Bud Krogh. Krogh was a White House aide who spearheaded a group called the "Plumbers." They were tasked with investigating, and stopping, leaks to the press.

Liddy seems to have taken the job seriously. "In 1971 Liddy and former Central Intelligence Agency (CIA) agent E. Howard Hunt, the future Watergate mastermind, led a group that broke into the Beverly Hills, California, office of the psychiatrist of military analyst Daniel Ellsberg, who had infuriated Nixon with his leak of the Pentagon Papers. They came up empty in their search for compromising information."[2] Eventually, the Plumbers were disbanded. When that happened, Liddy went to work for John Mitchell in CREEP.

Liddy brought a sense of relentless determination to the group. Normally, that would be a good thing! The desire to pursue out clients' matters with a sense of relentless determination was reflected in the Texas Creed:

> II. Lawyer To Client
> A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate legal means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

The concept of relentless determination is also reflected in the rule on diligence:

> Rule 1.3. Diligence.
> A lawyer shall act with reasonable diligence and promptness in representing a client.

Diligence is about being aware, motivated, engaged, and vigilant. It's almost a perfect ethical representation of the issue of relentless determination. While that certainly is an admirable approach for lawyers, it's not one that G. Gordon Liddy followed. Quite the contrary, he recommended some wild tactics to ensure that Nixon was reelected. Dubbing the strategy "Gemstone," Liddy's ideas included hiring prostitutes to set up members of the opposing political

[2] https://www.britannica.com/biography/G-Gordon-Liddy last checked 9/27/2023.

party, filming it all with hidden cameras, and even kidnapping radicals and assassinating members of the press.[3]

It seems that most of Liddy's proposals were too extreme for the campaign, but there was one idea that seems to have resonated with his colleagues. Liddy and Hunt proposed that the group break into the Democratic Party headquarters located at the Watergate office complex. John Mitchell agreed to give them $250,000 from CREEP's coffers to finance the operation.

Liddy and Hunt put together a team of seven people — six burglars and James W. McCord, the head of security for the Nixon Campaign. On May 28. 1972, the group entered the offices of the Democratic National Committee at the Watergate complex and plated surveillance bugs. A few weeks later on June 17, McCord and several of the burglars broke in again. In the early morning hours of that day, a night guard at the complex was making his rounds when he noticed a suspiciously taped-open exit door.[4] Local police were called to the scene and the burglars were arrested, along with Liddy and Hun who were monitoring the operation from a Watergate hotel room. In addition, the FBI was notified of the incident and that one of the people arrested was the security officer for the Commitee to Re-Elect the President.

When news of the arrest went public, CREEP and the administration assumed a protective posture. Mitchell issued a statement denying any involvement. President Nixon claimed to have no involvement.

Evidence, however, started to appear, establishing a link between the burglars and the White House. When the police searched the hotel rooms where the burglars stayed, they found $2300 in cash that was eventually tied to the CREEP group. That didn't matter the the White House, though. They were in cover up mode.

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[3] https://www.britannica.com/biography/G-Gordon-Liddy last checked 9/27/2023.
[4] https://www.fbi.gov/history/famous-cases/watergate last checked 9/27/2023.

Nixon's White House Counsel, John Dean, even got involved. Actually, it seems like a bunch of high ranking individuals got involved in cover up effort in the aftermath of the arrest. John Dean spoke with Liddy, top Nixon aides John Ehrlichman and John Haldeman. The group was charged with placing obstacles in front of the FBI investigation efforts and to otherwise keep the burglars from talking. Ehrlichman and Haldeman even arranged to pay $154,000 to the burglars to get them to plead guilty and otherwise keep their mouths shut.

Over at the FBI, however, agents were pursuing their investigation. One agent, in particular was growing frustrated. Mark Felt was the second-in-command at the FBI and he was basically spearheading the Watergate investigation. Felt got the impression that information about the FBI's investigation was being leaked to the Nixon Administration.

Felt's investigations seemed to be hitting dead ends, though he seems to have felt strongly (pun intended) that Nixon was involved in the scandal. In an effort to push the matter along, Felt began to leak information to Washington Post reporters Bob Woodward and Carl Bernstein. Felt became known as the reporters' secret informant *Deep Throat*. "According to their books, *All the President's Men* and *The Secret Man: The Story of Watergate's Deep Throat*, Woodward spoke with Felt 17 times between June 1972 and November 1973, sometimes by phone but also in person at a parking garage in Rosslyn, Virginia, and often using clandestine tactics to keep from being discovered."[5] Woodward and Bernstein used the information supplied by Deep Throat to keep the pressure on the Nixon Administration. It wasn't enough, however, to derail the President.

In fact, in the short term, things we working out for the Nixon team. For instance, on September 15, federal indictments were sent down, but they appeared to be limited — a grand jury indicted the five burglars, along with Liddy and Hunt, and charged them with conspiracy,

[5] https://www.history.com/news/watergate-deep-throat-fbi-informant-nixon last checked 9/28/2023.

burglary, and violation of federal wiretapping laws. All of the men, except for Liddy and McCord, pleaded guilty.[6]" The silver lining for the White House, however, was that no one else was indicted and Nixon won reelection in a landslide.

The White House continued to push the cover up story in a big way. There was even a meeting at the White House in March of 1973 with Haldeman, Ehrlichman, Mitchem. Dean and President Nixon. At that meeting, Nixon made the famous statement, "I don't give a [expletive deleted] what happens. I want you all to stonewall it, let them plead the Fifth Amendment, cover up or anything else, if it'll save it—save the plan."

**2. The independence of the lawyer in the context of the lawyer-client relationship**

These lawyers should have spoken up to the President. Attorneys have a requirement to maintain a sense of independence. That's mandated in the ethics rules in Rule 2.1.

> Rule 2.1 Advisor
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

The idea os speaking up is also a professionalism concept. Consider this section of the Georgia Aspirational Statement on Professionalism:

> As to clients, I will aspire:
>
> (a) To expeditious and economical achievement of all client objectives.
> (b) To fully informed client decision-making. As a professional, I should:
>
> > (1) Counsel clients about all forms of dispute resolution;
> > (2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes;
> > **(3) Maintain the sympathetic detachment that permits objective and independent advice to clients;**

[6] https://www.crf-usa.org/bill-of-rights-in-action/bria-25-4-the-watergate-scandal.html last checked 9/27/2023.

Incidentally, this happens to be the exact same language found in Ohio's "A Lawyer's Aspirational Ideals:

> Preamble [5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. **While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.**

Also consider the Florida Creed, which states: "I will exercise independent judgment and will not be governed by a client's ill will or deceit."

Meanwhile, things began to unravel for the Nixon Administration. James McCord, Nixon's security chief, did not take plea and went to trial. After being found guilty, McCord must have had a change of heart. The idea of keeping things quiet apparently no longer seemed so attractive, and he started talking to the authorities. McCord wrote a letter to the judge from his case, and it revealed and alleged some pretty damning things: witness perjury, pressure being put on defendants, and the fact that the cover up went high up in the Nixon Administration. Then, White House Counsel John Dean came clean. He read a 245 page statement to the State committee that was investigating Watergate in which he disclosed everything: the break ins, the fact that everyone (including the President) was in on the cover up.

In what appears to be a fit of desperation, Nixon aides testified that Dean was lying. But then an aide to the President revealed that the President had secretly taped all of the conversations in the Oval Office.

The special Prosecutor Archibald Cox, tried to get Nixon to turn over the tapes, but Nixon refused. The prosecutor sought relief in the court and In August of 1973, the judge ordered the President to turn over the tapes. Nixon, however, refused, claiming executive privilege.

At that moment, the President's desperation peaked. In what is now known as the "Saturday Night Massacre", Nixon ordered his attorney general to fire the Special Prosecutor, Archibald Cox. The attorney general refused and resigned, as did his deputy. Robert Bork, the solicitor general, eventually stepped up to the plate and did the deed. He fired Cox and shut down the special prosecutor's office. After that, the move for impeachment intensified.

**3. The lawyer's responsibility to perceive and protect the image of the profession**

This all looked terrible to the public. As Woodward and Bernstein's information seeped through society, the public became more distrustful of the President. It surely also denigrated the image off the legal profession. The public was sure to see just how many people involved were lawyers. That's certainly a problem, given that lawyers have a professional duty to maintain the image of the profession:

Georgia:

> As to the public and our systems of justice, I will aspire: (b) To consider the effect of my conduct on the image of our systems of justice including the social effect of advertising methods.

