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AMERICAN INNS of COURT®

FROM THE PRESIDENT

The Honorable Kent A. Jordan

Keep Your Promise

This issue of *The Bencher* is dedicated to the evergreen subject of ethics. It is one of the four watchwords of the American Inns of Court, our vision for the legal profession being centered on professionalism, ethics, civility, and excellence.

The notion of the dishonest, sharp-dealing lawyer is as old as the profession itself, I'm afraid. And that is, of course, fodder for endless joking. I had a good friend tell me once that he was delighted to see that his six-year-old niece, Cassy, was headed for a career in the law. When I asked why, he related this story. It seems that Cassy and her older brother, John, were in the backyard playing with some neighbor kids when a loud argument erupted. Their mom ran into the backyard to break up the fight and try to sort things out. She turned first to John and asked what happened. He said Cassy had started bossing everyone around, so people got mad. Then the mom turned to Cassy and asked, "Okay, what's your version?" Cassy said, "Well, John started hitting Billy, and then he shoved me when I tried to stop him, and he started talking really mean to all of us and…" About that time, John, who was looking very agitated, burst out, "She's just lying, Mom!" The mom looked at the little neighbor boy, Billy, who said, "I don't know what she's talking about." Then the mom sternly looked at Cassy and asked, "Have you been telling me the truth?" Cassy paused and then delivered this straight-faced reply: "I thought you said you wanted my version."

Unfortunately, there are some attorneys who look for semantic loopholes like that, to the detriment of their reputation and the reputation of our profession. I'm glad to say, though, that the overwhelming majority of the lawyers I've dealt with in my career have been people of integrity who, as nearly as I could tell, have played straight with the facts and the law, even when the stakes in a case and the emotions of the parties were running high and the temptation to shade the truth could have been strong. They acted ethically under pressure, not because it was easy but because they had a genuine commitment to honesty, which I take to be foundational for ethically sound decision-making.

There are indeed difficult ethical puzzles that arise from time to time, since the obligations we have as lawyers and judges can be complicated and their cross-currents challenging, but so many ethical questions can be answered and problems avoided by a straightforward commitment to the kind of backyard honesty that kids learn early on in life.

So, mark me down as less cynical than Mark Twain, though I appreciate the humor of his assertion that "we never become really and genuinely our entire and honest selves until we are dead—and not then until we have been dead years and years. People ought to start dead, and they would be honest so much earlier." (Autobiographical dictation, 31 July 1906, published in *Autobiography of Mark Twain, Vol. 2* (University of California Press, 2013), and at *www.twainquotes.com*.)

And while I hope that people are honest for the sake of honesty, there are some very practical and self-interested reasons for choosing to be scrupulously honest. Perhaps more than most people, lawyers should recognize that honesty can deliver rewards. As a lawyer's stock-in-trade is the power to persuade, a reputation for integrity is a great asset. People are much more easily persuaded by people they trust. In a relatively small bar, reputations can become established quickly, but even in larger legal communities it is a fair bet that one's ethical choices will have reputational effects that last.

A great American with an eye on his reputation was George Washington. In 1745, at the age of 13, young George wrote down a series of rules to follow in his quest to become a gentleman. He was wise enough even then to recognize the importance of honesty because he told himself he should "Labor to keep alive in your breast that little spark of celestial fire called conscience" and "Do not undertake anything you cannot complete; keep your promise." (*G. Washington's Rules of Civility*, Rules no. 110 and 82 (4th ed. 2005, Goose Creek Prod.).) The story of the boy Washington declaring he could not tell a lie, as he confessed to cutting down a cherry tree, may be hokum, but we have in his own hand his serious commitment to honest, ethical behavior. And history bears out the lasting reputation of his lifetime dedication to that early admonition: "Keep your promise."

Thank you to the contributing authors who remind us here again of the high importance of our dedication to our professional codes of ethics. ◆

Kent A. Jordan

Doris Jonas Freed American Inn of Court

Since March 2020, the coronavirus pandemic has continued to change and shape nearly every facet of our lives. Members of the Doris Jonas Freed American Inn of Court in Montgomery County, Pennsylvania, have not only experienced those changes within the practice of law, but also in how they interact with one another and the community.

When the Inn's March 2020 joint session with the Nicolas Cipriani American Inn of Court, of Philadelphia, Pennsylvania, was canceled, few, if any, of the Inns' members had the ability to foresee the uncertain times that lay ahead. Since then, Inn members have become masters of video conference tools in order to connect with one another and share knowledge through many successful individual and joint Inn meetings.

As much as the Freed Inn's scholarly endeavors pivoted, so too did community outreach. The Inn has a strong tradition of service to the community and helping those in need by participating in events benefitting groups such as the Crime Victims' Center of Chester County, the Leukemia & Lymphoma Society, Philabundance, Laurel House, and the Vietnam Veterans of America.

This past year the Inn focused on helping children through Cradles to Crayons, a nonprofit organization with a mission to help children from birth through age 12 living in low-income or no-income families by providing basic necessities.

Initially, the outreach committee contacted Cradles to Crayons in spring 2020, just as shutdowns began. At that time, the organization was unable to accept any donations, but once they were up and running again, donations were desperately needed after months of the organization being closed and families being unable receive necessities. Children's winter clothing was the biggest need, with efforts focused on Cradles to Crayons' Gear Up for Winter program. Families needed winter coats, gloves, hats, snow boots, warm pajamas, and socks. The organization set up an Amazon Wish List specifically for the Freed Inn to purchase needed items. The Amazon Wish List was not only pandemic safe, but also a simple way for members to participate in the outreach program.

Although the Inn may not be physically together, its members continue to stand together in the pursuit of legal scholarship and service to our community.◆

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Kathleen M. O'Malley American Inn of Court

The Kathleen M. O'Malley American Inn of Court in Cleveland, Ohio, held its inaugural Masters of the Bench meeting in February. The meeting brought together Benchers from the Cleveland bar, local law schools, and the bench, including U.S. District Court Judges James S. Gwin and J. Philip Calabrese and U.S. Circuit Judges Kathleen M. O'Malley and Richard Linn. The Benchers unanimously agreed to abide by the tenets of the American Inns of Court charter, adopted the Inn's bylaws, and approved the slate of its first officers. The Inn will begin meetings in fall 2021. ◆

Robert W. Calvert American Inn of Court

For the 2020–2021 school year, the Robert W. Calvert American Inn of Court, in Austin, Texas, adapted its Mentoring a Student (MAS) program at Travis High School by holding virtual sessions during the pandemic. The Inn coordinated with teacher Anthony Chase to prepare a presentation and discussion topics for the criminal justice class. The school community is diverse and includes many immigrant, minority, and low-income families. The MAS program provides students an opportunity to interact with attorneys and judges in the classroom. This year's topics included immigration, police filming laws in Texas, and a session titled "Now You Are 18," which prepares teens for adulthood by providing information about topics such as voting, jury service, obtaining credit, and driving. Inn members and the students quickly adapted to the Zoom format, which made the shared time together important and valuable. The Inn is looking forward to resuming in-person programming in the fall. ◆

Q. Todd Dickinson IP American Inn of Court

Most members of the Q. Todd Dickinson IP American Inn of Court in Pittsburgh, Pennsylvania, knew that the late Q. Todd Dickinson, Esquire, once served as director of the U.S. Patent and Trademark Office (USPTO). But while attending the Inn's March 15 program, "Q. Todd Dickinson, A History and Tribute," family and friends learned that he was much more than that.

Dickinson was born in Philadelphia, Pennsylvania, and grew up in the Mount Lebanon suburb of Pittsburgh. "I was a chemistry geek in high school," he once said when asked about his undergraduate degree in chemistry from Allegheny College. Following in the footsteps of his grandfather, Dickinson earned his law degree from the University of Pittsburgh School of Law in 1977. He returned to the law school in 2006 as the inaugural lecturer for Pitt Law's Distinguished Lecturer in IP Law series.

After having worked as a patent lawyer at two Pennsylvania law firms and three major corporations, Dickinson was appointed by President Bill Clinton in 1988 to be deputy commissioner of patents and trademarks. He became acting commissioner after the departure of Commissioner Bruce Lehman and then became assistant secretary of commerce and commissioner of patents and trademarks. During his tenure, the office implemented electronic filing of patent and trademark applications and inter partes reexamination began. Dickinson signed off on and broke ground for the USPTO campus in Alexandria, Virginia.

He resigned as director on January 20, 2001, then worked for three years at a national law firm before becoming vice president and chief intellectual property counsel at General Electric. In 2008, he was selected as executive director of AIPLA, where he worked with members of Congress on several legislative initiatives, including the America Invents Act. In 2015, he returned to private practice. On May 3, 2020, Dickinson died after a serious illness.

Those who knew him remember him as an exceptionally generous man, a wonderful mentor, and one who loved, defended, and improved the patent system. One examiner said Dickinson made him proud to serve as an examiner at the USPTO. Another recalled his mantra that the USPTO is the "patent office, not the rejection office." ◆

Intellectual Property and Innovation American Inn of Court, Pauline Newman Intellectual Property American Inn of Court, and Tokyo Intellectual Property American Inn of Court

The Intellectual Property and Innovation American Inn of Court of the Northern District of New York, the Pauline Newman Intellectual Property American Inn of Court of Alexandria, Virginia, and the Tokyo Intellectual Property American Inn of Court of Tokyo, Japan, joined together virtually in April to take a comparative look at patent litigation in both Japan and the United States.

