



SHOOK
HARDY & BACON

Update of the Law ^{CLE}

Tuesday, June 16, 2015 | Kansas City, MO

AGENDA

GUEST SPEAKER BIOGRAPHIES

SHOOK SPEAKER BIOGRAPHIES

SPEAKER MATERIALS

Communicating with the Millennial Juror

William Geraghty and Rachael Smith

**Quick Hits: Using Arbitration Clauses
to Minimize Potential Litigation Exposure**

Andrew Chang

Quick Hits: 2015 Tax Update

Jay Simpson

**Quick Hits: Key Considerations
in Government Investigations**

David Maria

Responding Like a Pro: A Mock Data Breach Response

Blake Bryant, Ozzie Fonseca, Al Saikali,

William Sampson and Sarah Tyre

Legal Ethics and Social Media

Patrick Castle, Vince Catanzaro and Gary Miller

Ethics: The Ethys Awards, 2014-2015

Sean Carter

NOTES PAGES

EVALUATION FORM



SHOOK
HARDY & BACON

8 – 8:30 a.m.

Registration and Breakfast

8:30 – 8:40 a.m.

Welcome and Introductions

Scott Kaiser and John Murphy

8:40 – 9:40 a.m.

KEYNOTE 1

The Economy in 2015: Reasons for Optimism

Dr. Marci Rossell

All financial crises follow a pattern, and the current U.S. experience is no exception. As a Federal Reserve economist, Dr. Marci Rossell followed the Asia Crisis of 1997. As chief economist for CNBC, she explained the financial market turmoil sparked by the September 11 terrorist attacks. In this session, you will hear her groundbreaking explanation of how we got into the economic mess we're in, how we get out of it and what implications the recovery roadmap may hold.

9:40 – 10:30 a.m.

Communicating with the Millennial Juror

William Geraghty and Rachael Smith

Generation Y is a growing part of jury pools, and today's trial attorney must be ready to address its specific perspective. Our presenters will review specific challenges – bias against corporations and demand for instant answers – and provide tips for effective communication.

10:30 – 10:40 a.m.

Break

10:40 – 11:30 am.

Quick Hits: Contracts, Taxes and Government Investigations

Andrew Chang, David Maria and Jay Simpson

This “quick hits” panel will provide practical advice on:

- Using arbitration clauses to minimize potential litigation exposure;
- Navigating recent and upcoming tax changes; and
- Key considerations in government investigations.

11:30 a.m. — 12 p.m. **Lunch**

12 — 12:50 p.m. **Class Action Face-Off**

Andrew Carpenter and Gregory Wu

This point-counterpoint program will offer a robust discussion on the top national class action decisions from 2014 and 2015, as well as their projected impact; select key cases from Missouri and Kansas; and the proposed amendments to Rule 23.

12:50 — 1 p.m. **Break**

1 — 2:30 p.m.

**Responding Like a Pro:
A Mock Data Breach Response**

**Blake Bryant, Ozzie Fonseca, Al Saikali,
William Sampson and Sarah Tyre**

Ninety percent of companies have suffered a data breach, and these business crises are increasingly followed by regulatory enforcement actions and private civil lawsuits. This two-part panel will help attendees minimize the risks associated with a data breach through effective preparation and response techniques.

Part 1: Preparation

- Drafting an incident response plan
- Ensuring adequate insurance coverage
- Planning employee training
- Engaging the right vendors
- Running proper preparation scenarios

Part 2: Response

- Working with a forensic vendor
- Legal requirements and regulator expectations
- Crisis communications
- Class action defense strategies

2:30 — 2:45 p.m. **Break**



2:45 — 3:45 p.m.

Legal Ethics and Social Media

Patrick Castle, Vince Catanzaro and Gary Miller

This presentation will provide an overview of the ethical challenges that surface when social media intersects with the law. Among the topics to be discussed:

- How to counsel clients and their nonlawyer staff on social media risk
- Spoliation and preservation of evidence
- Protecting client confidences
- Wrongfully obtaining evidence
- When the personal goes public

3:45 — 4:45 pm.

KEYNOTE 2

Ethics: The Ethys Awards, 2014-2015

Sean Carter

Each year, Hollywood celebrates the best performances in motion pictures at the Oscars – and the Ethys celebrate the worst ethics violations in the legal profession. Humorist Sean Carter will host the festivities and announce the award winners for Most Creative Billing, Best Supporting Actor in a Criminal Activity, Least Competent in a Legal Representation, and more.

In the process of recapping some of the most egregious instances of unethical behavior, Sean will demonstrate how the rest of us can avoid more common ethical violations.

4:45 p.m.

Adjourn



Blake Bryant

Principal Security Analyst | FishNet Security

Blake Bryant has 11 years of military/commercial experience in security operations with specific expertise in incident handling, investigation, on-site consulting and SIEM engineering. His military experience includes having served as chief technology officer for a 3,500-person organization with 18 discrete geographic locations while forward deployed in a combat theater.

His commercial certifications include CISSP, CCNA ICND, CCNA Security, CompTIA Network+, CompTIA Security+, MCITP (4 x MCTS concentrations), 7Safe Certified Security Testing Associate (CSTA), CNSS 4016: Certified Risk Analyst, and LogRhythm SIEM Certified Professional.

Blake is finalizing a master's degree in Information Technology and Information Assurance from the University of Kansas, and his master's thesis addresses cyber threat detection, mitigation and automated responses via security log data. He earned a bachelor's degree in Information Systems Engineering from the U.S. Military Academy.