Note that it's the same language in Ohio, except that Georgia added the phrase "social effect"

Also check out the language in the Creed of Professionalism of the Florida Bar:

> I will revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each.

The new special prosecutor ended up turning the tapes over to the court. The problem was that there was an 18-1/2 minute gap in the recording. The judge ordered an investigation into potential destruction of evidence. Further subpoenas were sent demanding more tapes. Nixon continued to refuse. The pressure was ratcheted up even further when, on March 1, 1974, Mitchell, Haldeman, and Ehrlichman were indicted. The President was names as an un-indicted co-conspirator.

In July 1974 the court heard the case US v. Nixon. The President contended that he didn't have to turn over any more tapes because of executive privilege. The special prosecutor disagreed. The United States Supreme Court ultimately unanimously ordered that the tapes be turned over.

Nixon turned over the tapes, and that was all she wrote. "[T]he newly released tapes—including the "smoking gun" tape of June 20, 1972—showed clearly that Nixon had lied to the public and had obstructed justice. On the tape, Nixon and Haldeman discussed the hush money, and Nixon told Haldeman to ask the CIA to call the FBI and 'say that we wish for the country, 'don't go any further into this case, 'period.'"[7]

Nixon was finished, and he knew it. He was sure to be convicted in the House if they impeached him. On August 8, 1974m Richard Buxom resigned as the President of the United States. Gerald Ford became the President the following day.

**4. Public good and public service**

Lawyers have a responsibility to serve the public. We know that because each state has some version of Rule 6.1. Here's the version, for instance, from Delaware:

> Rule 6.1. Voluntary pro bono publico service.
> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

When it came to pro bono concepts, the lawyers involved in Watergate had a particular duty in that regard, given the exalted positions they held.

a. The conflict between duty to client and duty to the public good

Ohio's "A Lawyer's Aspirational Ideals"

[7] https://www.crf-usa.org/bill-of-rights-in-action/bria-25-4-the-watergate-scandal.html last checked 9/28/2023.

AS TO CLIENTS, I shall aspire: d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve fidelity to clients.

Slightly different in Georgia (italicized section is different)

As to clients, I will aspire: (d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve *the fidelity to clients that is the purpose of these obligations.*

b. The responsibility of the lawyer to the public generally and to public service

To the public generally:

Ohio
TO THE PUBLIC and our SYSTEM OF JUSTICE, I offer service. I shall devote some of my time and skills to community, governmental and other activities that promote the common good. I shall strive to improve the law and our legal system and to make the law and our legal system available to all.

Look at the slight difference in Georgia. It's a "client focused" approach to a public duty:
To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

To public service:

Ohio
TO THE PROFESSION, I offer assistance in keeping it a calling in the spirit of public service, and in promoting its understanding and an appreciation for it by the public. I recognize that my actions and demeanor reflect upon our system of justice and our profession, and I shall conduct myself accordingly.

Georgia: In the General Aspirational Ideals

As a lawyer, I will aspire: (i) To practice law not as a business, but as a calling in the spirit of public service.

**5. How Watergate changed the entire system**

a. Why our current ethics code sounds like it does

Let's start by getting one concept clear. Ethics and Professionalism are not the same thing. To understand what I mean, consider that one of the biggest complaints about our disciplinary code is that the current code amounts to nothing more than a how-to manual — how-to stay away from a grievance. Surely you're wondering how that can be a bad thing. Well, staying away from grievances is good, but is that all our ethics code is really supposed to be about? The critics contend that the current code is devoid of the aspirational goals and the statements of morality that could be found in the predecessor codes. It's a valid point, but I once you learn the story of Watergate, you realize why the code is written that way.

After the Watergate fiasco, the powers that be realized that many of the people implicated in the scandal were lawyers. They also realized that many of the lawyers implicated really didn't take the ethics rules seriously. If those high-powered lawyers didn't take the code seriously, there was little chance that the rest of the practice was taking the code seriously. So the practice rewrote the rules, created an enforcement mechanism, and the attorney ethics world was changed forever. The current code we have today is an amended version of the 1983 code that was developed in the wake of the Watergate scandal.

The current code has a very different tone than the predecessor code. It's a harsh set of rules. Gone are the theoretical considerations, notions of justice and honor and other philosophical items. Why are they gone? I believe that they took out the aspirational elements from the disciplinary rules because they had to reinforce the idea that there really would be disciplinary action if you acted inappropriately. The problem was that all of the morality was removed.

b. The Fab Five of Attorney Lies

Let's take a look at some relevant rules from the "new code." What did the Watergate lawyers do when covering up their bad behavior? They lied. So let's look at the rules that address misrepresentation in the code. I call them the Fab Five of Attorney Lies.

**Misleading Statements and Deception**

***Rule 3.3. Candor toward the tribunal***
***(a) 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;***
***(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; or***
***(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.***
***(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.***
***(c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.***
***(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.***

This is the most complicated rule in the representation genre. It only seems logical, given the forum to which it applies. We need to be sure that our statements to tribunals are as far away from deception as possible. Not only do we want to avoid deception, but we may need to remediate situations where untrue testimony is provided to a tribunal. In that regard, this rule contains significant guidance regarding our duty to remediate false statements. Note something else in that regard: this is one of the rules where you should check to commentary. The commentary contains a lot of direction regarding how we remediate and the steps we must take when counseling a client who may have given false testimony to a tribunal. Furthermore, the

commentary expands on the differing obligations in a civil and criminal context.

***Rule 4.1. Truthfulness in statements to others***
***In the course of representing a client a lawyer shall not knowingly:***
***(a) make a false statement of material fact or law to a third person; or***
***(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.***

What I find interesting about Rule 4.1 is the limited responsibility with respect to the failure to disclose. Of all the rules addressing misrepresentation, this rule appears to impose the minimum responsibility because it only prohibits the failure to disclose when it's necessary to avoid assisting in a crime or fraud. That's a pretty limited situation. I think it has something to do with the audience.

4.1 governs those situations where we are speaking on behalf of a client, but not necessarily to a tribunal or other authority (since those venues are governed by Rule 3.3). Thus, the rule is most likely in play when we are talking to an adversary. It makes sense that, given the adversarial nature to our system, we would have a limited obligation to disclose when it comes to the opposing lawyer.

***Rule 8.1. Bar admission and disciplinary matters***
***An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:***
***(a) knowingly make a false statement of material fact;***
***(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.***

Rule 8.1 deals with several specific instances of misrepresentation. Interestingly, this is the only rule that applies to lawyers before they become members of the bar. But it's not only applicable to almost-lawyers. In addition to bar applications we also need to be concerned about statements about CLEs. The item that I want to make sure I point out to you, however, pertains to disciplinary tribunals.

We can see from the text of the rule that it's improper to make a misrepresentation in

connection with a disciplinary matter. But also note this related item: In many jurisdictions, failure to respond to a disciplinary tribunal is grounds for an independent grievance. In many cases it won't matter if you're ultimately exonerated for the underlying charge that got you into ethical trouble—if you fail to respond, you will still face a grievance.

Misrepresentations that may occur when we talk about ourselves or our services are covered by Rule 7.1. That rule is placed in the sections that deal with advertising, so it's common for lawyers to think that 7.1 is only invoked in cases of advertising. Personally, I think it's easier to think of it as being invoked in cases of "self-promotion." Every time you think you're acting in a self-promoting nature, Rule 7.1 could be in play.

Self-promotion is the cornerstone of any business's marketing effort. Major stars employ publicists and scores of other personnel whose sole job is to promote the celebrity and get them noticed and as we all know, many will sink to almost any level in order to get attention. As the old saying goes, "Bad publicity is better than no publicity." That's what the drafters of the rules of professional conduct were afraid of.

To a certain extent, lawyers are no different. We need to attract clients and self-promotion is certainly a way of doing that. But the drafters know that, if left to our own devices, many attorneys would likely indulge in ethically questionable tactics in order to get noticed and would end up denigrating the integrity of the profession in the process. Thus, it regulates advertising through Rules 7.1 and 7.2. There are other reasons that lawyer advertising is regulated, such as protecting the long standing professional traditions in the practice. The commentary to Rule 7.2 expresses that best when it states, "Advertising involves an active quest for clients, contrary to the tradition that lawyers should not seek clientele." Rule 7.2, Comment [1].