The program built on the story arc developed by the Newman Inn starring the character Guy Gantor, CEO of Giganticorp, eager to release his latest artificial intelligence-based product in time for the 2021 Summer Olympics in Japan. Sarah Jaeger, Esquire, program chair of the IP and Innovation Inn and GE's vice president of business development, GE licensing, served as Gantor's in-house counsel. She moderated the presentation and panel discussion, which focused on the differences and similarities between patent law, dispute resolution, and litigation in Japan and the United States.

Presenters and panelists included Deborah Yellin, Esquire, program chair, Newman Inn; Mami Hino, Esquire, president, Tokyo Inn; David Curren, Esquire, Tokyo Inn; John Williamson, Esquire, Newman Inn; and Rich Sterba, Newman Inn.

Robert Burns, president of the Newman Inn, delivered opening remarks, and Judge Pauline Newman of the U.S. Court of Appeals for the Federal Circuit provided closing remarks. ◆

Benjamin Franklin American Inn of Court

Members of the Benjamin Franklin American Inn of Court in Philadelphia, Pennsylvania, were happy to resume their annual Judges Program in March after being forced to cancel last year's program due to the pandemic. Judge Richard Linn of the U.S. Court of Appeals for the Federal Circuit, Judge Noel L. Hillman of the U.S. District Court for the District of New Jersey, and Judge Mitchell S. Goldberg of the U.S. District Court for the Eastern District of Pennsylvania heard arguments by Yeshesvini Chandar, a third-year student at Drexel Law School, and Bianca Basilone, a third-year student at Villanova Law School. The arguments centered on the case of *Minerva Surgical, Inc. v. Hologic, Inc.* This year's program was set up similarly to prior versions in years past except held virtually on Zoom.

In the *Minerva* case, the U.S. Court of Appeals for the Federal Circuit (CAFC) affirmed a decision of the U.S. District Court for the District of Delaware holding that the doctrine of assignor estoppel did not bar an assignor from relying on a CAFC decision affirming a Patent Trial and Appeal Board (PTAB) decision invalidating asserted claims in an inter partes review (IPR) proceeding. With respect to a second continuation patent-in-suit, the CAFC affirmed the district court's summary judgment that assignor estoppel barred the assignor from asserting invalidity of the assigned second patent in district court. Certiorari was granted by the Supreme Court of the United States on January 8, 2021, on Minerva's petition.

The petition essentially called into question the continued vitality of the doctrine of assignor estoppel in the courts. Specifically, the petition presented the question: "Whether a defendant in a patent infringement action who assigned the patent, or is in privity with an assignor of the patent, may have a defense of invalidity heard on the merits." Minerva's petition argued that the doctrine should be either abolished in its entirety, or, in the alternative, that it should at least be limited so not to apply to assignor/defendants such as Minerva who are being sued not on the patent originally assigned but rather on a continuation fashioned entirely by Hologic from applications containing the same disclosure as the original patent.

These aspects of the case were addressed in the students' arguments. The judges played the role of Supreme Court justices, hearing arguments on the merits. Each student had an opportunity to argue their side of the case for 15–20 minutes. Following each argument, the judges peppered the student with questions. At the close of the arguments, the judges commented on the student's performance.

Following the arguments, the judges responded to general questions from Inn members. The judges commented on how they had been handling proceedings in their respective courtrooms during the pandemic. One Inn member asked whether they anticipate that the use of video conferencing technology such as Zoom will continue to be used when the courts fully open again. At least one judge voiced a great interest in having everyone return to the courtroom and using video conferencing technology sparingly as a last resort. Another judge said that on Zoom an expert witness can display his or her many diplomas and awards in the background, which may give that witness an unfair advantage. In contrast, such a display would be impossible in a courtroom.

The Inn appreciated the judges' time. The Inn and the law students benefitted greatly from the experience of hearing the judges' views on legal issues and their perspectives on practice, including virtual hearings and trials. The Inn hopes to have the annual judges program in person next year. ◆

Inn members and their guests at the Central Texas Food Bank.

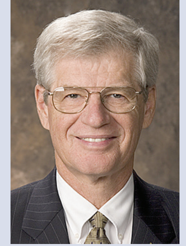
Barbara Jordan American Inn of Court

As one of its regularly scheduled public service projects, members of the Barbara Jordan American Inn of Court, in Austin, Texas, donned their masks and volunteered to help process donations and assemble family distribution boxes at the Central Texas Food Bank in Austin in January.

The Central Texas Food Bank, established in 1982, serves 21 counties across Central Texas, helping 46,000 people in need each week. In February, the food bank distributed 4.7 million pounds of food and served more than 97,000 households—more than 12,600 of which turned to the Central Texas Food Bank for help for the first time.

During their volunteer event, members of the Barbara Jordan Inn packed 387 boxes equaling 5,805 pounds of food, which provided 3,870 meals for distribution to community members in need. The team-building effort included team tasks of box assembly, pallet unloading, packing boxes with healthy food, and sealing and storing the boxes. ◆

Judge John M. Scheb American Inn of Court



W. Russell Snyder, Esq.

Attorney W. Russell Snyder, Esquire, was recently awarded the Judge John M. Scheb Professionalism Award. Snyder is a past president of the Judge John M. Scheb American Inn of Court in Sarasota, Florida.

The award is given annually to a Sarasota County attorney who exemplifies professionalism in his or her day-to-day practice. The recipient is selected by secret ballot of the Master of the Bench members of the Inn.

“Russ Snyder is a longtime member of our Inn and has exemplified professionalism and leadership throughout his distinguished legal career. He is a true role model for our legal community,” said Inn President Derek Byrd, Esquire.

After earning a bachelor’s degree from Bradley University in Peoria, Illinois, in 1967, Snyder served in the United States Air Force for four years where he was awarded an Air Force Commendation Medal in 1969. After leaving the armed forces, Snyder attended law school at the University of Florida (UF) where he was executive editor of the *UF Law Review* before graduating with his J.D. with honors in 1973. Since then, Snyder has been a litigator in the Venice, Florida, area for nearly 50 years, including as an AV-rated attorney by Martindale-Hubbell since 1989. ◆

James L. Petigru American Inn of Court

In March, members of the James L. Petigru American Inn of Court in Charleston, South Carolina, participated in a wheelchair ramp build in the Charleston community. The Inn partners each year with Operation Home, a nonprofit that provides critical-need repairs for families in the tri-county area.

This time the Inn replaced a wheelchair ramp for an older woman who was referred to Operation Home. The woman had been unable to get out of her home unassisted. The members of the Inn were glad to help the woman regain some of her independence. ◆

Inn executive committee members, left to right, Nickisha Woodward, Esq., Inn historian; Michael Jordan, Esq.; Ryan Neville, Esq., president; Brian L. Quisenberry, Esq.; J. Scott Bischoff II, Esq.; and R. Britt Kelly, Esq., president elect.

Burta Rhoads Raborn Family Law American Inn of Court

The Burta Rhoads Raborn Family Law American Inn of Court in Houston, Texas, is proud to announce that it reached platinum level for 2019–2020 in the American Inns of Court Achieving Excellence program, which recognizes outstanding efforts in effective administration, communications, program development, mentoring, and community outreach.

As 2021 flies by, the Inn is moving forward with its community service projects: a clothing drive and toiletry drive. The clothing drive will gather new and gently used women's work attire as part of Dress for Success Houston. Women have been particularly affected by job loss during the pandemic, and the Inn elected to donate items to help alleviate the need for work-appropriate clothing for women both for interviews and jobs. The clothing will be donated to Star of Hope, a community organization dedicated to meeting the needs of men, women, and children experiencing homelessness. The toiletry donations will also go to Star of Hope as part of the Inn's We Care: Toiletry service project, which was started in 2019. Donations include soaps, shampoos, conditioners, hand wipes, sanitizer, and mouthwash. We often take these items for granted, but they are not easy to access for all Americans. To date, the Inn has donated nearly 750 pounds of toiletry items.

The Inn's February presentation was canceled due to the severe Texas winter storm. Programming resumed in March with an outstanding and informative discussion on the topic of misogyny and its effect on women both in the legal community and in society. Often misdefined as sexual harassment, misogyny is more than that. It is a hatred of, contempt for, or prejudice against women and/or girls. The program discussed existing laws and cultural norms that unfairly affect women, including stereotypes and societal expectations that impact the outcome of family law cases. The program concluded by highlighting many Texas women who excelled in their careers, including the Inn's namesake, Burta Rhoads Raborn. ◆

James Kent American Inn of Court

The James Kent American Inn of Court in Norfolk, Virginia, traces its existence back to 1994, but 2020–2021 has been one of its most memorable years. In spite of the pandemic, Inn members banded together and ensured that the Inn thrived, engaged with its members, and offered much-needed fellowship and robust programming.

Soon after the pandemic began, Inn leaders surveyed members about how to conduct Inn business going forward. The leadership team then revamped the Inn's programming format. They assigned Inn members, including professors and law students, to nine small groups, designated an Inn executive committee member to lead each group, and suggested program topics and meeting ideas for the months to come. Each small group brainstormed and proposed topics for a continuing legal education symposium. After a vote to select the best topics, four small groups were chosen to prepare presentations and gather materials for the symposium.