Sean Carter

Humorist at Law

Sean Carter is the founder of Lawpsided Seminars, a company devoted to solid legal continuing education with a healthy dose of laughter.

He graduated from Harvard Law School in 1992. His 10 years of legal practice focused on corporate securities and mergers and acquisitions. During this time, he represented such clients as GNC, Experian, The Boston Beer Co., Homeside Lending, Safelite Auto Glass, J. Crew, and many others before eventually serving as in-house counsel for a publicly traded finance company.

In 2002, Sean left the practice of law to pursue a career as the country's foremost Humorist at Law. Since then, he has crisscrossed the country delivering Lawpsided Seminars for state and local bar associations, law firms, corporate legal departments and law schools. Each year, he presents more than 100 programs on such topics as legal ethics, stress management, constitutional law and legal marketing.

He is the author of the first-ever comedic legal treatise — *If It Does Not Fit, Must You Acquit?: Your Humorous Guide to the Law*. His syndicated legal humor column has appeared in general circulation newspapers in more than 30 states and his weekly humor column for lawyers appeared in the *ABA e-Report* from 2003 to 2006.



Ozzie Fonseca

Director, Data Breach Resolution Group | Experian Information Solutions

Ozzie Fonseca has been involved in the identity protection arena for nearly a decade and has managed thousands of data breach response plans for clients of every size and events involving hundreds to millions of victims. A Certified Information Privacy Professional (CIPP), Ozzie has worked with countless privacy and compliance professionals in virtually every industry and consistently brings to the table his extensive practical experience in handling large-scale breach notifications, setting up incident response call centers, and providing best-in-class identity protection and fraud resolution services. Before his involvement in the privacy arena, he worked as an educator in the auto insurance, telecom and credit industries where he was responsible for developing training programs. Ozzie holds a bachelor's and master's degree in Business Administration.



Dr. Marci Rossell

Former CNBC Chief Economist and Co-Host of “Squawk Box”

Marci Rossell electrifies audiences nationwide, speaking on the nexus of economics, politics, culture and the media. Her animated style was honed when she served as the popular Chief Economist for CNBC in the months immediately following September 11. Marci takes complex economic issues, often dull in the button-down business press, and makes them relevant to people's lives, families and careers.

Before her career in broadcast journalism, Marci served as Corporate Economist and Investment Spokesperson for OppenheimerFunds, one of the nation's largest mutual fund companies. Before moving to Wall Street, she was an expert witness for Deloitte and Touche in court cases involving economic issues. She began her career as an economist with the Federal Reserve Bank of Dallas. She has served as a visiting professor at DePaul University.

Marci earned a Ph.D. in economics from Southern Methodist University, where she was named one of the Young Alumni of the Year in 2002. She brings a world of experience—from Main Street to Wall Street—when discussing the U.S. economy, international events and movements in capital markets.



Sarah Tyre

Managing Director | Public Affairs & Crisis Practice | Burson-Marsteller

Sarah Tyre is an issues and crisis management specialist with significant experience in advising corporations, associations and government bodies facing high-profile, complex communication challenges. Before joining Burston-Marsteller in 2011, she was Senior Vice President and Group Manager of Issues & Crisis Management at Ketchum, where she held a variety of positions throughout her 15-year tenure. As Senior Vice President, she served as a senior counselor on client engagements, providing strategic issues management and crisis communications counsel to protect companies' reputations in the face of intense public pressure and media scrutiny.

Sarah has advised Aetna, Bridgestone/Firestone, ConAgra Foods, Express Scripts, Genentech, Hyundai Motor America, Hyatt, IBM, Johnson & Johnson, Kimberly Clark, Lenovo, Pfizer, Roche and Wendy's, among other leading companies. She has experience dealing with a variety of crisis scenarios from data breaches and tragic events to congressional hearings and product recalls. She also has extensive expertise supporting companies facing various types of litigation, including intellectual property rights, product liability, workplace discrimination, fraud and sexual harassment.

Sarah has also conducted crisis preparedness initiatives, including vulnerability assessments, crisis plan development, executive training sessions and crisis simulations. She was part of an on-the-ground team supporting Russia's hosting of the G8 Summit in St. Petersburg in 2006 and developed crisis preparedness plans for the Olympic Torch Relays for the 2006 and 2010 Summer Olympic Games in Athens and Beijing, respectively.

**Andrew Carpenter**Partner | acarpenter@shb.com

Andy Carpenter is a litigator who focuses his practice on complex litigation, such as class actions, multidistrict litigation and consolidated litigations. He has represented a wide variety of *Fortune* 500 clients, including Boston Scientific, DuPont, Zimmer Orthopedics, Philip Morris, Lorillard Tobacco Co. and The Coca-Cola Company in jurisdictions across the United States, as well as internationally.

His experience includes having served DuPont as its class action and e-discovery counsel in MDL No. 1733, *In re Teflon Products Liability Litigation*, consisting of 22 putative class actions pending in the U.S. District Court, Southern District of Iowa. The district court denied class certification in every case and rejected each of the plaintiffs' motions for discovery sanctions. He has also helped negotiate, brief, implement and oversee the successful resolution of several national litigations, including the \$1.1-billion resolution of MDL No. 1401, *In re Sulzer Orthopedics, Inc. Hip Prosthesis and Knee Prosthesis Liability Litigation*.

Andy is a principal author of *Missouri and Kansas Class Action Law*, a legal blog dedicated to discussing developments in class actions and complex litigation in state and federal courts in Missouri and Kansas.