On the other hand, there are reasons to permit attorney promotion such as the desire to encourage competition among lawyers to keep the cost of legal services at a reasonable level

for the public and the “interest in expanding public information about legal services” Rule 7.2, Comment [1].

Two rules to be aware of when dealing with attorney advertising are Rules 7.1 and 7.2. Those Rules state:

> ***Rule 7.1. Communications concerning a lawyer's services***
> ***A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.***
>
> ***Rule 7.2. Advertising***
> ***(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.***
> ***(b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may***
> ***(1) pay the reasonable costs of advertisements or communications permitted by this Rule;***
> ***(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and***
> ***(3) pay for a law practice in accordance with Rule 1.17.***
> ***(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.***

Basically. Rule 7.2 tells us where we’re permitted to advertise. The content of our advertisements, however, must be seen through the prism of Rule 7.1. By way of example, we are permitted to put an ad in an, “electronic communication,” per 7.2, but the content of that communication may not contain a “material misrepresentation of fact,” per 7.1. One of the underlying goals of these rules is to make sure that attorneys avoid deceptive tactics.

Deception is an issue that was dealt with by the Philadelphia Bar Association as well. In Opinion 2009-02, the bar dealt with permissible actions in the world of social media. What's helpful to attorneys is that the decision hinged on the issue of deception (Note: The opinion is reprinted in its entirety in the Appendix). It's often been difficult to determine when a statement is permissible or so misleading that it violates the code. I think decisions like the Philadelphia opinion give that issue some teeth-- if you intended to deceive, then your statements/actions are

probably in violation of the rule.

**Preying on Vulnerabilities**

While this section may be slightly off the beaten path (at least as far as this program is concerned) it's closely related and deserves exploration. After all, when we talk about misrepresentation we're talking about a form of deception and the drafters know that there is a very real risk that lawyers will resort to questionable tactics in their effort to drum up business. That aggressiveness may manifest itself in misleading advertisements as we discussed in the previous section, but it may also appear in the context of soliciting clients for work. The drafters realized that lawyers might put undue pressure on people in order to convince them to retain the services of the lawyer, so Rule 7.3 was created.

> ***Rule 7.3. Direct contact with prospective clients***
> ***(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:***
> ***(1) is a lawyer; or***
> ***(2) has a family, close personal, or prior professional relationship with the lawyer.***
> ***(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:***
> ***(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or***
> ***(2) the solicitation involves coercion, duress or harassment.***
> ***(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).***
> ***(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.***

Rule 7.3 places different restrictions on different types of conduct. The rule distinguishes the conduct by the ability for the lawyer to coerce the potential client. Thus, subsection (a)

addresses the more pressure-filled communication of in-person, live telephone or real time electronic contact. Since the potential to coerce in those instances is so great, the rule outright prohibits that kind of solicitation, unless the lawyer has a close relationship with the prospect.

That restriction exists because there is an inherent potential for abuse in direct interpersonal communication. Rule 7.3, Comment [1]. With in-person communication there is a greater potential that a lawyer could persuade the client in a way that overwhelms the client's judgment. Comment [2].

Note, however that the rule does not prohibit contact with *any* person, rather the rule refers to contact with a "prospective client." Rule 7.3, Comment [1] describes that person as one who is, "known to need legal services." The key here is that the pressing need for legal services puts the prospective client in a more vulnerable mental state. Thus, the purpose of the rule prohibiting solicitation is to protect vulnerable people from being preyed upon. The reason I say that there are only four rules that address misrepresentation (3.3, 4.1, 7.1 and 8.1) is because the fifth rule, 8.4 Misconduct, is about much more than just misrepresentation. In fact, it almost seems as if misrepresentation is an afterthought—or at the very least buried among some other important concepts. Here is the rule, along with some important things to consider in Rule 8.4.

> ***Rule 8.4. Misconduct***
> ***It is professional misconduct for a lawyer to:***
> ***(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;***
> ***(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;***
> ***(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;***
> ***(d) engage in conduct that is prejudicial to the administration of justice;***
> ***(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or***
> ***(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.***

The sections that I find most interesting are (b), (c) and (d). In subsection (b) the rules tell us that misconduct can be the commission of certain crimes that impact our fitness to be an attorney. Do you think that driving drunk would fall in there? Maybe that's debatable. How about drug offenses? Of course it seems to get a little easier when you talk about check fraud or theft. What's interesting, though is that the rule doesn't say that you must be "convicted" of a criminal act, only that you "commit" the act. As a result, discipline may be forthcoming if the criminal behavior occurred, even if there were no formal consequences in the justice system.

Subsections (c) and (d) are what I call the "catch all" sections. For instance, I think we could spend an entire day giving examples of, "conduct involving dishonesty, fraud, deceit or misrepresentation." What's critical to remember is that the conduct we're talking about is not limited to the things you do in your office-- the rule doesn't make that distinction. That's one of the reasons that I tell attorneys that there is almost no separation between the professional and private life of an attorney. What you do outside the office matters and if your behavior outside the office violates Rule 8.4, you're going to be subject to discipline

Likewise, I could imagine a slew of actions that could be considered "prejudicial to the administration of justice." What about blogging about how you believe a judge is a thief and a liar? How about stealing evidence out of a courthouse. The list could go on. An interesting side note: 8.4(d) would probably be the section that would be cited in a claims of discrimination in the profession. Many states have adopted specific ethics rules outlawing discrimination, but not all of them. 8.4(d) would serve the purpose for states without a specific prohibition.

**PART 2 -- The Dirtiest Word in Ethics: Zealous: Why pushing the boundaries is not the ethical way to practice law**

Believe it or not, but there are critics of our ethics rules. I know what you're thinking, "How could that be? They are PERFECT." I'm sorry to burst your bubble, but there really are scholars who have taken shots at the code.

One of the biggest complaints is that the current code amounts to nothing more than a how-to manual. How-to stay away from a grievance. Surely you're wondering how that can be a bad thing. Well, staying away from grievances is good, but is that all our ethics code is really supposed to be about? The critics contend that the current code is devoid of the aspirational goals and the statements of morality that could be found in the predecessor codes. It's a valid point, but I understand why the code is written that way. To get a real picture for what I mean, you need a bit of a history lesson.

If you've ever heard me speak, you know that I am intrigued by the history of the ethics code. The relevant part for this program goes back to the 1970's. After the fallout from the Watergate fiasco, the powers that be realized that many of the people implicated in the scandal were lawyers. They also realized that many of the lawyers implicated— and, upon further reflection, many lawyers across the country — really didn't take the ethics rules seriously. Thus, they had to reform the code and I believe that's why they treated such a harsh set of rules. I believe that they took out the aspirational elements from the disciplinary rules because they had to reinforce the idea that there really would be disciplinary action if you acted inappropriately. The problem was that all of the morality was removed.

The current code tells us how we "could" act. What actions could we take that are within bounds and what actions, if we take them, subject us to discipline. The code tells us what out minimum levels of responsibility are and it also explains our fundamental duties. For

instance, we are told about the need to be competent (Rule 1.1) and diligent (Rule 1.3) and the need to supervise others (Rules 5.1 and 5.3). The commentary to the rules also reinforce the age old duty of the advocate to be zealous on behalf of our clients (see the commentary to Rule 1.3). Nothing, however, tells us how we "should" behave.

That's an important distinction. In other words, just because we "could" do something, does it mean we "should" be doing it? Just because some action taken in the course of our practice won't subject us to discipline, is it still "right" to take that action? That disconnect is something the drafters have been considering since the publication of the modern code in 1983. And over the years you've started to see a flurry of new "professionalism documents" being adopted across the country. Basically, these professionalism codes are trying to reinforce the need to behave in a morally acceptable way. Though they are the product of individual states, the all seem to share the same sentiment— they are talking about how we "should" be behaving. Of course, they are not enforceable by the disciplinary world, but they are still critical in defining proper behavior among lawyers.