In March 2021, the Inn broadcast a live four-hour symposium, attended by 75 lawyers, local and federal judges, professors, and law students, including members of a sister Inn, the I'Anson-Hoffman American Inn of Court of Norfolk and Williamsburg, Virginia. The four symposium topics were how to obtain and admit social media evidence, implications of the legalization of marijuana in Virginia, takeaways from practicing law in a pandemic, and how to deal with difficult lawyers and judges and when to report misconduct to the state bar. The guest presenters, speakers, and panelists included local and federal judges, esteemed members of the local bar, law professors and students, and legal vendors and service providers. Attendee feedback was favorable. Although the virtual symposium was a success, the Inn greatly anticipates an outdoor, in-person meeting to close out the Inn year. ◆

C.H. Ferguson-M.E. White American Inn Court, Bruce R. Jacobs-Chris W. Altenbernd Criminal Appellate American Inn of Court, and Stann Givens Family Law American Inn of Court

In honor of Black History Month, three Tampa, Florida, Inns joined forces with the Greater Tampa Jack and Jill Associate Group to collect over 700 books for the students of Edison Elementary, ensuring every child took home at least two books.

Due to the pandemic, the C.H. Ferguson-M.E. White American Inn Court, the Bruce R. Jacobs-Chris W. Altenbernd Criminal Appellate American Inn of Court, and the Stann Givens Family Law American Inn of Court were unable to hold their annual joint holiday celebration and toy drive. Undeterred, the Inns remained committed to continuing their tradition of community service, particularly to Tampa's children.

While volunteering for a separate Hillsborough County Public Schools' activity for Black History Month, Ferguson-White Inn member Jon Philipson, Esquire, learned about Jack and Jill's planned book drive and suggested to pupillage group leader U.S. Magistrate Judge Julie Sneed an online book drive to support Jack and Jill's efforts.

Sneed and Ferguson-White Inn President Judge Samantha Ward quickly solicited the support of other Inns. Working as a team, the three Inns developed a seamless system to achieve an amazing result for the Tampa Bay community. Taking the list of books provided by the school, Jacobs-Altenbernd President Chelsea Simms, Esquire, created an Amazon registry to facilitate book purchases. Givens Inn President Eric Boles, Esquire, promoted the book drive on social media to generate additional interest. The Ferguson-White Inn collected and organized the books.

After initially collecting 262 books, the three Inns intensified their efforts, more than doubling that number two weeks later. Collecting books from attorneys and friends beyond the Tampa Bay community, these Inns made the Black History Month Book Drive for Edison Elementary a national effort. ◆

Villanova Law J. Willard O'Brien American Inn of Court

The Villanova Law J. Willard O'Brien American Inn of Court in Philadelphia and Villanova, Pennsylvania, like other Inns around the country, transitioned its 2020–2021 schedule to virtual meetings due to the COVID-19 pandemic. Despite the unconventional format, the Inn successfully adapted to provide its members a fulfilling year.

The Inn tailored its meeting discussions to timely topics prevalent in the nation over the past year. In October, the Inn presented "#We the People…Social Media's Impact Upon the First Amendment," which addressed the development of defamation law through an analysis of landmark First Amendment cases and the influence of social media.

The Inn's November presentation, "Defund the Police: Reform or Revolution?" discussed police reform efforts in the wake of the nationwide protests against police brutality. Camden County, New Jersey, Prosecutor Warren W. Faulk, Esquire; Mayor Jacob Frey, Esquire, of Minneapolis, Minnesota; District Attorney Lawrence S. Krasner, Esquire, of Philadelphia; and Chief J. Scott Thomson of the Camden Police Department provided their unique perspective on policing in America and the balance between social justice and police reform efforts with effective policing.

The Inn's spring meetings addressed the impact of COVID-19 on the legal profession. In "Effective Advocacy, Jury Selection, and Jury Trials During the COVID-19 Pandemic," Inn members discussed court policies and the administration of jury trials in the pandemic era. "COVID-19 Economics" considered the pandemic's impact on employment law. In "States of Confusion—The Admissibility of Expert Opinions," members considered the different standards for admitting expert testimony at trial. In April, the Inn was scheduled to join the Temple American Inn of Court, of Philadelphia, for a point/counterpoint discussion of "The Way We Were and What Will Remain After COVID-19." ◆

Garland R. Walker American Inn of Court

Despite the pandemic, the Garland R. Walker American Inn of Court in Houston, Texas, continued its popular "Chambers Chat" program in 2021. The program provides lawyer and student members valuable opportunities to talk directly with Houston judges in an informal setting. In previous years, judges met with small groups of Inn members in chambers, but for 2021 the Inn shifted the chats to a remote format. This still allowed members to introduce themselves to the judges, ask questions, and hear news and advice from the judges about how they run their courtrooms.

Participating judges this year have included Judge Kristen Brauchle Hawkins, Harris County 11th District Court; Judge Donna Roth, Harris County 295th District Court; and U.S. District Judge Simeon Timothy Lake III, Southern District of Texas. These members of the Houston judiciary addressed a wide variety of topics in the chats, including their diverse paths to the bench, tips for effective oral advocacy via Zoom, the status of socially distanced jury trials in Harris County, and guidance on persuasive motion practice.

The program remains a hit with local lawyers. "Chambers Chats provide a rare opportunity to meet and learn from the judges who we practice before, in a small-group setting," Houston lawyer David Nachtigall, Esquire, said.

Houston area law school students have also benefitted from the program. Shruti Modi, a three-year student at South Texas College of Law, said she especially appreciated the opportunity as a first-generation American. "Regardless of whether someone is a student, how many years someone has been in the field, what field they may practice, or even how old they may be," she said, "each of us leaves these Chambers Chats with new and thoughtful insight."

U.S. Magistrate Judge Christina Bryan organizes the Chamber Chats. "In the small and informal setting of a Chamber Chat, participants learn things they won't read about in a judge's court bio or procedure manual," she said. "Participants may hear stories from the judge's background to which they can relate. They may hear advice that will help guide them in their practice or career. There is no substitute for the extra little bit of comfort a practitioner may feel when appearing before a judge he or she has the opportunity to speak with in a relaxed setting."

In February, a pupillage group of the Inn presented a Zoom session called "Anatomy of a Supreme Court Case." The program focused on the procedural steps and strategic considerations that go into taking a case to the Supreme Court of the United States. To keep the focus on procedure and strategy, the program did not discuss substantive law. Rather, after a brief live introduction to the program, a series of recorded vignettes was played that featured pupillage group members portraying attorneys, clerks, and justices as they worked through the process of bringing a case to the Supreme Court.

The members portraying attorneys discussed their strategic considerations in scenes that shifted between counsel for the petitioner and respondent. As the case moved along, those portraying clerks and justices discussed their considerations in granting review. After the vignettes, Inn members were treated to a live moderated panel discussion featuring two of the Inn's members, Raffi Melkonian, Esquire, and Roger B. Greenberg, Esquire, who have argued cases at the Supreme Court. The panelists shared their experiences before the Supreme Court, comparing them to the vignette scenes. ◆

ETHICS COLUMN

John P. Ratnaswamy, Esquire

Virtual Practice

At the World Science Fiction convention in Chicago, Illinois, in 2000, during Q&A, I suggested to a wellknown sci-fi author and professional futurist that I believed that, due to the growth of the internet, over time a lot of people would stop having city center offices or any "office office" at all and that they simply would work over the internet from home. The sci-fi author/futurist mocked me, comparing my prognostication to past predictions that someday everyone would have a "gyrocopter."

Yet, here we are, with significant numbers of lawyers still having an "office office" but working most, if not all, of the time from home, while many other lawyers have only a home office, at least for the near future but perhaps also going forward.

On March 10, 2021, in recognition of the growing "virtual practice" phenomenon, the American Bar Association's (ABA's) Standing Committee on Ethics and Professional Responsibility (SCEPR) issued its Formal Opinion 498: "Virtual Practice." The Opinion uses the very flexible definition for virtual practice of "technologically enabled law practice beyond the traditional brick and mortar law firm," noting that virtual practice may occur regardless of whether the lawyer has a physical office.

The March 2021 SCEPR Opinion mostly discusses legal ethics issues relating to competence, diligence, client communication, and confidentiality, especially in relation to remote access to information technology systems and cybersecurity. I addressed cybersecurity ethics issues in my column in the November/December 2020 issue of *The Bencher*. In that column I cited, among other things, the ABA's Model Rules of Professional Conduct (MRPC), the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility's Formal Opinion 202030 (April 10, 2020) ("Ethical Obligations for Lawyers Working Remotely"), and various other opinions and resources. One particular concern noted by the March 2021 SCEPR Opinion is that team members working remotely may be more likely to use their own electronic devices, which may or may not comply with firm security protocols.