**Patrick Castle**Associate | pcastle@shb.com

Patrick Castle has a talent for developing inventive solutions to complicated legal problems. He has represented clients in multiple forums, including state and federal courts and domestic and international arbitrations, and has experience across all stages of litigation, including trial. Patrick achieves successful outcomes through creative legal analysis, clear writing and persuasive argument.

During his time at the University of Chicago Law School, Patrick was on the Hinton Moot Court board and was awarded the Thomas R. Mulroy Prize for Excellence in Appellate Advocacy. Before law school, Patrick was a Teach For America corps member, teaching high school special education and civics in St. Louis, Missouri.



Vincent Catanzaro

Of Counsel | vcatanzaro@shb.com

Utilizing years of experience as a problem solver and team builder in the corporate setting, Vince Catanzaro works with clients to develop best practices and untangle issues related to data preservation, litigation management and international and cross-border collection. With a focus on strategic solutions to litigation and investigation complexities, Vince helps companies create policies governing information management and social networking, and navigate the technology implications related to mergers and acquisitions.

Before joining Shook, Vince served as Senior Counsel, Global Discovery Manager for E. I. du Pont de Nemours and Co.. In this role, he was responsible for counseling the company on how best to comply with evolving legal standards relating to discovery; guiding and supporting the legal teams in the development of e-discovery response strategies and the use of litigation technology; coordinating, managing and monitoring the work of the company's discovery vendors; and overseeing DuPont Legal's Discovery Excellence Center, which was named one of *Inside Counsel* magazine's Top 10 Innovative Legal Departments for 2013.



Andrew Chang

Associate | achang@shb.com

Andrew Chang focuses on individual, mass tort and class actions involving automotive, pharmaceutical, medical device and other consumer products. With experience in all phases of civil litigation, he has drafted and argued successful motions, briefs and appeals for matters before both state and federal courts and participated in numerous jury trials. He has represented companies in business, environmental and employment litigation related to consumer fraud, contract disputes, trade secrets, copyright infringement, architectural design and construction law, overtime and Employee Retirement Income Security Act benefits, Resource Conservation and Recovery Act claims, and insurance coverage.



William Geraghty

Partner | wgeraghty@shb.com

Bill Geraghty is a trial lawyer who has served as lead trial lawyer in many lengthy and difficult civil trials in both state and federal court. He has successfully defended several *Fortune* 500 companies in high-stakes commercial and products liability cases in which plaintiffs were seeking tens of millions of dollars in both compensatory and punitive damages.

Most recently, Bill has spearheaded the defense of Philip Morris USA in thousands of so-called *Engle*-Progeny cases filed throughout Florida. He has won defense verdicts for Philip Morris in six trials. He serves as the managing partner of Shook's Miami office.



Scott Kaiser

Partner | skaiser@shb.com

Scott Kaiser defends companies against product-liability and consumer-fraud cases, whether brought individually or as mass actions. He has experience defending a variety of products, ranging from cigarettes to Chinese drywall to heating blankets to Teflon[®]-coated cookware to Class-III medical devices. Scott's current focus is the *Engle* progeny litigation in Florida. Scott is a principal author of *Missouri and Kansas Class Action Law*, a legal blog dedicated to discussing developments in class actions and complex litigation in state and federal courts in Missouri and Kansas.



David Maria

Partner | dmaria@shb.com

David Maria focuses on white collar criminal litigation and government enforcement and compliance. He has substantial experience conducting corporate internal investigations and litigating complex white collar criminal matters, including matters relating to health care fraud, the Foreign Corrupt Practices Act (FCPA) and securities fraud.

Before joining Shook, David was a federal prosecutor in the Criminal Division of the U.S. Department of Justice (DOJ), working in both the Health Care Fraud Unit and the Foreign Corrupt Practices Act Unit of the Fraud Section. In the Health Care Fraud Unit, he was a member of the Medicare Fraud “Strike Force” and prosecuted criminal cases in Baton Rouge, New Orleans, Houston, and Los Angeles. He tried multiple cases to jury verdicts and was responsible for the successful prosecution of more than 30 criminal defendants during his tenure in these cities. David was also responsible for handling corporate health care fraud cases, including the investigation and prosecution of various health care providers for violations of the federal health care fraud statute and the federal anti-kickback statute.



Gary Miller

Partner | [gmiller@shb.com](mailto:gmillier@shb.com)

Gary Miller is an experienced litigator who has first-chaired trials, arbitrations and other evidentiary hearings across the country with great success. His practice covers a broad range of commercial cases. For clients such as Groupon, CNA and the Chicago Cubs, he has handled hundreds of matters involving trademarks, copyright, trade secrets, patents and restrictive covenants. Gary has significant experience with cases concerning post-acquisition disputes, alleged securities violations, breaches of contract, breaches of fiduciary duty, fraud, privacy violations and consumer class actions. His clients in these areas include *Fortune* 500 companies, private equity firms and trading companies.

Gary has represented clients on a pro bono basis in federal civil rights litigation. He has served on the judicial evaluation committee of the Chicago Counsel of Lawyers.