One word that you don't see in many of these new professionalism documents is "zealous." The reason is clear. The word zealous has been used by many lawyers to cover all manner of sins. I shudder to think about how many ethical violations have been committed in the name of zealous advocacy. I believe that the drafters have the same concern. I believe they know that lawyers push the edge too far, and try to cover it up by claiming to be "zealous." Well, as you'll see in this program, lawyers need to start thinking about behaving in a morally acceptable manner. And that might not be compatible with the old school definition of zealous (just for the record— I am old school age. But I'd like to think that I'm learning some new tricks).

It's because of that interesting interplay between professionalism and the code that I'm including a lot of rules in these materials. I want to explore the relationship between what we

"could" do and what we "should" do. Incidentally, you'll see that these materials don't mirror the spoken program exactly. That's because I want to give you a reference tool that will supplement and add to the material we discuss during the program, not simply repeat it.

**1. *Being a Zealous Advocate***

The lawyer's obligation to zealously advocate his client's position is legendary. In fact, that obligation is set forth several times in the "Preamble and Scope" of the ethics rules. Specifically, a review of comments [2], [8] and [9] reveal several places where an attorney is given direction on what it means to be "zealous."

> "[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
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> * * * *
>
> [8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.
>
> * * * *
>
> [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

It is disturbing to consider, however, how many attorneys have behaved unethically in various situations, all the time claiming that they were actually being "zealous." The whole concept warrants some analysis.

The primary manner in which we manifest our "zealousness" is when we communicate. Thus, it pays to evaluate the quality of that communication. On one side of the spectrum is the passive attorney. A passive attorney is heavily influenced by others, and their actions fail to rise to the level of competent representation. His advocacy is hampered by a lack of control over the situation and his failure to be diligent causes him to be unworthy of the client's trust.

On the other side of the spectrum is the aggressive attorney. That lawyer is prone to violating the rights of others and justifies his overbearing attitude in the name of zealousness. The aggressive attorney is a bully whose arsenal includes unprofessional tactics such as domination, humiliation, harsh criticism and intimidation.

The optimum style of communication for an attorney in negotiation is "assertive." An assertive attorney clearly and firmly states her client's position and does so with respect and in a dignified manner. The approach is bold, yet civil, and it is displayed with confidence. Her advocacy is characterized by a controlled, respectful vigor. An assertive negotiator seeks an advantageous result for her client without sacrificing integrity or good judgment.

Evaluating some real-life situations is a bit easier in light of the aforementioned definitions. For example, it's clear that assertive speech is acceptable, but speech and conduct that is mocking or condescending would be considered "conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute" and should be avoided.

### *2. Improper Behavior*

**RULE 8.4 MISCONDUCT**
**It is professional misconduct for a lawyer to:**
**(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;**
**(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
**(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
**(d) engage in conduct that is prejudicial to the administration of justice;**
**(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or**
**(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.**

Several matters discussed throughout this seminar illustrate the idea that if attorneys commit serious crimes, we can lose our law license. Rule 8.4 governs such situations and it states that it is professional misconduct to commit a crime that "reflects adversely on the lawyer's honesty trustworthiness or fitness as a lawyer in other respects." Rule 8.4(b).

I've always considered Rule 8.4 to be the photonegative of the professionalism rules (I'm sorry if you're too young to have every used film in a camera— you don't know what you're missing). That's because they are the complete opposite of the aspirational goals that professionalism codes like to discuss. Rule 8.4 sets the outside boundary of our conduct. And it's quite broad.

To appreciate the rules' breadth, consider that Rule 8.4(b) does not limit actionable crimes to those that are committed while in the course of the practice of law. The forum does not matter—commission of a serious crime of any type could cause us to lose our license. It's also important to realize that fact that you also do need not be actively practicing law. A licensed attorney who is acting in a non-legal capacity and commits a crime in violation of Rule 8.4 may nonetheless be sanctioned by the bar.

Incidentally, Rule 8.4 also governs certain actions within the courtroom—specifically, fighting. It may seem almost ridiculous to discuss the concept of attorneys actually coming to

blows in a courtroom setting, but it's far more prevalent than we'd all like to admit. Keep in mind that if attorneys fight in the courtroom, they engage in conduct prejudicial to the administration of justice in violation of Rule 8.4(d). In addition, committing a crime by physically assaulting your co-counsel would be a criminal act and would likely subject you to sanction under Rule 8.4(b).

**RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL**
**A lawyer shall not:**
**(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;**
**(b) communicate or cause another to communicate ex parte with such a person or members of such person's family during the proceeding unless authorized to do so by law or court order; or**
**(c) communicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court rule; or**
**(d) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.**

Coming to actual blows is certainly not permitted, but verbal sparring also may cross the ethical line. Rule 8.4 is not the only rule that is applicable in such cases. If counselors trade profane insults in the courtroom and get into a physical altercation in the courtroom, they may also be "engaging in conduct intended to disrupt a tribunal" in violation of Rule 3.5(d). At the very least, it would be considered "undignified or discourteous," which is also prohibited by that rule.

Again, consider the proscription in Rule 3.5 and the concept of professionalism among lawyers. Do we really want to get to a place where we were so rude to each other that we're talking about whether we've violated Rule 3.5? Of course not. But think about how many lawyers have behaved badly in a situation like that, all in the name of zealous advocacy. That's why you're starting to see that work vanish.

### 3. *The Intersection of Zealousness and Diligence*

**RULE 1.3 DILIGENCE**
**A lawyer shall act with reasonable diligence and promptness in representing a client.**

**RULE 1.4 COMMUNICATION**
**(a) A lawyer shall:**

> **(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), required by these Rules;**
> **(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;**
> **(3) keep the client reasonably informed about the status of the matter;**
> **(4) promptly comply with reasonable requests for information; and**
> **(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.**

**(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**

Procrastination is so rampant in the legal profession that it's discussed specifically in the commentary to Rule 1.3 (Diligence). Comment [3] states,

> "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client."

Far too many attorneys find themselves on the other end of an ethics grievance because they procrastinate. They take a client, accept a fee, tell the client that they will provide the service in a reasonable length of time, and then put things off. The reason that the matter is delayed is normally pretty understandable—after all, it's not easy to maintain the business end of a law practice. Attorneys are always on the hunt for the next new client so we can keep the work-pipeline full at all times. Unfortunately, that means that we sometimes put off the execution of work we need to complete for the existing clients. Rule 1.3, however, reminds us that we need to stay vigilant in our attention to ongoing matters.

It is helpful for attorneys to read Rule 1.3 in connection with Rule 1.4 (Communication). It is not enough to simply pursue a matter diligently—we must also, "keep the client reasonably informed about the statues of the matter" per 1.4(a)(3). If an attorney proceeds with both 1.3 and 1.4 in mind, they are far more likely to avoid some common ethics pitfalls.

What's interesting is that there is so much wiggle room in these rules. Diligence could be defined in so many ways. When you look closely at the professionalism codes from around the country you'll see that many of them are trying to fill the ethical gaps that are left behind by rules like 1.3 and 1.4.

### *4. More Boundaries- Conflicts of Interest*

Conflicts is all about loyalty. Well, mostly. It's about ensuring that we don't breach our duty of loyalty to one client because of an interest that we might have in another client, a third person, or ourselves. So many conflicts arise because of our desire to zealously pursue one of those other interests.

Maybe we look past a conflict because we want to get the best deal for an existing client. Maybe we are zealous in pursuing our own monetary goals and we ignore a conflict as a result. It happens all the time. To more fully understand this, you need to learn how to read the rule.

**RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS**
**(a) Except as provided in paragraph (b), 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, a former client or a third person or by a personal interest of the lawyer.**

**(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client 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; and**
**(4) each affected client gives informed consent, confirmed in writing.**

Conflicts of interest could certainly reach outrageous proportions, but they are problems that exist in every attorney's practice, albeit normally in a less bombastic form than may have been displayed in the seminar. A common concern revolves around "concurrent" conflicts of interest, or those which occur between current clients of a lawyer. In this instance, attorneys find guidance in Rule 1.7. That Rule is the destination for attorneys when they need to evaluate potential conflicts and what can be done about it if a conflict does, in fact, exist.