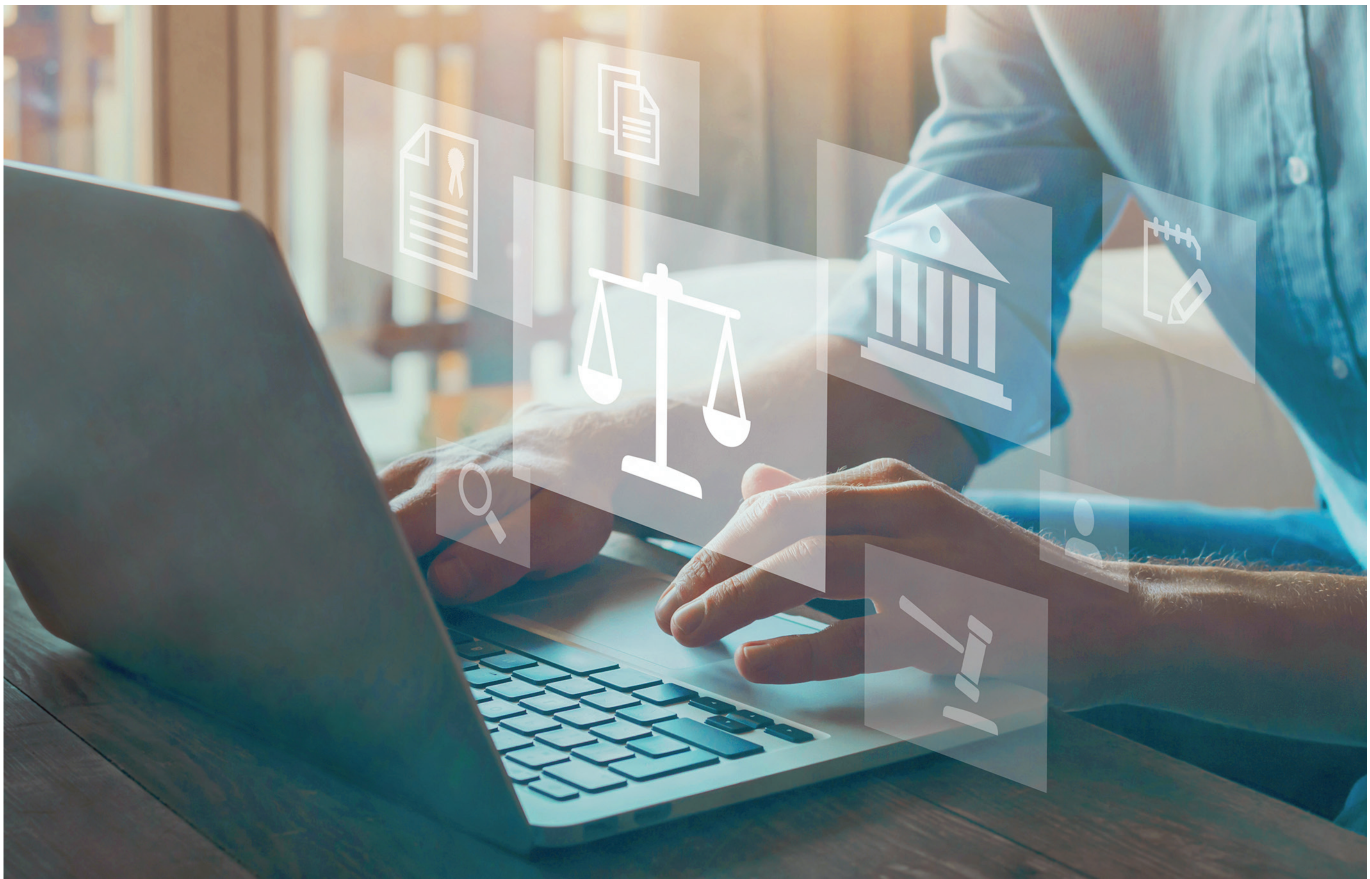
The March 2021 Opinion also addresses a firm's (including law departments) or lawyer's duty of supervision of subordinate lawyers and of non-lawyer assistants in the virtual practice context. The Opinion states in part that lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the applicable ethics rules and that supervisory lawyers have a duty to make reasonable efforts to ensure that subordinates comply with the applicable rules, citing ABA MRPC 5.1 and 5.3 and prior ABA SCEPR opinions.

Under the principles discussed by the March 2021 Opinion, lawyers with managerial or supervisory roles would need to consider how a virtual practice setting affects policies and procedures. For example, when a lawyer and subordinate, for extended periods or indefinitely, are not working in the same office, the Opinion recommends consideration of how the lawyer's interaction and communication with the subordinate should be structured to ensure completion of work in a timely, competent, and secure manner and to discern the health and wellness of team members (both for their own sake and in relation to meeting obligations to clients).

The March 2021 Opinion also notes other potential virtual practice issues, including but not limited to the potential complexity of accounting rules if more than one state is involved or establishing how a lawyer may be served with legal papers. It also includes things as simple as posting a sign that a lawyer is not available, or is available by appointment only, at an "office office" and covering who is going to pick up and distribute the mail.

Finally, note that the March 2021 Opinion mentions but does not address the unauthorized practice of law issues that might arise under state law and ABA MRPC 5.5. *See, e.g.*, ABA SCEPR Formal Opinion 495 "Lawyers Working Remotely" (Dec. 16, 2020). ◆

John Ratnaswamy is the founder of The Law Office of John Ratnaswamy, LLC, in Chicago, Illinois. He also serves as an adjunct professor of legal ethics at the Northwestern University School of Law. He is a former member of the American Bar Association's (ABA's) Standing Committee on Ethics and Professional Responsibility and is the current chair of the ABA Solo, Small Firm, and General Practice Division's Committee on Ethics and Professional Responsibility. This column should not be understood to represent the views of any of those entities or Ratnaswamy's or the firm's current or former clients.



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The New Normal: Technology, Law, and Ethics in an Increasingly Connected But Remote World

By Andrew J. Throckmorton, Esquire

Refreshing our recollection on the relationship between attorney ethical duties and the accelerated integration of technology into legal practice that we are all witnessing is more important than ever. To date, 39 states have already adopted an ethical rule establishing an attorney duty of technology competency consistent with Comment 8 to American Bar Association (ABA) Model Rule of Professional Conduct 1.1. Artificial intelligence (AI) is driving innovation in key legal functions such as electronic discovery, contract review, and legal analytics. In the past year, the mass remoting of the legal industry in response to the COVID-19 pandemic further accelerated trends in legal technology innovation and adoption within law firms. Understanding our ethical duties considering these trends in legal technology and the consensus around an attorney's duty of technology competency are particularly timely to consider.

Ethical Duties with Legal Technology

Duty of Competency

Comment 8 to ABA Model Rule 1.1 was adopted in 2012 establishing an attorney duty of technology competency to address the growing integration of technology into legal practice. ABA Model Rule 1.1 provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment 8 to Rule 1.1 further provides

that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of…the benefits and risks associated with relevant technology[.]" Almost a decade after the duty of technology competency was adopted into the model rule, 39 states have formally adopted an attorney duty of technology competency. A working knowledge of the capabilities and applications of technologies like AI-powered analytics or electronic discovery tools is important to comply with this ethical duty.

Duty to Communicate

Consulting with your clients about the use of technology on their matters is necessary to comply with the duty to communicate. Under ABA Model Rule 1.4(a)(1) lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished[.]" Consider technology tools such as cloud storage, third-party vendor databases, or AI-powered analytics or technology-assisted review (TAR) software. Lawyers are increasingly turning to these types of technologies to augment work on client matters. Failure to adequately inform and consult with the client about technology used during a representation and obtain necessary approvals can violate the duty to communicate.

Duty of Confidentiality

Technologies such as cloud storage, remote environments, or AI-powered analytics tools are regularly used to work on client matters, and it is important to ensure that the use of these tools protects the confidentiality of client data. ABA Model Rule 1.6(a) requires that "[a] lawyer…not reveal information relating to the representation of a client unless the client gives informed consent[.]" Depending on the matter, highly sensitive or proprietary client data may be involved that the client is not comfortable transmitting to a third party for storage or processing. Complying with this part of the rule means communicating with the client and obtaining approval under ABA Model Rule 1.4 on the use of a third-party vendor and the type of client information handled by the vendor.

Disclosure of client data is another risk when using technology tools that transmit or store data electronically, particularly when a third party's technology tools are used. ABA Model Rule 1.6(c) requires that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Third party vendors routinely work with lawyers to store or process client data. Once client approval is obtained to use a third-party, such as a vendor,

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make sure to communicate and confirm appropriate confidentiality safeguards with the vendor. This can include limiting access to specific users, segregating data to a particular database, or monitoring access to maintain confidentiality.

Duty to Supervise

Technology tools like AI-powered software automate specific legal tasks, and it is crucial to carefully review work product produced using technology tools for accuracy and completeness. ABA Model Rule 5.3 places a responsibility on lawyers to supervise non-lawyer assistance, which includes legal technology tools such as AI-powered software. The language of ABA Model Rule 5.3 was updated in 2012 from non-lawyer assistants to non-lawyer assistance to reflect the growing integration of technology into legal practice.

As an example, TAR uses AI to replicate the coding of human attorneys on documents, while contract review software identifies potentially missing clauses in agreements. Supervision of a tool such as TAR can take the form of human attorney review of finalized production sets of documents for privileged communications or confidential information. Using quality control teams of human attorneys performing routine review of documents flagged for privilege or confidential data is another good step to take to avoid an inadvertent disclosure. Supervising contract review software similarly requires a human attorney to review the output for accuracy and completeness.

Managing Technology Risks

Disclosure of Client Data

Inadvertent disclosure of client data to third parties is a risk with the use of technology to perform legal tasks and process sensitive client data such as

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privileged communications. This is worth specific mention because attorneys on both sides of a disclosure have ethical obligations while it is determined whether the disclosure was inadvertent or whether it acts as a waiver.

A lawyer handling client data is subject to the duty of confidentiality under ABA Model Rule 1.6 to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of client information. On the other hand, ABA Model Rule 4.4(b) requires that lawyers who receive a disclosure and know, or reasonably should know, that the document was sent inadvertently should promptly notify the sender. Comments 2 and 3 to Model Rule 4.4 include the statement that a lawyer who reads or continues to read the document may be subject to court-imposed sanctions, including disqualification and evidence preclusion. Given these duties under the model rules, lawyers on each side of a disclosure must handle the disclosure in a way that preserves confidentiality while the issue of whether a disclosure acts as a waiver is resolved by the parties and the court.