John Murphy

Chair & Managing Partner | Shook, Hardy & Bacon | jmurphy@shb.com

John Murphy has served as the firm's chair since January 1, 2002. As chair, he has led the firm in its quest to be "the best in the world at providing the clients creative and practical solutions at unsurpassed value." Shook has honed its ability to deliver the promise of its vision statement by focusing on such areas as science and technology, knowledge management, litigation support, operational efficiency, and a culture that causes diversity to thrive. The success of these efforts culminated in the firm's selection as the inaugural Product Liability Defense Law Firm of the Year by *the International Who's Who of Business Lawyers*. Before his appointment as chair, John was actively involved in the management and trial of significant lawsuits for a number of corporate clients. His 25-plus years of experience involve many facets of trial activity, including discovery, trial, appellate practice and mediation.



Al Saikali

Partner | asaikali@shb.com

As chair of Shook's Data Privacy and Security Practice, Al Saikali has gained the trust of clients challenged by data breach response, crisis management and compliance with laws governing the collection, storage, use and disposal of sensitive information. He also represents companies in class action lawsuits arising from data breaches and other data privacy issues.

Al was recently named co-chair of The Sedona Conference's newly formed Working Group 11: Data Security and Privacy Liability. Tasked with developing guides to help organizations minimize their privacy and data security liability risks, the working group includes leading practitioners in privacy and data security law, in-house counsel, judges, regulatory authorities, and data forensic experts.

Al is a Certified Information Privacy Professional accredited by the International Association of Privacy Professionals, and he authors the *Data Security Law Journal* blog where he regularly posts about legal developments and trends in data security and data privacy law.



William Sampson

Partner | wsampson@shb.com

Bill Sampson has tried more than 80 jury cases in federal, state and military courts and tribunals and has been active nationally and internationally in the defense of civil litigation. He has taught more than 100 programs on trial practice, litigation strategy and legal writing.

His experience includes having acted as lead counsel for The Paradigm Alliance, a Wichita-based pipeline public awareness company, in a multi-count action involving violations of the Computer Fraud and Abuse Act, misappropriation of trade secrets, fraud, breach of fiduciary duty, and breach of contract. Following a two-week trial, the court granted Paradigm's motion for judgment as a matter of law on defendants' counterclaim. The next week, the jury awarded Paradigm the prayer of the complaint, found defendants' conduct intentional and malicious on the trade secrets count, and awarded punitive damages. The jury's findings enabled Paradigm to apply for its fees and litigation expenses, which the court awarded.



Jay Simpson

Partner | jsimpson@shb.com

As chair of Shook's Tax Practice, Jay Simpson handles all types of tax planning and tax controversy matters, including developing strategies for corporate acquisitions, dispositions, joint ventures, reorganizations and restructurings. He also has significant experience in the area of state income, sales and property tax law (particularly Missouri and Kansas law).

Jay currently serves as a vice-chair of the State and Local Tax Committee of the American Bar Association's Tax Section. He is also a member of a special task force of the Tax Section of the American Bar Association that is drafting model legislation (aka Model Transaction Tax Overpayment Act), the purpose of which is to protect retailers from consumer suits alleging that retailers have over-collected state and local transaction taxes.

**Rachael Smith**

Associate | rxsmith@shb.com

As a member of Shook's Product Liability Practice, Rachael Smith represents a broad spectrum of clients in commercial, products liability and complex litigation matters in state and federal courts. She is experienced in all stages of litigation and devotes a significant part of her practice to preparing company witnesses for deposition and trial. Rachael has been a strategic member of numerous trial teams since joining the firm in 2008. Most recently, she was a member of a California trial team that successfully represented Ford Motor Co. in a seven-week trial involving the design of the Ford Taurus. The jury returned a 10-2 verdict in favor of Ford.

**Gregory Wu**

Partner | gwu@shb.com

Greg Wu's practice focuses on tort and products liability defense, with an emphasis on class actions and complex personal injury litigation. As a member of Shook's Product Liability Practice, Greg has defended cases involving a variety of products, ranging from cigarettes to windshield wipers and fire suppression systems to mortar cartridges.

Greg is a principal author of *Missouri and Kansas Class Action Law*, a legal blog dedicated to discussing developments in class actions and complex litigation in state and federal courts in Missouri and Kansas.

Active in the greater Kansas City legal community, Greg recently served as president of the Asian American Bar Association of Kansas City and the local affiliate of the National Asian Pacific American Bar Association, which honored him among its "Best Lawyers Under 40."