The beauty about evaluating conflicts under Rule 1.7 is that it is relatively methodical in its approach. First, an attorney determines whether a conflict exists by reviewing Rule 1.7(a). If there is a conflict under either 1.7(a)(1) or 1.7(a)(2), then the attorney proceeds to the next section, 1.7(b), to determine if the conflict is "waivable" or "consentable." Note that in order for an attorney to proceed with a matter where a conflict exists, they must fulfill all four elements in Rule 1.7(b)—informed consent from the affected client, alone, is not enough.

Something to keep in mind: Concurrent conflicts don't only encompass conflicts between clients—a concurrent conflict may exist between the interest of a client and the lawyers own self-interest. That reality is addressed, in part, in Rule 1.7(a)(2).

**RULE 1.5 FEES**
**(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:**
**(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
**(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
**(3) the fee customarily charged in the locality for similar legal services;**

**(4) the amount involved and the results obtained;**
**(5) the time limitations imposed by the client or by the circumstances;**
**(6) the nature and length of the professional relationship with the client;**
**(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and**
**(8) whether the fee is fixed or contingent.**

**(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.**

**(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.**

**(d) A lawyer shall not enter into an arrangement for, charge, or collect:**
**(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or**
**(2) a contingent fee for representing a defendant in a criminal case.**

**(e) A division of a fee between lawyers who are not in the same firm may be made only if:**
**(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;**
**(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and**
**(3) the total fee is reasonable.**

It probably isn't obvious why the rule regarding attorneys fees would be included in a discussion about conflicts of interest, but if one steps back for a moment, the reason becomes evident. One area where an attorney has a real potential for their duty of loyalty to run afoul is when he or she is in pursuit of their lawyer's fee.

This seminar discussed some genuinely over-the-top conduct where an attorney used improper methods to collect a fee, but the reality of everyday practice presents its own problems. Rule 1.5 attempts to provide guidance in that regard.

Adherence to the rule might produce a written fee agreement and that would certainly achieve one goal, specifically, there would be better communication between a lawyer and the client about the terms of the fee arrangement. Interestingly, even if one follows the Rule they're not guaranteed certainty, because section 1.5(b) states only that a fee agreement in matters where there is hourly billing "preferably" be in writing. Contrast that with section 1.5(c) which addresses contingency fee arrangements where agreements for such services are required to be in writing.

### *5. Being Responsible for Others*

**RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS**
**(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.**
**(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.**
**(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:**

> **(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or**
> **(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

**RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER**
**(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.**

**(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.**

**RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**
**With respect to a nonlawyer employed or retained by or associated with a lawyer:**
**(a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;**
**(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and**
**(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:**

> **(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or**
> **(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

If you rate some of the worst attributes of our citizenry, you'd probably find that selfishness ranks pretty high on the list. It's almost as if we're genetically predisposed to worrying about ourselves, often times at the expense of others. Rules 5.1 through 5.3 fly in the face of that concept. These rules remind us all that, as attorneys, we have the obligation to supervise others and even to be responsible for the ethical violations of another. It's a large pitfall about which an attorney should be aware in everyday practice because our selfishness may cause us to drop our guard regarding how much we concern ourselves with the actions of those we supervise.

A key concept to remember when you review Rule 5.1 and the responsibilities of supervisory lawyers is the need to be proactive. The rule requires, among other things, that there be measures in place which give reasonable assurance that all lawyers in the firm are conforming to the relevant code of conduct. The same holds true when it comes to non-lawyer

assistants (See Rule 5.3). Installing such measures requires that you give some advance consideration about the pitfalls that each of those groups might encounter as well.

### *6. Truthfulness in Disclosures*

**RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS**
**An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:**
**(a) knowingly make a false statement of material fact; or**
**(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.**

There are real issues that arise when filling out a bar application and answering the fitness questionnaire. The lessons are valuable even to the practicing attorney because they deal with issues of truthfulness and candor. And as we discussed earlier, "truthfulness" is one of the most common places that people push the ethical boundaries in the name of zealousness.

The classic question straight out of the law school text book deals with the famous Iowa Bar Application question that asks whether the applicant has ever done any drugs. It raises the issue about whether one discloses minor recreational drug use and therefore risks being flagged for further questioning by the committee, or lie on the application and hope that they never get caught. It's a dilemma many people face when filling out the application and it causes us to evaluate our own personal sense of morality. To what extent do we pursue full disclosure?

Attorneys would be well served to err on the side of full disclosure. There are far too many ways for an attorney to get caught in telling untruths. Furthermore, the ramifications from lying appear to be far worse than the consequences that arise after having to explain truthful information disclosures, regardless of how distasteful they may appear.

## Part 3 -- The Ethics of Technology Today

I think lawyers are in the midst of a developing ethical dilemma. It's not the type of usual dilemma that educators have been talking about. It's not just the specific ethical issues with programs like generative AI, cloud storage, or whatever else comes down the technological pike. The ethical dilemma I'm concerned about is a larger ethical paradigm shift that's going on in the practice.

Here's the bottom line: I don't think the current ethical standards are equipped to guide lawyers. I think things have changed so drastically in the world of technology over the past several years that the current legal ethics standards are inadequate. And what does that mean?

Somethings' gotta give.

The ethics authorities need to provide some proactive guidance to lawyers. If they don't, one of us is going to get into trouble.  I don't want that to happen. That's why I created this program.

The purpose of this program is to (a) teach the existing ethics issues, (b) to explain why I think they are inadequate to properly guide lawyers, and (c) to implore the ethics authorities to so something. So let's start with the existing ethics issues. Let's talk about the standards that govern lawyers and the use of technology.

**1. The basic ethical duties. The stuff you already know.**

a. Competence and Technology

Understanding the latest technology is required for lawyers to maintain their minimum level of competence. That mandate is found in the Model Rules of Professional Conduct ("Model Rules"), and it's also been reinforced in state ethics opinions. For instance, in ABA jurisdictions, Rule 1.1, Competence, states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[8]

In addition, Comment [8] to Rule 1.1 is explicit about technology: "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 . . . ." Finally, a variety of state advisory opinions from the last several years have made it clear that lawyers have a duty to understand technology.[9] At this point it should be considered common knowledge. But there's one extension of that duty that should be explained— opinions have confirmed that a lawyer's duty of competence regarding technology is not static, rather it changes.

A lawyer's duty of competence is a living, breathing responsibility, and that was established in my favorite ethics opinion of all time. In *The State Bar of California's, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193*, the Bar faced a situation where a lawyer had only a basic knowledge of e-discovery. That surface knowledge ended up getting him in trouble and caused harm to the client (for reasons that we won't go into here). The Bar explained that the lawyer should have had a better understanding

[8] Delaware Rule 1.1. Note: All references to the rules in this paper are to the Delaware Rules of Professional Conduct. They are substantially similar to the ABA rules, but not subject to copyright restrictions.

[9] *See, e.g.,* Cheryl B. Preston, *Lawyers 'Abuse of Technology*, 103 CORNELL L. REV. 879, 884-88 (2018).

of e—discovery. Specifically, it stated that, "An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law."[10] The California Bar made it clear that as the technology used in the practice changes, lawyers' duty to understand those technologies must keep pace. But it went further.

The opinion also made it clear that the lawyer needs to understand how the underlying technology works. The California Bar stated, "Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI")." Sure, in that case it referenced a specific area of e-discovery and required that the lawyer understand that underlying technology. But one can see the point about competence the opinion was trying to make. Lawyers need to stay abreast of new technologies that become integrated in the practice of law, and they must also understand how to use those technologies.

So that's the limit of the expansion of our duty of competence, right? Oh, heck no. Several ethics opinions have expanded that duty of competence into the internet. And it's not just about staying aware of the technology used in the internet, but it's about understanding the pitfalls as well.