Mitigating Inadvertent Disclosure

A disclosure is not always a waiver if specific steps are taken. Federal Rule of Evidence 502(b) provides that a disclosure does not operate as a waiver in a federal or state proceeding if the disclosure is inadvertent and the holder of the privilege takes reasonable steps to prevent disclosure and promptly acts to rectify the error. An attorney receiving a disclosure must take specific steps under Federal Rule of Civil Procedure 26(b)(5) once made aware of the production of privileged information: (1) promptly return, sequester, or destroy the information and any copies; (2) not use or disclose the information until the claim is resolved; and (3) take reasonable steps to retrieve the information already disclosed before being notified. The producing party is required to preserve this information while the issue is submitted to the court to resolve the disclosure.

Taking proactive steps early to adequately supervise the work product created using AI-powered technology tools such as TAR will ensure that ethical duties such as the duty of confidentiality or the duty to supervise are not violated. Similarly, parties receiving discovery can avoid ethical issues by taking the steps outlined in Federal Rule of Civil Procedure 26(b)(5) to properly handle disputed productions. Entering into a clawback agreement with opposing counsel is another proactive step to take to minimize the risk of an inadvertent disclosure. A clawback provision limits or reverses a production for specified reasons. Under Federal Rule of Evidence 502(d) a clawback provision can be included in a protective order.

Ethically Connecting in a Remote World

The world is paradoxically increasing in its connectedness and remoteness. Legal work is performed more and more in decentralized ways because technology tools make it simple to transmit, process, and store client data. Knowledge of technologies such as AI that are used to augment legal work will both help fulfill our ethical duties to clients and prepare us to provide crucial guidance as clients seek to navigate complex decisions dealing with these same technologies. As counselors to decision-makers, lawyers have an important role in guiding the implementation of AI and similar technologies. Issues such as consumer data privacy or bias in AI decision-making are arising due to greater use of automation technology, which can expose clients to legal liabilities such as discrimination claims.

Wise legal guidance from lawyers will protect clients from these emerging liabilities as regulations are developed to address the impacts of greater technology integration and automation on society. As we consider our ethical duties to clients in our use of technology, we are also becoming more knowledgeable counselors on the complex technologies our clients are seeking to understand and use wisely in our increasingly connected world. ◆

AUTHOR'S NOTE: *Credit is due to Tom Wilkinson, Esquire, of Cozen O'Connor, a Master of the Bench in the Villanova Law J. Willard O'Brien American Inn of Court, and an expert on legal ethics, for his help understanding the nuanced issues arising from inadvertent disclosure.*

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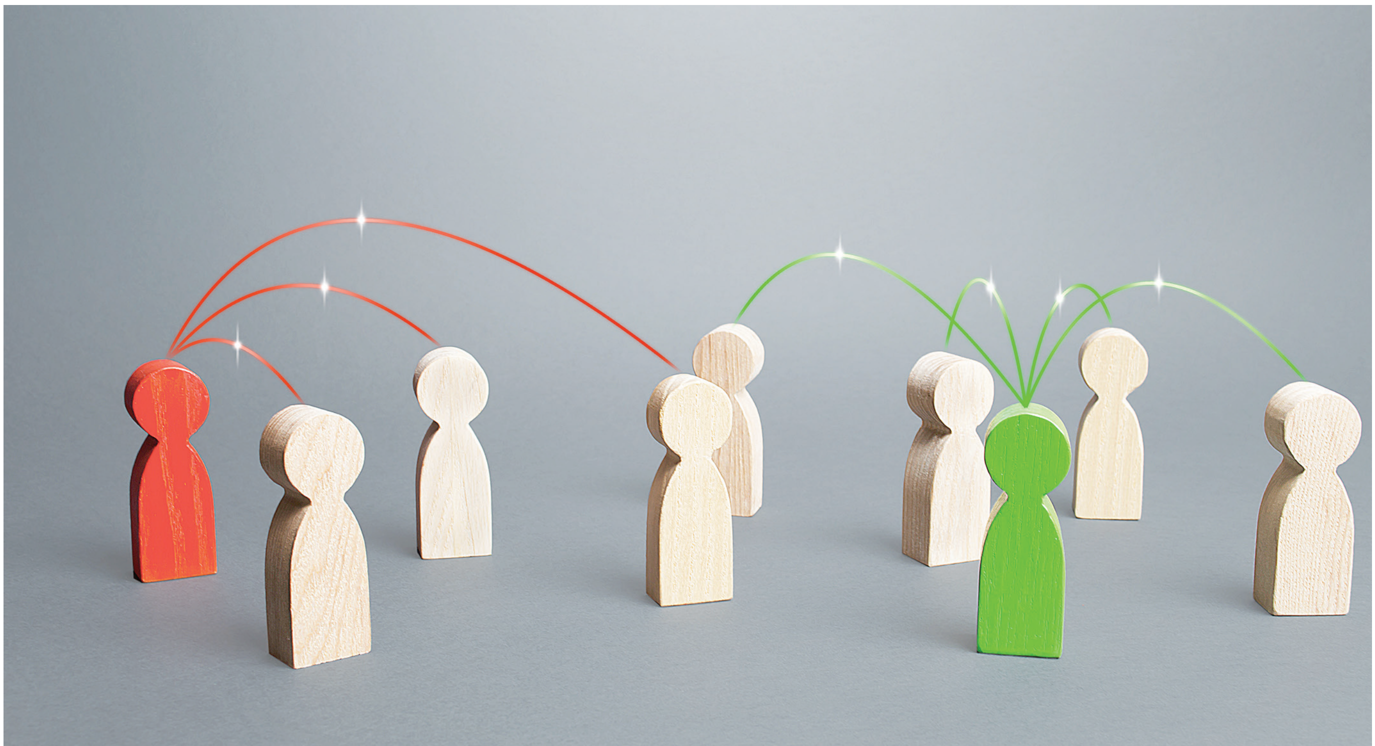

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When a Non-Conflict Really Is a Conflict: A Beginner's Guide to Not Losing a Client

By Jared M. Moser, Esquire

Everything a lawyer does in practice is governed by rules of ethics, and we, as members of the American Inns of Court, are particularly mindful of the Inns' vision: "A legal profession and judiciary dedicated to professionalism, ethics, civility, and excellence." Whether looking to the American Bar Association's Model Rules of Professional Conduct or the rules of professional conduct for your particular jurisdiction, we are guided by rules generally focused on the attorney-client relationship, duties as counselor and advocate, transactions with persons other than our clients, responsibilities of a law firm and among the various levels of the hierarchy within, public service, advertising, and general integrity of our profession. What happens, though, when an action or opinion is not inconsistent with the rules but still gives pause? Can that create a conflict? Yes, and you should be aware of the potential pitfalls.

Model Rules 1.7, 1.8, 1.9, 1.10, and 1.11—as well as many local counterparts, typically identified by the same numbering—are the primary rules addressing conflicts of interest in the legal profession. Rule 1.7 specifically addresses conflicts of interest relative to current clients and restricts a lawyer from representing "a client if the representation involves a concurrent conflict of interest," which the rule defines as a situation in which "the representation of one client will be directly adverse to another client" or when "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." Model Rules of Prof'l Conduct R. 1.7(a)(1), (2).

Even with a concurrent conflict, a lawyer may still represent a client if the ability to competently and diligently represent each affected client is not compromised, the representation is not otherwise

unlawful and does not involve directly adverse claims by one client against the other, and each client gives informed written consent. Model Rules of Prof'l Conduct R. 1.7(b)(1)–(4).

Rule 1.8 outlines a number of topic-specific conflicts concerning (a) business transactions between client and counsel, (b) use of client information against the client, (c) solicitation or receipt of gifts from a client, (d) literary or media rights for the client's story (sorry, Johnny Cochran), (e) financial assistance to a client, (f) payment of compensation to the lawyer by one other than the client, (g) joint settlements on behalf of multiple clients, (h) resolution of malpractice liability, (i) a lawyer's proprietary interest in the client's cause of action or subject matter of the litigation, (j) sexual relations with a client, and (k) imputation of the foregoing conflicts to every member of the same firm. Model Rules of Prof'l Conduct R. 1.8(a)–(k).

Rule 1.9 deals with conflicts with and duties to former clients. Model Rules of Prof'l Conduct R. 1.9(a)–(c). Rule 1.9 primarily seeks to avoid representation adverse to a former client's interest in the same or a substantially related proceeding. *See id.* In my own experience, this rule can be tricky because there is a split of authority around the country regarding whether an attorney who helps form a business entity represents the entity or the founding members, owners, officers, or directors who retain the lawyer for purposes of forming the business. *Compare In re Brownstein*, 602 P.2d 655, 657 (Or. 1979) (suggesting the individuals were clients), *Detter v. Schreiber*, 610 N.W.2d 13, 17 (Neb. 2000) (same), and *Matter of Nulle*, 620 P.2d 214, 217 (Ariz. 1980) (en banc) (same), with *Waid v. Eighth Judicial Dist. Court*, 121 Nev. 605, 611, 119 P.3d 1219 (2005) ("a lawyer representing a corporate entity represents only the entity, not its officers, directors, or shareholders … "), and *Jesse v. Danforth*, 169 Wis.2d 229, 485 N.W.2d 63 (1992) (same). Rule 1.10 addresses imputation of one attorney's conflict to others in that attorney's firm, and Rule 1.11 governs "special conflicts of interest for former and current government officers and employees."