Communicating With The Millennial Juror

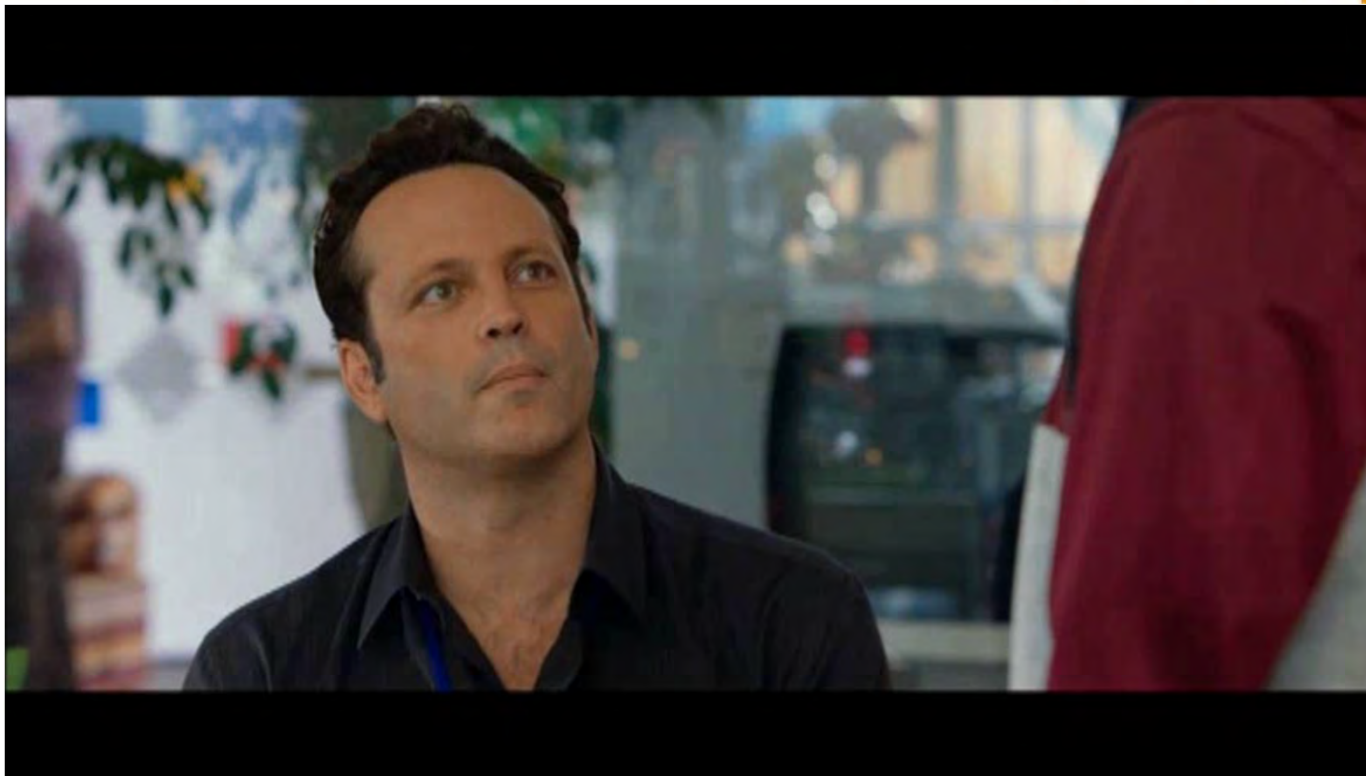
Bill Geraghty | *Partner* | Shook, Hardy & Bacon L.L.P.

Rachael Smith | *Associate* | Shook, Hardy & Bacon L.L.P.

The Challenge



An Illustration



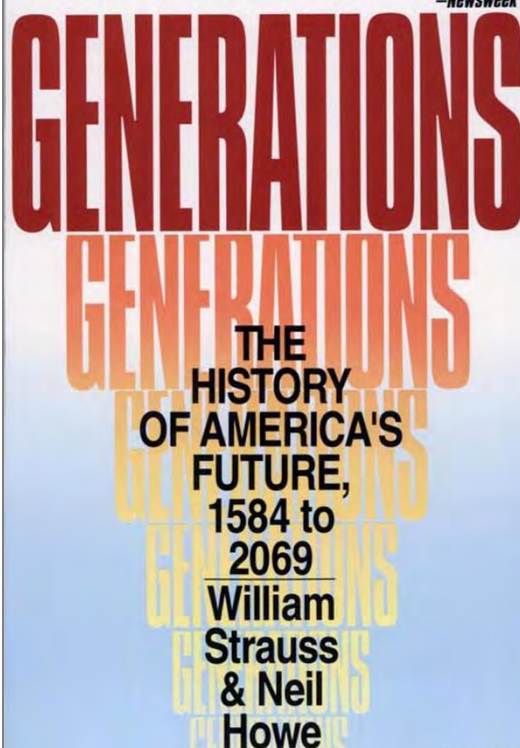
Who Are Millennials?



- Not a precisely defined term or generation
- We did what we thought Millennials would do – we “Googled” it!
- And found a very reliable source – Wikipedia. What did Wikipedia tell us?

Who Are Millennials?

"A provocative, erudite, and engaging analysis of the rhythms of American life"
—*Newsweek*