There are a variety of opinions that have held that lawyers have a duty to understand the dangers of the internet. The Association of the Bar of the City of New York Committee on Professional Ethics issued Formal Opinion 2015-3 in April 2015 which dealt with email scams. When discussing that particular type of thievery, the opinion listed a series of troubling indicators that might have raised concern for the lawyers and said that the lawyer should have seen them coming. The committee said, "A lawyer's suspicion should be aroused by any one

[10] Cal. Op. 2015-193.

or more of these common 'red flags' indicating a scam."[11] The committee could not have been more clear in its mandate to lawyers when it stated, "In our view, the duty of competence includes a duty to exercise reasonable diligence in identifying and avoiding common Internet-based scams, particularly where those scams can harm other existing clients."[12]

Another case in Rhode Island dealt with a similar issue. There, a lawyer acted as a "Pay Master," or an escrow agent for a client he found online. The client gave the lawyer money to deposit in his trust account, then had him disburse those funds to others. The lawyer asked Rhode Island disciplinary counsel for an opinion about whether the scheme was permitted, and counsel basically said, yes, it could be, but be careful because it's likely to be a scam. You know what happened, next, right? The lawyer proceeded to represent the client and, lo and behold, it was a scam. The lawyer was disciplined.[13] The Rhode Island Supreme Court didn't offer a slam-dunk holding to quote, but it found that the lawyer violated the rule on competence. Basically, the court said he should have known better.

Those cases established what I call the "The Duty Not to Be a Bonehead." Some internet scams are so obvious that a competent lawyer should have seen them coming. It's wise to consider the logical extension of that concept. Not only are lawyers duty-bound to be competent about common internet-based scams,[14] but they must also be competent about common technology-related scams and pitfalls in general. That concept isn't so difficult to accept. What is difficult, however, is determining which pitfalls are deemed to be "common" or "obvious," and when they acquire that status.

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[11] N.Y. Bar, Formal Op. 2015-3.
[12] *Id.*
[13] In the Matter of Donald F. DeCiccio., No. 2013-275-M.P.
[14] *See, e.g.,* Jordan K. Carpenter, *The Ethics of Dealing with Internet Scams Targeting Vermont Lawyers*, 41 VT. B.J. 17 (Fall 2015).

To a certain extent, this question is similar to the earlier issue about when a technology is deemed to have been integrated with the practice of law. At some point the general-lawyering-public will consider certain platforms and their pitfalls to be commonly known. As for when they are both considered to have reached critical mass, well, that's not so clear. The various state bars probably will not issue any announcements confirming when a technology is deemed "integrated" into the practice. Lawyers just have to figure it out. Sometimes that will be easy— a scam that exists for some time gets a lot of press from bar journals and becomes the topic of many-a-CLE-program. But lawyers need to be worried about the "next" scam. And how is a lawyer to figure out if a technological pitfall that has not been extensively covered by journalists or teachers has nonetheless acquired "common" status? There are two ways.

The first, rather unfortunate way that lawyers will figure scams out is by getting disciplined. There's always some lawyer who finds themselves having their conduct evaluated by a disciplinary tribunal and, after the dust has settled, ends up hearing the four worst words that any lawyer could hear. "You should have known." When that happens, word spreads through the practice, because when a lawyer gets in trouble other lawyers perk up. There is, of course, another way to get the message without having to take one for the proverbial team: Research.

Lawyers should be actively researching technology issues on a consistent basis. In fact, this type of research should be integrated into their daily practice. What the cases and ethics rules have shown is that technology has emerged as a core competency. It is, therefore, every lawyer's duty to continually research both the ways that various technology is being used in the practice, and the software, hardware, internet, and other related pitfalls and scams that might be surfacing. That type of research includes reading bar journal articles, legal tech blogs, and following popular legal tech thought leaders on social media. But it also includes staying abreast of technology-related issues in the larger business world. Read newspapers, business

journals that don't originate in the legal field. That's a very important aspect of this research because many scams, concerns, and new technology solutions start in the non-law professional world.

b. Confidentiality and the Cloud. The Reasonable Care Standard

The key ethics concerns that we need to apply in the current era were nearly all established at when cloud computing became a part of the practice of law. The early ethics opinions that addressed technology didn't always talk about "cloud computing" in particular, but they set the standard that would be followed when that technology arrived.

The State of Nevada addressed the ability of lawyers to store confidential client information and/or communications in an electronic format on a server or other device that is not exclusively in the lawyer's control.[15] The Committee found that it was ethically permissible and stated that, "If the lawyer acts competently and reasonably to ensure the confidentiality of the information, then he or she does not violate [the rules] by simply contracting with a third parity to store the information…"[16]

The Committee said that the duty to save files on third party servers is the same as the duty to safeguard files that are put into third party warehouses, so contracting for such storage is not a per se confidentiality violation.[17] The lawyer wasn't strictly liable for an ethics violation "even if an unauthorized or inadvertent disclosure should occur".[18] Instead, the question was

[15] State Bar of Nevada, Standing Committee on Ethics and Professional Responsibility,Formal Opinion No. 33, February 9, 2006, at 1.

[16] Nevada Opinion No. 33, at 1.

[17] Nevada Opinion No. 33, at 1.

[18] Nevada Opinion No. 33, at 1.

whether they exercised proper care. They articulated a standard that would be repeated in many following opinions when they said, "The lawyer must act competently and reasonably to safeguard confidential client information and communications from inadvertent and unauthorized disclosure."[19]

Similarly, New Jersey evaluated a technologically related issue— whether a lawyer can scan client files to a PDF, then archive them electronically and store those documents on the web.[20] Just like in Nevada, the concern was that Rule 1.6 requires "that the attorney 'exercise reasonable care' against the possibility of unauthorized access to client information."[21] The New Jersey Committee echoed the Nevada findings and stated that,

> "Reasonable Care…does not mean that "the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all unauthorized access…What the term 'reasonable care' means in a particular context is not capable of sweeping characterizations or broad pronouncements." at 3.

Given the changing nature of technology, the New Jersey Committee was reluctant to make a particularly bold decision but they did provide some elaboration of what constituted "reasonable care." They stated that,

> ""The Touchstone in using 'reasonable care' against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider in circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then 'reasonable care' will have been exercised." at 5

[19] Nevada Opinion No. 33, at 1.

[20] State Bar of New Jersey, Supreme Court Advisory Committee on Professional Ethics, Opinion 701, April 10, 2006, 15 N.J.L. 897 April 24, 2006, at 2

[21] NJ Opinion 701, at 3.

That phrase, "reasonably foreseeable" was an indication of things to come. In fact, the standard evolved in a decision out of Maine. Maine agreed that the lawyer needs to take reasonable steps to protect confidentiality but they went further and they stated that,

> "the lawyer would be well-advised to include a contract provision requiring the contractor to inform the lawyer in the event the contractor becomes aware of any inappropriate use or disclosure of the confidential information. *The lawyer can then take steps to mitigate the consequences and can determine whether the underlying arrangement can be continued safely.* (emphasis added). at 2

This is the first time we see an extended affirmative duty on the lawyer's part. Maine set forth the idea that the lawyer's duty is ongoing and that there may be a time where a lawyer needs to actually take some action to protect the client information.

Arizona reviewed a question that was analogous to cloud storage and added a further elaboration of what it meant to be exercising reasonable care. Arizona said that if you're going to use online storage sites, Competence (Rule 1.1) demands that you understand them. Specifically they stated that "the competence requirements…apply not only to a lawyer's legal skills, but also generally to 'those matters reasonably necessary for the representation..' Therefore, as a prerequisite to making a determination regarding the reasonableness of online file security precautions, the lawyer must have, or consult someone with, competence in the field of online computer security."[22] In other words, in order to show that you're exercising reasonable care, you need to understand the systems or associate yourself with someone who has that understanding.

And there's something more— here we see a further expansion of the affirmative duty. Not only must we take reasonable precautions to protect confidentiality and security of client information, but, the committee acknowledged that as technology changes, certain protective

[22] State Bar of Arizona, Opinion 09-04, 12/2009, at 1.

measures might become obsolete.[23] Thus, the Committee warned that "As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients' documents and information."[24] Thus, there is a continuing obligation to revisit the reasonability of the security that our vendors are utilizing. In other words, we can't take the "stick our heads in the sand approach".

A year later, the State of Alabama agreed and stated that,

> "Additionally, because technology is constantly evolving, the lawyer will have a continuing duty to stay abreast of appropriate security safeguards that should be employed by the lawyer and the third-party provider. If there is a breach of confidentiality, the focus of any inquiry will be whether the lawyer acted reasonably in selecting the method of storage and/or the third party provider."[25]

In the same year, the New York Bar Association elaborated on that idea. In Opinion 842 they evaluated whether a lawyer could use an online data storage system to store and back up client confidential information. Like the other states that opined on the topic, they answered in the affirmative, subject to the same confidentiality concerns. They also confirmed the ongoing nature of the lawyer's duty if one were to make use of these systems. They stated:

> "10. Technology and the security of stored data are changing rapidly. Even after taking some or all of these steps (or similar steps), therefore, the lawyer should periodically reconfirm that the provider's security measures remain effective in light of advances in technology. If the lawyer learns information suggesting that the security measures used by the online data storage provider are insufficient to adequately protect the confidentiality of client information, or if the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information, notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated. See Rule 1.4 (mandating

[23] Arizona Opinion 09-04 at 2.