With all of these rules governing conflicts, that has to be exhaustive, right? Wrong. To understand how much more broadly the concept of conflicts of interest extends, one can first look to the definition of "legal ethics" in *Black's Law Dictionary*: "The standards of professional conduct applicable to members of the legal profession within a given jurisdiction." Legal Ethics, *Black's Law Dictionary* (11th ed. 2019). More broadly, the term "ethics" is defined as "a system of moral tenets or principles; the collective doctrines relating to the ideals of human conduct and character." Ethics, *Black's Law Dictionary* (11th ed. 2019). More specifically, the term "conflict of interest" is defined as "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties." Conflict of Interest, *Black's Law Dictionary* (11th ed. 2019). The takeaways here may be summarized as follows: As part of our jobs as attorneys, we must comply with the standards of conduct and the moral tenets or principles of our industry, which includes avoidance of taking seemingly incompatible positions in furtherance of our own interests when inconsistent with our fiduciary obligations to our clients.

By way of example, I am aware of a problem that arose for an associate at a firm that had significant clients that may not have agreed with the social media content the associate was quick to post. Notably, the clients' interests could have been perceived to be inharmonious with the messages contained on the associate's social media profile, creating a conflict of interest not necessarily proscribed by the Model Rules or rules of the jurisdiction but certainly prohibited by a strict reading of the general definitions of "conflict of interest," "ethics," and "legal ethics." As such, an attorney may be conflicted in trying to represent an equal rights coalition while simultaneously speaking out against marriage equality. Or, it may be difficult to represent immigrants and insist on the humane treatment of immigrant children while advocating for continued operation of detention centers along the U.S.-Mexico border that place children in cages.

I'm not making these examples to present my own opinions. Rather, I provide these scenarios for consideration, to reiterate the moral of this article and a general principle that seems to be ignored far too often in society today: We are entitled to our own opinions, even strong opinions, whether as an attorney or not. We are entitled to voice our opinions should we so choose. However, we are not free from the consequences of our speech, whether verbal, written, virtual, or otherwise. As such, remember the definitions above, and take this one measure to avoid a potential ethical violation: Do not express your personal views in a manner that is inconsistent with your fiduciary obligations to your or your firm's clients. ◆

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Everyday Ethics—Building a Professional Reputation

By the Robert M. Spire American Inn of Court

The "Oracle of Omaha," Warren Buffett, once said, "It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently." A lawyer's reputation is often the key to his or her success (or failure), and it is built one interaction at a time. The Robert M. Spire American Inn of Court in Omaha, Nebraska, has been meeting virtually this past year. As part of our social hour prior to our programs, the Master of the Bench members have been sharing stories and suggestions for building a strong, positive, professional reputation. Here are the "bricks" for building a reputation as a strong, ethical, professional attorney.

Communication

Communication is one of the cornerstones of the legal profession. As a counselor, or an advocate, a lawyer communicates constantly. How you speak is sometimes as important as what you say. As one of our Master of the Bench members explained, "Mean what you say, but don't say it meanly." It is possible to be a zealous advocate on behalf of your client without resorting to personal attacks. The fight is never personal; don't make it so. The Comment to Rule of Professional Responsibility § 3-503.5 advises: "Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of clients." Getting to know your fellow attorneys is a critical part of building your professional reputation. It is much easier to disagree agreeably with someone you know. Participation in the American Inns of Court is a key

way to interact with other legal professionals in your community, and Inns colleagues are often the best way to build connections with other attorneys outside the Inns.

Sometimes what is not said is as important as what is. Prior to saying anything, stop and ask: "Is it necessary? Is it true? Does it need to be said now?" This pause for thought is critically important in this age of email and social media. Remember that there is such a thing as too much convenience. Before sending an email or posting something on a social media platform, pick up the phone or arrange a meeting in person.

The Virtual World

Professional courtesy extends to the virtual world of communication as well. It is easy to forget that virtual communication can last forever; you do not want your email to go viral for all the wrong reasons. One of our judicial leaders reminded all of us that the email or social media post sent in anger is normally the one attached to a motion sent to the court. If a communication is not one that would present your case, or you, in the best possible light don't send or post it.

Professional Courtesy

Professional courtesy is not optional. Assume opposing counsel has the best of intentions. In addition, remember that opposing counsel also has a client and an obligation of zealous advocacy on the client's behalf. The practice of law has a very large element of reciprocity, and the "war stories" shared this year often included learning, positively or negatively, that "what comes around goes around." As much as possible, agree to reasonable requests for extensions in discovery if you are a litigator, or requests for changes in wording in a contract that are not important to your client if you are a transactional lawyer.

Even if a request is not one to which you can necessarily agree, discuss it in a respectful way and see if there is a compromise that allows both parties to protect their clients' best interests. Respond with curiosity and courtesy, rather than a dismissive attitude, and see where it leads. At some point in a case, you'll need an extension or need to stand firm on some point of negotiation. An attorney who has been agreeable and flexible has a better chance of receiving courtesy in return.

Professional Courtesy Is a Strength, Not a Weakness

However, remember professional courtesy does not mean that an attorney needs to be a doormat. It is possible to maintain a strong position in a courteous way. This can sometimes be done with an explanation (but never an apology). If the other party becomes angry, there is no reason to respond in kind. If nothing else, a "let's discuss this tomorrow" is often effective. To paraphrase Eleanor Roosevelt, no one can make you feel bad without your consent. This is true of anger as well. Counting to 10 before speaking is a classic for a reason.

Remember Your Manners

Basic courtesy to everyone is also a critical part of building a strong reputation. Thank the bailiff who set your hearing on the judge's calendar. Learn and use the names of court personnel. Maintaining good relationships with everyone is not only one of the keys to building a strong reputation, it is also crucial to professional success. Many clients believe they want "a shark" and expect their attorneys to be "aggressive," by which they mean rude. Explain to clients the benefits of professional courtesy to the success of their case. Explain also the obligations of the Rules of Professional Conduct, which state: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person…." *See* Neb. Rule § 3-504.4, "Respect for rights of third persons."

Building relationships and maintaining a reputation for professionalism and ethics is an ongoing project created interaction by interaction.

The "good old days" of attorneys fighting it out in the courtroom and then going out for a meal together aren't "the old days." Building relationships and maintaining a reputation for professionalism and ethics is an ongoing project created interaction by interaction. It is also deceptively simple: Be polite, respect the positions of others, say "please" and "thank you," and don't lie.

In the blink of an eye, you will have spent a lifetime in the law. What stories will you share along the way? What stories will others share about you? If you ensure your interactions with others are respectful ones, and you maintain your connection with the American Inns of Court and its guiding principles of professionalism, ethics, civility, and excellence, those stories will be only good ones. ◆

The Robert M. Spire American Inn of Court is an Achieving Excellence Platinum Level Inn in Omaha, Nebraska.

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Behavior Reminders for the Young Lawyer

By Judge Judith K. Fitzgerald (Ret.)

"Behavior is the mirror in which everyone shows their image."

—JOHANN WOLFGANG VON GOETHE

With so few live in-court appearances during this pandemic year, I'd like to provide some reminders about appropriate courtroom behavior and highlight conduct that judges do and don't appreciate from counsel.

We all strive to be excellent lawyers. This article provides practical tips for getting ready and going to court. Keep in mind that civility goes a long way with the judge and enhances your reputation for professionalism and courtesy as you develop the skills to become an excellent practitioner. I'll begin with the way litigation begins—at the pleading stage.

What should you always check out when preparing pleadings?

When preparing pleadings, review the national rules of procedure, read the local rules and the judge's own posted procedures, and comply with all, even when you regard the judge's preferences as "make-work." If you have any questions, contact the judge's administrative assistant or a local lawyer who appears in that court. As an example, if the judge wants all the pleadings fully justified or wants the font to be 14-point Times New Roman, then use the prescribed format for your written submissions. And always take a look at the docket to be certain nothing has happened that will change what you need to emphasize.

How can you be sure you will make a good first impression?

Be totally honest with the facts and the law. Your pleadings and briefs are usually the first time the judge gets any familiarity with you, so don't waste it. Always disclose binding case law even if you have an argument to change it. When you can, have someone read your work product before you file it. Sometimes what seems really cogent to you isn't all that clear to someone else.

Let's move to the courthouse. When should you arrive?

Be early, not just on time. Some judges will delay opening court for a few minutes, but others won't wait for you or your client, even if the reason is because you couldn't get through security in time. And remember to turn off your cell phone and any other device that makes noise or records anything. No photos, no recordings! No talking to counsel, just to the judge. Some judges take away devices when they make a sound, so beware.

The judge is coming—what do you do? Stand and face the court when the judge enters and leaves. Treat the courtroom as though it were a national treasure—in fact, courtrooms are national treasures as they are where justice is sought and provided. The judge presides over that space; treat the judge as a national treasure too.

At the podium, what do you think the judge will notice first?

Think about your face. A smile, or at least a pleasant, engaging countenance, is much more appealing

than a frown or angry look. The judge is going to look at you, so be prepared to look back. A stage director I know once told me that you always need a face. In other words, look alive! Show your face, not the back of your head.

Consider what you are going to wear. Dress professionally. The idea is to ensure that the court's focus is on your argument and not on what you are wearing. Whether we like it or not, our appearance forms a basis by which other people develop their perception of what we are like. We want the judge to see us as competent, trustworthy, believable. If we are messy, if our pleadings are sloppy, we are not going to make the best impression we can make, and that can adversely affect our client too.