32

GENERATIONS

FIGURE 1-1
Living American Generations

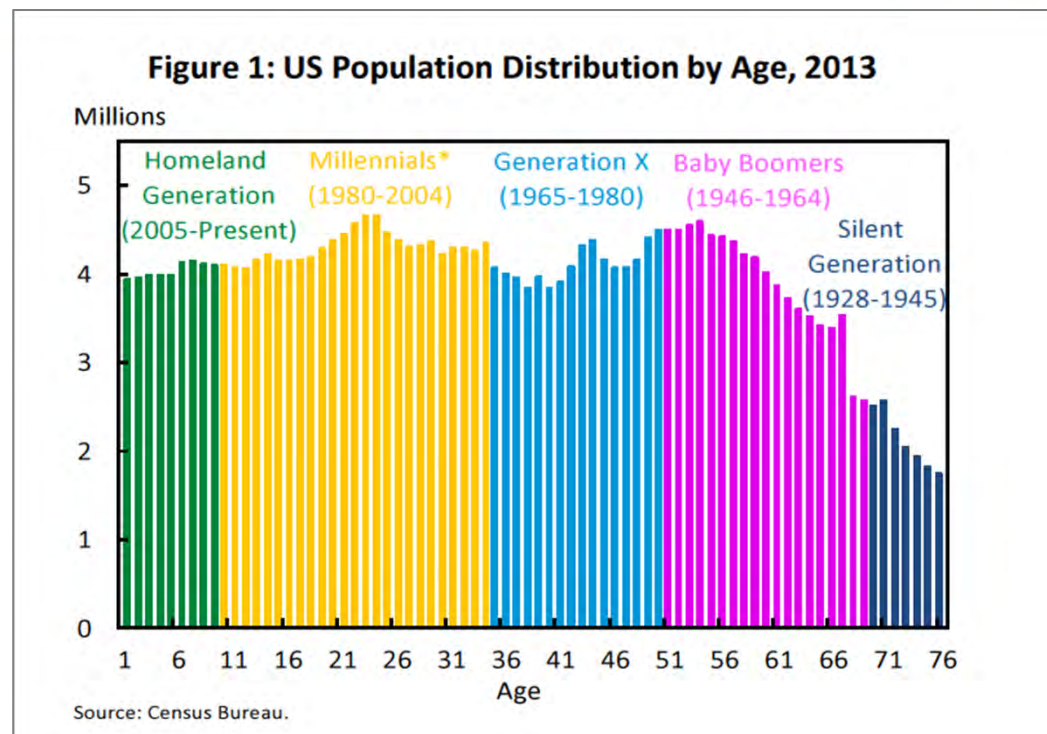
GENERATION	BIRTHYEARS	AGE IN 1969	AGE IN 1991
Progressive	1843–1859	109+	(not alive)
Missionary	1860–1882	86–108	108+
Lost	1883–1900	68–85	90–107
G.I.	1901–1924	44–67	66–89
Silent	1925–1942	26–43	48–65
Boom	1943–1960	8–25	30–47
Thirteenth	1961–1981	0–7	9–29
Millennial	1982– ?	(not alive)	0–8

Who Are Millennials?



	Millennials	Generation X	Baby Boomers
Born Between	1981-2000	1965-1980	1946-1964
Ages	16-35	36-50	51-69

Why should you care about Millennials?



Source: 15 Facts About Millennials – The Council of Economic Advisors, Oct. 2014

Why should you care about Millennials?



- 79 million Millennials
- Will surpass Baby Boomers as America's largest living generation by end of 2015
- Becoming an increasingly higher percentage of jurors in civil trials

Can we define people by generation?



- It can be arbitrary.
- It can be dangerous.
- What do generational researchers tell us?

Can we define people by generation?



Shared experience
of major events



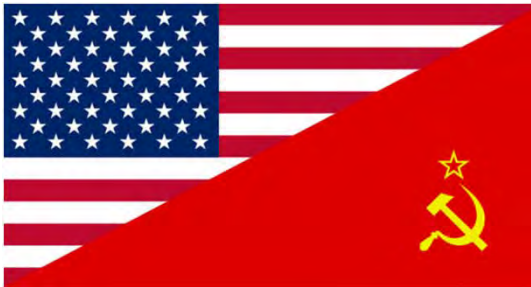
Experience of being
raised in a
generation with
shared values



Generation with a
unique bond and
common attitudes

Can we define people by generation?

- E.g., Baby Boomer “shared experiences” include:



What do Millennials have in common?



What can we say about Millennials?



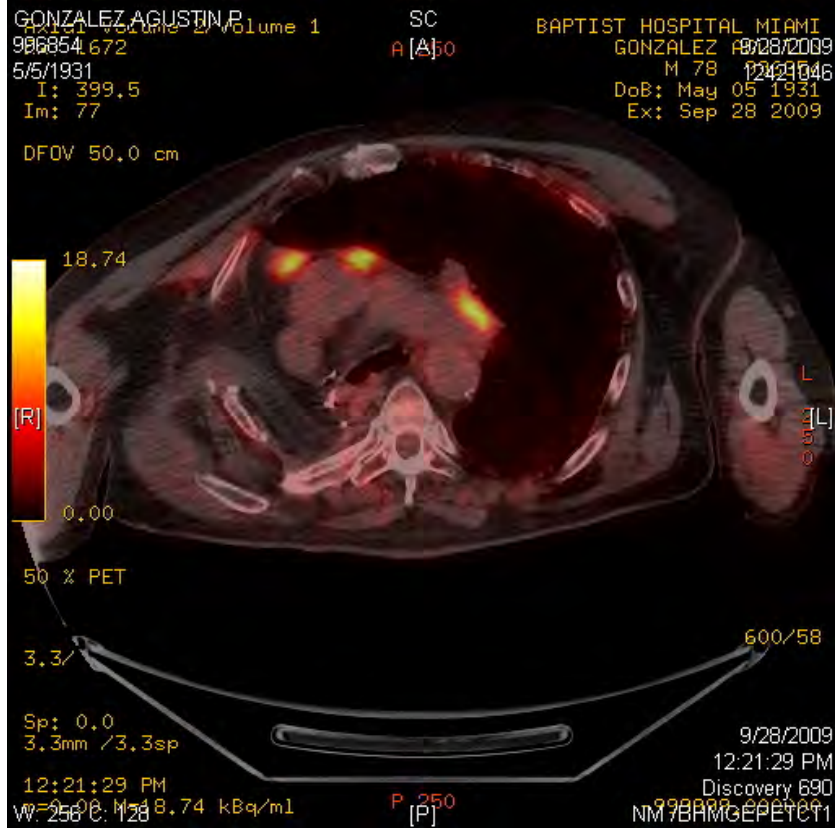
- Highly educated, self-confident, technologically savvy, ambitious
- Socially liberal (66% voted for Barack Obama in 2008)
- Ethnically diverse
- Team oriented
- Less religious than Generation X or Baby Boomers
- Experienced high rates of unemployment (“Boomerang Generations”) and debt