[24] Arizona Opinion 09-04 at 1-2.

[25] Alabama Ethics Opinion 2010-02 at 16

communication with clients); see also N.Y. State 820 (2008) (addressing Web-based email services)."[26]

In the following, far less earth-shattering paragraph, the New York authorities also noted the need for lawyers to stay abreast of the law regarding technology. "Not only technology itself but also the law relating to technology and the protection of confidential communications is changing rapidly. Lawyers using online storage systems (and electronic means of communication generally) should monitor these legal developments, especially regarding instances when using technology may waive an otherwise applicable privilege. *[citation omitted]*."[27]

c. A lawyer's fiduciary duty under Rule 1.15

In North Carolina we see an opinion that reveals the next major ethical concern with using cloud-based systems/software. That's the need to protect our client's information with the care required of a fiduciary as set forth in Rule 1.15.

Most people hear the "Rule 1.15" and think about trust accounts. It's true that the rule is most often invoked in our discussion about our client's money, but the rule actually has broader implications. Rule 1.15 governs our responsibilities with our client's property and money is just one type of client property that we might hold. The relevant client property we're dealing with in this program is our client's file. Comment [1] to Rule 1.15 establishes the duty regarding that client property — it requires that we hold client property with the care required of a professional fiduciary.

[26] New York State Bar Association Opinion 842 (9/10.10) at 4.

[27] New York State Bar Association Opinion 842 (9/10.10) at 4.

The digital version of your client's file is also their property—you're simply holding it in computerized form. Any information about your client matter is part of their "file." Thus, if we release that to another individual (like a cloud storage vendor, or a generative AI program) we need to make sure that we're taking steps to safeguard that client property appropriately. That's why the North Carolina opinion states, "Rule 1.15 requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. See also RPC 209 (noting the "general fiduciary duty to safeguard the property of a client")."[28]

d. The Extension of our Duty to Supervise.

The day-to-day realities of the practice reveal that lawyers are not the only individuals in the office about whom we must be concerned when we decide to use technology. The commentary to Rule 1.6 confirms that: "[16]…A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Various states have expanded upon that concept and discussed our larger responsibility to train our non-lawyer staff.

Maine, for instance, confirmed that the primary responsibility for confidentiality remains with the lawyer, but they also noted that the Maine rule "implies that lawyers have the responsibility to train, monitor, and discipline their non-lawyer staff in such a manner as to guard effectively against breaches of confidentiality. Failure to take steps to provide adequate training,

[28] The North Carolina State Bar, 2011 Formal Ethics Opinion 6, Issued in January 27, 2012.

to monitor performance, and to apply discipline for the purposes of enforcing adherence to ethical standards is grounds for concluding that the lawyer has violated [the rule]."[29]

Plus, our duties extend beyond keeping an eye on our in-house nonlawyer staff. The foundation for that was laid before the technology era when the Oregon State Bar addressed whether a lawyer could use a recycling service to dispose of client documents. The issue was whether doing so violated the rule on confidentiality because you would be exposing confidential client information to the recycling vendor. The opinion held that, "as long as Law Firm makes reasonable efforts to ensure that the recycling company's conduct is compatible with Law Firm's obligation to protect client information," using the service is permissible.[30] They further stated that "reasonable efforts include, at least, instructing the recycling company about Law Firms duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately."[31] This is exactly the sentiment set forth by other bars regarding cloud computing vendors.

The Maine Committee noted that the technology vendor needs to be supervised as well. While the lawyer doesn't directly train or monitor the service provider employees, "the lawyer retains the obligation to ensure that appropriate standards concerning client confidentiality are maintained by the contractor."[32]

The Oregon and Maine opinions marked the beginning of a trend, about which all lawyers must be aware. Over the past several decades we've seen states expand upon the duty for lawyers to be responsible for non-lawyers who are working for the firm, but not necessarily

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[29] Maine Board of Overseers of the Bar, Opinion #194, Issued June 30, 2008, at 1-2.

[30] Oregon State Bar, Formal Opinion No. 2005-141, August 2005, at 386

[31] Oregon Opinion 2005-141 at 386.

[32] Maine Board of Overseers of the Bar, Opinion #194, Issued June 30, 2008, at 2.

inside the firm's office. This was further exhibited in North Carolina's Formal Ethics Opinion 6, in which they stated,

> "Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer. The extent of this obligation when using a SaaS vendor to store and manipulate confidential client information will depend upon the experience, stability, and reputation of the vendor. Given the rapidity with which computer technology changes, law firms are encouraged to consult periodically with professionals competent in the area of online security."[33]

New Hampshire went a little further and let us know that we can't pass the buck when it comes to the tech vendors. They made is clear that the duties of confidentiality and competence are ongoing and not delegable:[34]

> "When engaging a cloud computing provider or an intermediary who engages such a provider, the responsibility rests with the lawyer to ensure that the work is performed in a manner consistent with the lawyer's professional duties. Rule 5.3 (a). Additionally, under Rule 2.1, a lawyer must exercise independent professional judgment in representing a client and cannot hide behind a hired intermediary and ignore how client information is stored in or transmitted through the cloud.[35]

A short while ago, the ABA chimed in on the topic. In a batch of amendments, the ABA made a change to two letters in the title of Rule 5.3-- that's right, I said two letters in the *title* -- and that change has profound implications. Rule 5.3 used to be called, "Responsibilities Regarding Nonlawyer Assistants." However, how it's called, "Responsibilities Regarding Nonlawyer Assistance." Did you catch that? The last two letters of the final word-- "Assistants" is now "Assistance." This is a big deal because it reflects a growing trend in the world of ethics.

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[33] North Carolina's 2011 Formal Ethics Opinion 6

[34] New Hampshire Opinion 2012-13/4, at 4.

[35] New Hampshire Opinion 2012-13/4, at 3.

Yes, we are responsible for supervising our own staff, but today that duty extends to other parties like those that we would have once called "independent contractors." Anyone that we use in assistance, like vendors, are parties that we now have a duty to supervise. We get further guidance in this regard from new Comments [3] and [4] in Rule 5.3.

What we notice from those comments is that this change was brought about mostly because (a) lawyers now outsource many of the tasks that used to be completed in house and (b) there is an increased reliance on cloud storage and other technology-related vendors. Thus, the comments tell us that we must supervise nonlawyers outside the firm that we use for investigations, document management, cloud storage, etc., and the Comment also provides factors that should be considered when determining the extent of our obligations in these circumstances.

e. The Emerging Affirmative Duty to Understand, Anticipate, and Act

I've tried to take the information that's been provided by the various state opinions and distill it down to some workable direction to attorneys. Here's how it looks to me:

All of these opinions make clear is that we need to be competent and protect client confidentiality. In order to do that we need to understand the technological systems, understand the security precautions that the vendors use, supervise the vendors appropriately, ensure that the terms of service are adequate, and remember that the review of all of the foregoing is a continuing duty (plus some other stuff, but those are the biggies).

What's clear is that the opinions have created a significant affirmative duty for lawyers who choose to use cloud systems. *We have an ongoing obligation to understand, anticipate, and act.* We must understand the technology, the security, and the law. We must be able to anticipate security issues, problems presented by our nonlawyer staff, confidentiality concerns, and everything else. And if the situation requires it, we must act. We may be forced to change

vendors, for instance, if we think our client's information is vulnerable. We may need to demand that vendor change some protocol. It could be anything.

The point is that we can't sit idly by. Ignorance is not bliss, it's an ethical violation. If we are going to utilize these systems we need to continually stay up to date on all relevant variables. It's an active, ongoing process.

**2. How the ethical standard evolved.**

Okay, we established the basic ethical issues. Competence, confidentiality, safeguarding client property, and supervision. Now let's get a little deeper into the ethical standards that have evolved over the years. To understand the next level of ethical concern, we need to go back to the advent of email.