And know how to use all the equipment available in the court. Judges are getting quite savvy at technology—and even more so since audio-visual equipment has been the way courts have run during the COVID-19 crisis. If the judge knows how to use it, you should too.

Pay attention to instructions though. If there is a sign on the podium that says "don't touch the microphone," then don't touch the microphone. Microphones are sensitive and can throw an entire system out of whack, which may harm the ability to record the proceedings.

What is the purpose of a trial?

Yes, it is simply to prove the facts. Organize your case, your trial notebook, and your time toward that goal. One hint to prepare for trial is to have answers to the questions you reasonably anticipate and if there is an objection made, how the law relates to those facts. If the court accepts proffers, be prepared to give a short, concise recitation of what the witness will say. Good practice is always to have a proffer ready for each witness. A proffer helps you match the witness with the element of the proof you need to produce and forces you to have a clear summary in mind of what you want the witness to testify about, even if not used as a proffer.

Who is the most important person in the room?

The factfinder, not you. So, talk to the factfinder, not to opposing counsel or to the audience.

Find out in advance what the judge wants to be called and whether the judge has any pet peeves.

"Your Honor" or "Judge X" usually works fine. One federal district court judge years ago did not want to be thanked. Most of us have an automatic reaction to say "thank you" at the end of an argument, for example, but this judge would go into a long explanation about how it is not proper to thank the court for doing its duty. The court will thank the jury members for their public service, but everyone else is there for the job, not to be thanked for ordinary services.

One judge wants everyone to talk while seated at counsel table, not to stand at the podium. However, in certain jurisdictions, you are expected to stand whenever you are being addressed by the judge (even if you are not at the podium). Other judges have particular ways they want exhibits and documents marked and offered. Find out what those are: Do you get the witness to identify and then offer, or do you go through the whole testimony of the witness and then offer them all? Just remember to offer them into evidence at some point!

How do you start your case, and who do you look at?

Always start with "May it please the court, I am X, and I represent Y." Look at the witness if you have one on the stand, or the judge or jury otherwise, not at opposing counsel or the audience. If you are appearing by phone, be sure to state who you are each time you speak.

What's the game plan at the podium?

To exude confidence and reliability and to be credible. Stand straight; do not use negative body language—no eye-rolling, no frowning, no signaling your own reaction to the testimony or the argument of opposing counsel. And no gum, candy, or food.

What about your tone of voice?

Sometimes we don't think about the tone we use. It should be modulated, but clear. It should not be so low in volume that you cannot be heard clearly, but don't shout either. If the judge can't hear you, you are not communicating or getting your points across. Yet, talking with too much volume can be irritating or induce hostile reactions in the listener—and the most important of those is the judge. I have heard about some great trial lawyers who took voice lessons to be able to project across a large space without a microphone and without shouting, just to win the tone of voice war with opposing counsel. How you present what you have to say has an impact and sometimes causes more of an immediate reaction than the merits of your position.

What are some important things to consider when writing and arguing pretrial procedures and dispositive motions?

This may sound a bit like English Writing class in high school: Check grammar and spelling; keep the

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argument in logical order; skip extraneous things; pay attention to page and time limits if they exist; and focus on what is important, but always include a general statement that you rely on the record/briefs for whatever you are not arguing so as not to waive anything.

And, unless you absolutely have something in the factual background that you must express, consider asking the judge whether he or she wants a complete background or wants you to jump to the issue. You can always ask, if the judge doesn't tell you, whether there is a particular topic the judge would like to hear about first. And if the judge says, "Yes, what about Z?" then talk about Z. That should be a big clue that Z is what is most troubling the judge, even if you don't know whether the trouble is with your argument or opposing counsel's.

All of these things help the judge get through the argument more easily and get a ruling out faster. Some courts have time limits to issue rulings and must file reports about their compliance. In general, judges want to get things done as expeditiously as possible and appreciate your efforts to make that happen.

Never interrupt or talk over the judge or whoever has the floor.

The court reporter cannot take down two conversations at one time, so something will be lost, and it may be your best argument that goes out the window. If you need to interrupt, ask permission: "Your honor, I would like to interject something to clarify a statement before counsel goes on. May I?" You may be told no, to wait your turn. If so, make a note and get to it when it is your turn.

If you disagree with a ruling the judge makes, what do you do?

Politely point out what it is you found to be in error and move on. Do not be combative. That never wins you any points with a judge who is there to try to figure out the best resolution to the problem.

Can you rely on your trial notes or your brief if you are making an argument?

Hopefully for trial, you have made an outline of elements you need to prove (or defeat) and how the witnesses will assist. But remember that listening to the witnesses—including your own—is important so you can catch a statement that needs clarification or something that clues you in to a question to ask. For argument, don't simply restate what is in your brief and don't read out loud. Make a presentation that engages the judge and affords the opportunity for questions, comments, and clues.

You've finished your presentation. What next?

Ask the court if there are any questions you can answer or supplemental briefing you can supply. Then sit and pay attention to what happens next. Don't daydream about what you said or could have said—you can do that when you get back to the office. In court, keep your radar working. You may get a helpful hint about something that may enable you to provide a supplemental point if the judge offers you the chance or if you ask for it and the judge grants that request.

The judge is leaving the bench. What do you do?

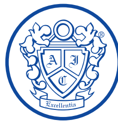
Once again, stand, face the court, and stop talking. Remember that the microphones are often still on even though court is in recess, and sometimes those microphones feed into chambers. The court is not a private facility, and your conversations may not be either. Gather your things and leave if court is over for the day.

One final point: Treat every member of the court staff with the same respect and dignity that you do the judge.

Judges are very protective of their staff members, and insulting or irritating a staff person usually finds the ear of the judge, with results that are not likely to help you gain the reputation you cherish. You don't need a dressing down in court, with clients or other lawyers present, for mistreating staff. Plus, being friendly and helpful with staff usually gets returned at some time. You never know when you will need a friendly tip from the people closest to the judge.

This list of practical suggestions can be expanded exponentially. Think about your experiences to date and how you can use them as positive examples or as matters to improve. There is no magic formula to developing professionalism and civility in court. But, there is a strong likelihood that practice will make perfect. One place to go and learn these skills from other lawyers is your local American Inn of Court. ◆

The Honorable Judith K. Fitzgerald (Ret.) cofounded the Judith K. Fitzgerald Western Pennsylvania Bankruptcy American Inn of Court, which was named in her honor upon her retirement from the bench in 2013. She is now a shareholder in the Pittsburgh-based firm Tucker Arensberg, P.C., and a professor in the practice of law at the University of Pittsburgh School of Law where she teaches bankruptcy and advanced bankruptcy.



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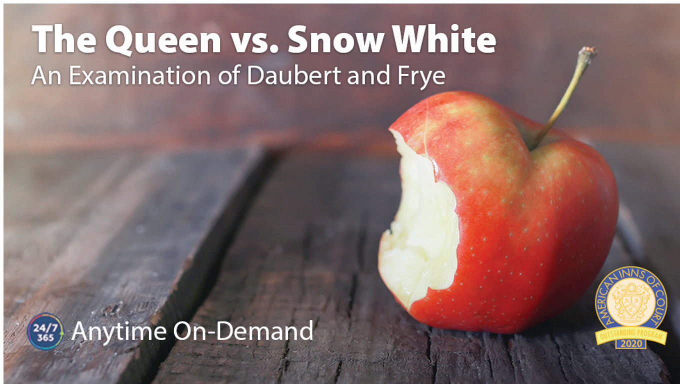

In the case of the *Queen v. Snow White*, the Queen maintains she is the "fairest of them all." Snow White challenges this assumption and a battle ensues using the testimony of expert witnesses. Through this course, you will learn to recognize differences between the Frye and Daubert standards for expert testimony and how to navigate the ethical challenges associated with experts providing the testimony.

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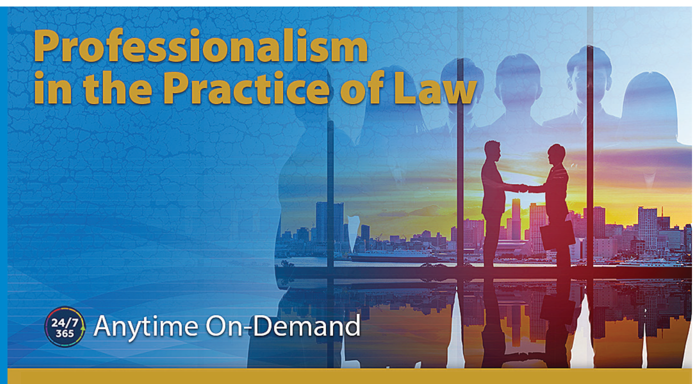

JUSTICE MARIE L. GARIBALDI AMERICAN INN OF COURT FOR ALTERNATIVE DISPUTE RESOLUTION

ADR Series

While ADR stands for alternative dispute resolution, negotiation, mediation, and arbitration are the dominant forms of dispute resolution. New lawyers are likely to encounter clients, mediators, and arbitrators in the ADR context before going to trial, especially with current strains on the court systems. This six-part series is designed to prepare you for those opportunities and includes a variety of ADR topics for you to learn and implement right away.