The Basics

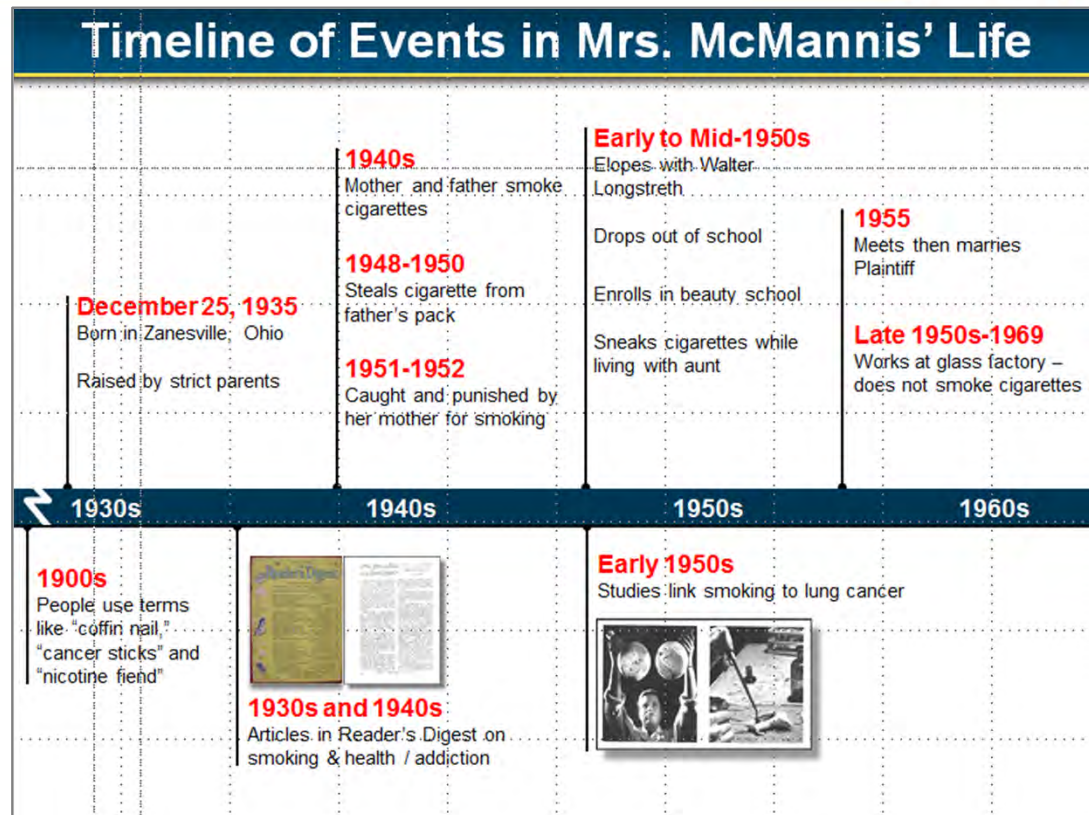


- Learning is visual
- Presentation must be concise
- Answers must be provided (the sooner, the better)
- Credibility is key
- Lecturing vs. engaging