Back when email first came out, lawyers weren't allowed to use unencrypted email to discuss client matters. That's because it was unencrypted, which meant that our client data was vulnerable to those hackers we talked about earlier. However, things changed in the late 90s.

The ABA issued a formal opinion in 1999 which stated that there is a reasonable expectation of privacy despite the risk of interception and disclosure. The key development was that legislation was enacted making the interception of email a crime. In its Opinion, the ABA stated:

> "The Committee believes that e-mail communications, including those sent unencrypted over the Internet, pose no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy. The level of legal protection accorded e-mail transmissions, like that accorded other modes of electronic communication, also supports the reasonableness of an expectation of privacy for unencrypted e-mail transmissions. The risk of unauthorized interception and disclosure exists in every medium of communication, including e-mail. It is not, however, reasonable to require that a mode of communicating information must be avoided simply because interception is technologically possible, especially when unauthorized interception or dissemination of the information is a violation of law. The

> Committee concludes, based upon current technology and law as we are informed of it, that a lawyer sending confidential client information by unencrypted e-mail does not violate Model Rule 1.6(a) in choosing that mode to communicate. This is principally because there is a reasonable expectation of privacy in its use."[36]

States, of course, followed suit and permitted the use of unencrypted email in the practice of law. What's key here is that we see the standard clearly— the reasonable expectation of privacy. It's important to understand the standard/rationale for permitting such email communications, because it continues to be relevant today. As new technologies are developed, the authorities apply the same reasoning. Consider the recent furor over gmail and other free email services.

In its Opinion 820, the New York State Bar Association opined about those free email systems.[37] The systems of yore were a concern because of the business model that the systems use to keep the service free. Here's how they worked: in return for providing the email service, "the provider's computers scan e-mails and send or display targeted advertising to the user of the service. The e-mail provider identifies the presumed interests of the service's user by scanning for keywords in e-mails opened by the user. The provider's computers then send advertising that reflects the keywords in the e-mail."[38] The obvious problem is that if a lawyer was using the email system for client work, then that lawyer was allowing the provider to scan confidential information.

When considering whether these new email systems would be permitted, the NY authorities first considered the rationale for permitting email back in the 90s. Email was allowed because, "there is a reasonable expectation that e-mails will be as private as other forms of

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[36] ABA Commission on Ethics and Professional Responsibility Formal Opinion 99-413

[37] New York State Bar Association Committee on Professional Ethics Opinion 820 – 2/8/08

[38] NYSBA Op. 820 at 2

telecommunication and…therefore…a lawyer ordinarily may utilize unencrypted e-mail to transmit confidential information.[39] They applied that same reasoning to the question of free emails.

You'd think that the authorities would have banned the emails, given that their content was being read by the email system, right? Wrong. Even though the email messages in the system were scanned, the opinion noted that humans don't actually do the scanning. Rather, it's computers that take care of that task. Thus, they stated that "Merely scanning the content of e-mails by computer to generate computer advertising…does not pose a threat to client confidentiality, because the practice does not increase the risk of others obtaining knowledge of the e-mails or access to the e-mails' content."[40]

What the opinion is basically saying is that there continued to be a reasonable expectation of privacy in those email systems. Maybe the better way to phrase it is a reasonable expectation of "confidentiality," but the idea is the same (more on Rule 1.6, Confidentiality, later).

That ethical standard continued to be relevant and we saw it being applied later to another google product. And this is a really important part of the analysis because it finally starts to get to the paradigm shifting concern that's at the heart of this program.

On September 21, 2018 the Wall Street Journal reported that Google shares Gmail information with its app developers. But what's important is the type of information that's being shared and who viewed it. The WSJ article revealed that:

> Google Inc. told lawmakers it continues to allow other companies to scan and share data from Gmail accounts…the company allows app developers to scan Gmail accounts…outside app developers can access information about what products people buy, where they travel and which friends and colleagues they interact with the most. In

[39] NYSBA Op. 820 at 1

[40] NYSBA Op, 820 at 2

> some cases, employees at these app companies have read people's actual emails in order to improve their software algorithms.[41]

Did you get that last part? There are real human beings who are reading the contents of Gmail messages. What we know from NY Opinion 780 is that if human beings are reading the lawyer emails, then lawyers no longer have a reasonable expectation of privacy in Gmail.

Sure, we lack some specific data about which emails were read, but that doesn't change the conclusion. We might not know if lawyers' messages in particular were included in the messages that were scanned. But that's sort of exactly the problem — we don't know. And we don't have any way to control or restrict the app developers from reading anyone's emails, including our practice-related emails. Because of that reality we have to wonder whether lawyers can continue to use Gmail. Our duty to protect client confidences set forth in Rule 1.6 seems to be compromised. I'll tell you the truth, it actually looks like no one — lawyer nor otherwise — has a reasonable expectation of privacy with the platform.

The same standard is relevant today. When lawyers use generative AI like the version of Chat GPT that's available to the public, we put our client information into the system. We create prompts that will yield valuable research results and those promote contain the details of our client matters. But the publicly available version of Chat GPT takes the information that's fed into it and uses it in its processing going forward. The Enterprise DNA blog explained that, "Chat GPT logs every conversation, including any personal data you share, and will use it as training data. Open AI's privacy policy states that the company collects personal information included in 'input, file uploads, or feedback' users provide to Chat GPT and its other services. The

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[41] https://www.wsj.com/articles/google-says-it-continues-to-allow-apps-to-scan-data-from-gmail-accounts-1537459989 last checked 7/3/2023.

company's FAQ explicitly states that it will use your conversations to improve its AI language models and that your chats may be reviewed by human AI trainers."[42]

You can see how ye olde Email standard is still relevant. Lawyers do not have an expectation of privacy if we put our client information into generative AI programs like Chat GPT.

### 3. The problem we face today

One of the things I'll document in the spoken portion of this program are the problems with protecting client data in today's environment. What we'll discuss is the concerning realities of the technological world today: the number of inadvertent revelation of data from big tech is astonishing; the frequency of hacking is incredible. Furthermore, cloud systems admit that they frequently scan customer data when there is a concern about child abuse exploitation imagery and other uses that might violate their terms of service. What all that means is that there does not appear to be any way for lawyers to adhere to the ethical standards governing our use of technology.

The question we need to ask ourselves is this: at what point does the combination of consistent intentional and unintentional information breaches gain critical mass such that they dispel any reasonable expectation of privacy? The ethics authorities have told us that we will be okay (from a disciplinary standpoint) so long as we make reasonable efforts to protect our client information. But today it seems like there are no efforts we can take that will protect that information. There are various safeguards we could try, but they all seem to be inadequate. We

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[42] https://blog.enterprisedna.co/is-chat-gpt-safe/#:~:text=No%2C%20Chat%20GPT%20is%20not%20confidential.&text=The%20company%27s%20FAQ%20explicitly%20states,reviewed%20by%20human%20AI%20trainers last checked July 2, 2023.

could take the safeguard of opting out of sharing our client information in the systems we use. But as we will discuss in the program, that information is likely to be shared anyway. Another safeguard is to train our people to avoid revealing client information. But personnel are going rogue all over the place. We can also read the terms of krervice for the systems we use, but the TOS admit they will have human beings review our client data in some circumstances and there's no way we can negotiate that out of the TOS.

I feel like we are sitting inside an ethical paradigm shift. Given the realities of the world, I don't think it's possible for lawyers to adhere to the current ethical standards. Being hacked is not a possibility: being hacked is an eventuality. Having your information accidentally exposed by the caretakers of the information seems to be a sure thing. The danger of rogue employees revealing client information they deem troubling is exponentially more likely today. The bottom line is that it seems like our client data is unreasonably vulnerable to exposure, no matter what steps we take to protect it.

So what do we do? In the ABA's Opinion 477 they said, "Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether…" Is that the answer? Stop using technology?

That makes no sense.

We need some guidance from the drafters. We need the people who write the opinions to tell us what "reasonable efforts" consists of today. We need to know what it means to have a "reasonable expectation of privacy" in today's world. If they don't proactively give us that guidance, then the only way any of us will learn the answers is by reading the disciplinary opinion when someone gets in trouble. I think it's in everyone's best interest to avoid that.