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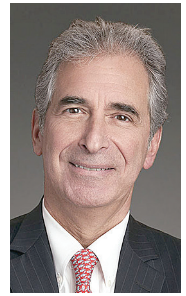
Get the resources you need at www.innsofcourt.org/COVID.



James I. Glasser, Esquire

2020 Professionalism Award for the Second Circuit

By Rebecca A. Clay

For James Glasser, Esquire, being a lawyer is a family affair. His grandfather went to Brooklyn Law School. His father—still working as a federal judge at age 97—went to Brooklyn Law. His mother did too. His brother is also a lawyer, although he did not go to Brooklyn. "The family still has not forgiven him," laughs Glasser, who earned his own law degree at the school in 1985.

Glasser has been a partner at the Connecticut law firm Wiggin and Dana LLP since 2007 and head of its litigation department since 2012. From 2010 to 2013, he chaired the firm's white collar and investigations practice group.

"I hold our profession in the highest regard," says Glasser, the husband of a former lawyer and father of two daughters, one of whom is a lawyer. "Being a lawyer is a noble mission."

As a trial lawyer and appellate advocate, Glasser represents individuals and corporations in complex civil litigation and in investigations and prosecutions conducted by state and federal regulators, including the U.S. Department of Justice, Securities and Exchange Commission, Department of State, Department of Commerce, and state attorneys general. He also conducts internal investigations and helps companies ensure compliance with the law.

"I have been involved in helping predominantly defense contractors and private companies make sure they have robust systems in place so they do not find themselves subject to investigation by some regulatory authority," Glasser says. "A call to me is a sign that a company wants to do the right thing and ensure compliance. That is music to my ears."

Another of his specialties is defending white collar cases, such as mail and wire fraud and alleged violations of the Foreign Corrupt Practices Act.

Glasser teaches trial practice at Yale Law School. In these "days of the vanishing trial," he says, it is gratifying to see students go from not understanding the basics to becoming proficient at skills such as getting pieces of evidence into evidence and conducting cross-examinations.

Before joining Wiggin and Dana, Glasser spent almost two decades as a federal prosecutor for the U.S. attorney's office for the District of Connecticut, handling cases involving corruption, fraud, civil rights violations, money laundering, violent crime, drug trafficking, and other federal offenses. The case he remembers most proudly was the investigation and prosecution of the murder of an eight-year-old boy and his mother to prevent the child from testifying as a witness.

His roles at the U.S. attorney's office included counsel to the U.S. attorney, chief of the criminal division, and chief of appeals. That background serves Glasser well in his current role.

"Knowing where the prosecution is coming from and what their point of view might be is helpful background as I vigorously and aggressively represent those who may be subject to government scrutiny," he says. Glasser also lectured frequently at the U.S. Department of Justice's National Advocacy Center and helped create its advanced trial advocacy course.

Glasser is a fellow of the American College of Trial Lawyers and serves as the organization's state chair for Connecticut. He is a member of the Federal Bar Council and a member of the board of editors of the *Federal Bar Council Quarterly*. He was the first recipient of the *Connecticut Law Tribune's* Professional Excellence Award in 2015.

In addition to his service to the legal community, Glasser is president of the board of CT Star, a nonprofit organization that supports Connecticut's Support Court initiative, which helps current and former criminal defendants with substance use problems reintegrate into their communities. In addition to raising money for various programs, Glasser and his fellow volunteers gather clothing that participants can wear to job interviews and conduct mock interviews designed to help participants answer difficult questions, such as whether they have a felony conviction.

"It is just a way to support this wonderful effort undertaken by dedicated federal judges in Connecticut to try not just to imprison people but help folks on the wrong end of the law," he says. He also serves on the regional board of the Anti-Defamation League.

"Jim has always been a student of the law, and the person to whom other lawyers—young and old—turn to for advice," says Joseph W. Martini, Esquire, of Spears Manning & Martini LLC, who wrote in support of Glasser's nomination for the award. "He simply makes other lawyers better." ◆

TECHNOLOGY IN THE PRACTICE OF LAW

By Sharon D. Nelson, Esquire, and John W. Simek

How the Pandemic Accelerated Technology Adoption by Lawyers

In March 2020, virtually all law firms across the country shut down. The shock waves rippled nationwide as lawyers suddenly found themselves working from home.

The first challenge was setting up at home. Some lawyers used home computers, while others used their work laptops, which were more secure as the devices were part of the firm network. Law firms, understanding that work-from-home was going to be long term, sent or purchased docking stations, multiple monitors, and even standing desks in some cases.

The Rise of Video Conferencing

The legal world took quick note of the wholesale adoption of Zoom for video conferencing. While not secure at the outset, Zoom quickly battened down the hatches and implemented true end-to-end encryption. Webex is the only other platform with end-to-end encryption, but it hasn't garnered the popularity of the very reliable and easy-to-use Zoom.

Clients and potential clients drove the adoption of Zoom as everyone glommed onto it within weeks of the shutdown. Microsoft Teams is growing in popularity but used primarily in-house because of the tight integration with a firm's active directory structure. It is included free with most Microsoft 365 subscriptions.

Clio Legal Trends Report 2020

Clio's October 2020 Legal Trends Report was startling. Here's how the respondents reported adapting to the pandemic:

- 85% used practice management software.
- 79% used the cloud to store law firm data.
- 62% allowed clients to share documents securely.
- 73% permitted invoices to be paid electronically.
- 83% met with clients virtually.

While all those statistics were remarkable in showcasing the rapid adoption of technology, statistics about what lawyers planned to do in the future were even more remarkable:

- 96% said they would use practice management software.
- 96% planned to store firm data in the cloud.
- 95% said they would support the use of electronic signatures and econtracts.
- 96% said they would support electronic payments.
- 83% said they would meet with clients virtually.

We believe that, in 2021, more than 90% of lawyers are meeting virtually with clients. But lawyers, having dawdled for decades about adoption of the other kinds of technology referenced above, are now either there or planning to be there soon.

In a February 2021 survey of solo attorneys, Clio reported an extraordinary statistic: Electronic payments, client portals, electronic client intake, and customer relationship management solutions accelerated recovery post-pandemic, resulting in solo lawyers earning over $52,000 more in revenue than other solo firms. Extraordinary.

For lawyers, the pandemic in many ways proved an unexpected blessing as it compelled the profession to embrace legal technology.

From the Trenches

As IT and cybersecurity providers, we have been witnesses to a lot of change in the practice of law. Here are our observations of those changes from the beginning of the pandemic through the first few months of 2021:

- Beyond Zoom, most lawyers are now familiar with Webex and/or Teams.
- Most firms that did not accept electronic payments now do—cash flow has improved.
- Virtually all lawyers now use electronic contracts, usually DocuSign or Adobe Sign.
- Everyone wants to get to the cloud. Virtually all clients use Microsoft 365. All have cloud backups (multiples with at least one always unconnected from the network to prevent being encrypted in a ransomware attack).
- More lawyers are using law practice management software with client portals.
- Firms are purchasing laptops for employees as a primary work device.
- In the rise of ransomware and business email compromise attacks, most are implementing multi-factor authentication and endpoint protection.

Retired Judge Arthur "Monty" Ahalt of Maryland was fond of saying, "We are the only profession that works by looking in the rearview mirror."

Times have changed. Lawyers now understand that to stay relevant and attract new clients (and keep current clients), they must be willing to embrace change—in particular, technology. They have done an admirable job of doing so with no end in sight. ◆

Sharon D. Nelson, Esquire, is a practicing attorney and the president of Sensei Enterprises, Inc. She is a co-author of 18 books published by the American Bar Association. John W. Simek is vice president of Sensei Enterprises, Inc. He is a certified information systems security professional, certified ethical hacker, and a nationally known expert in the area of digital forensics. He and Nelson provide legal technology, cybersecurity, and digital forensics services from their Fairfax, Virginia, firm. You can contact them at snelson@senseient.com and jsimek@senseient.com.

Highway to the Danger Zone: A Romantic Comedy of Love and Ethics

Program No.: P14191

Presented By: The Honorable Lee Yeakel IP American Inn of Court
Presented On: February 21, 2019
Materials: PowerPoint Presentation, Script, Citations of Law, Fact Pattern, Handouts, Video
CLE: 1hr

Summary

This program featured four ethics-based vignettes inspired by well-known romantic comedies to illustrate the ethical issues presented by each scenario. The overall theme was based on the movie "Top Gun" and was rounded out with live musical performances. The issues presented included the distinction between federal and state approaches to the rules of professional behavior, the obligation of confidentiality, conflicts of interest, ex parte communications, the duty of candor, the duty to report misconduct, the very real challenge presented by alcohol abuse within the profession, and the features of approved peer assistance programs that make them uniquely effective. The overarching message of the presentation was to remind attorneys that the rules of professional conduct are a starting point for ethical behavior, not an ending point, and that an attorney's conscience may well demand more than the rules do.

Roles

Presenter (4) .... Associates, Pupil
Writers (4) .... Associates
Actors .... Barrister, Associates
Props, costumes, and set changes .... Barrister, Associate
Live musical performance .... Associates

Agenda

Introduction (in character) .... 5 minutes
Legal Presentation/Vignette #1 .... 15 minutes
Legal Presentation/Vignette #2 .... 15 minutes
Legal Presentation/Vignette #3 .... 15 minutes
Legal Presentation/Vignette #4 .... 15 minutes
Finale .... 10 minutes

Recommended Physical Setup

Projector, screen, laptop, live band, dinner table setting, office table setting, set props, four flight suits with sunglasses, one judge's robe, one disco ball effect.

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