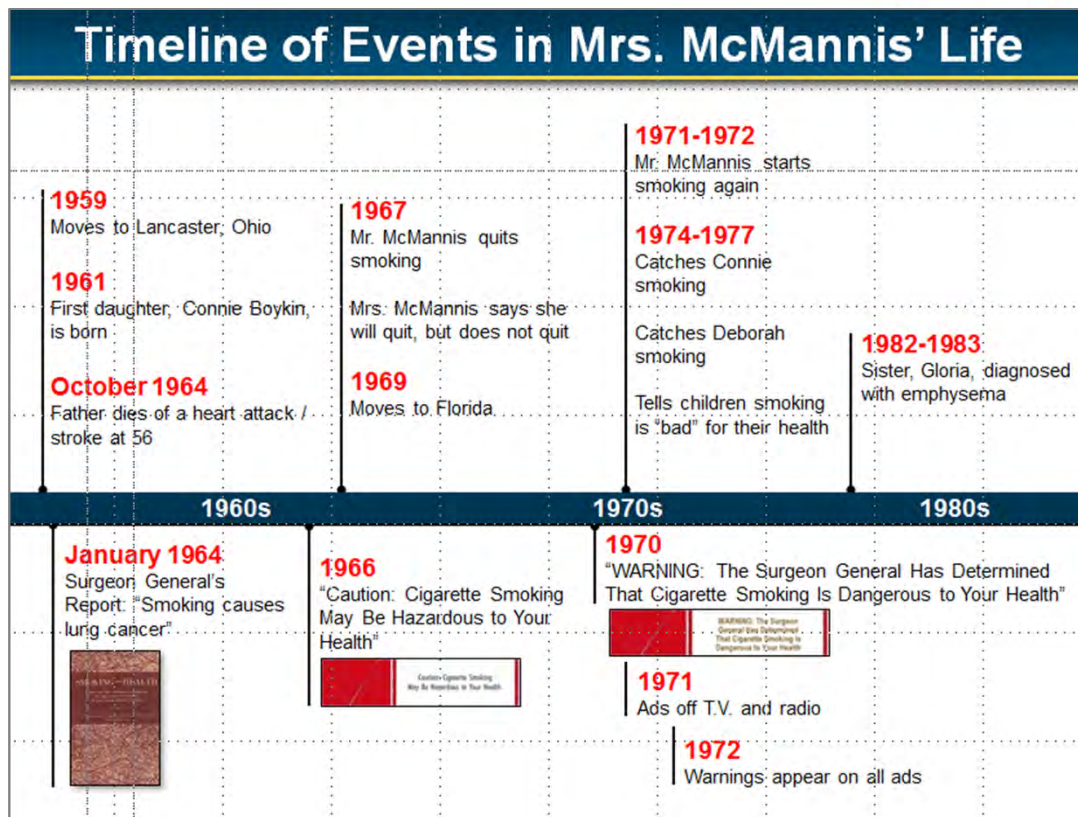
Case Example: Cox



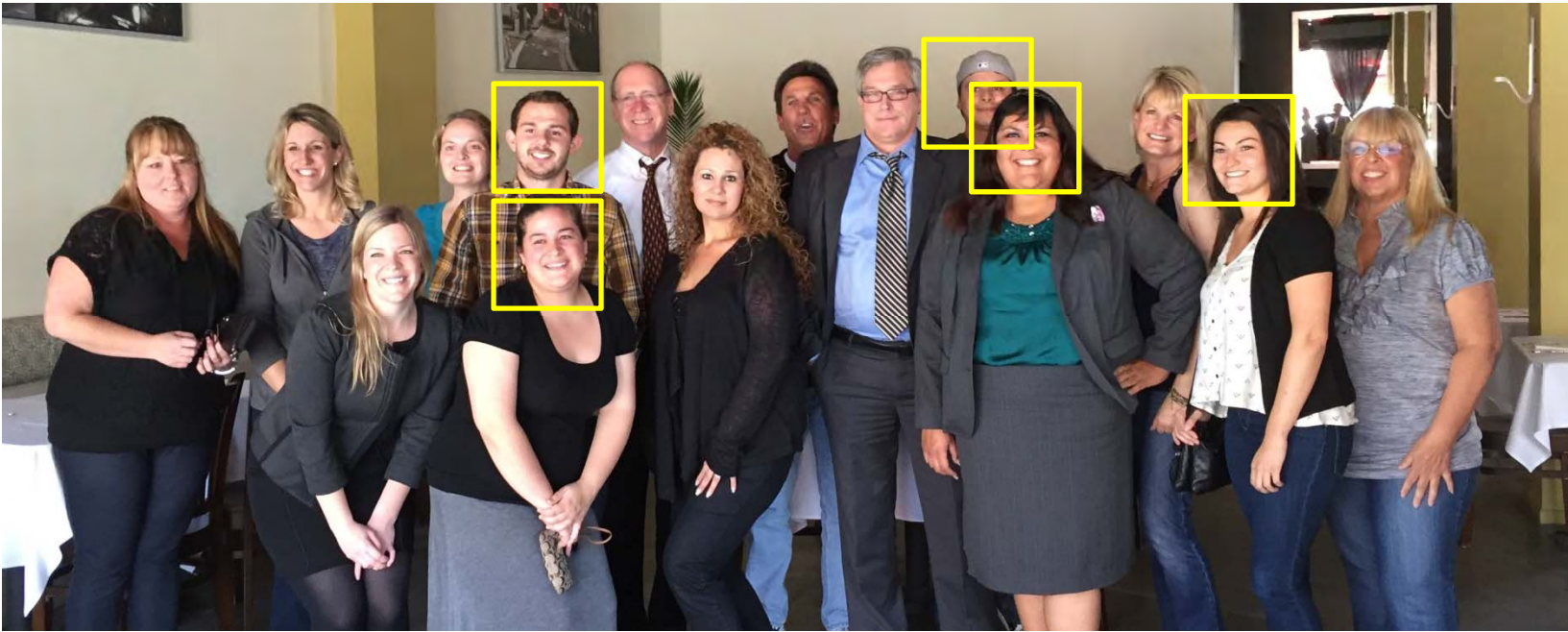
Case Example: *McMannis*



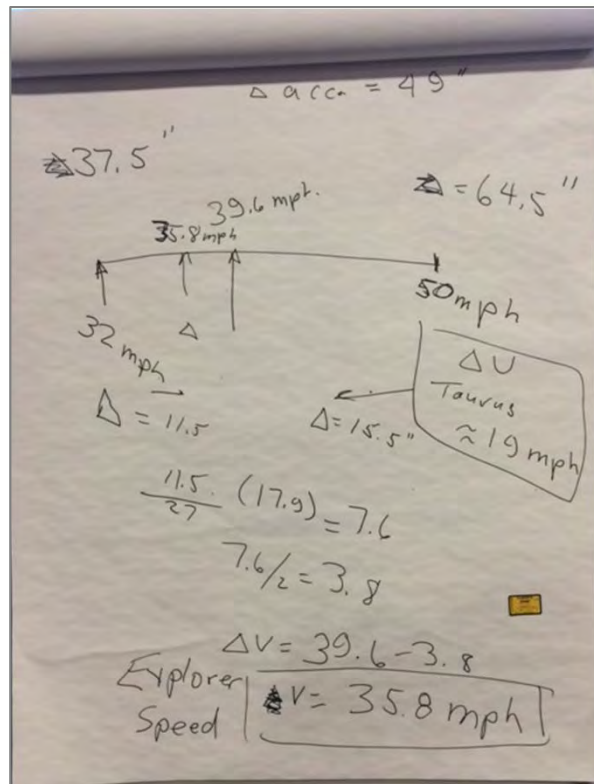
Case Example: *McMannis*



Case Example: *Verduzco*



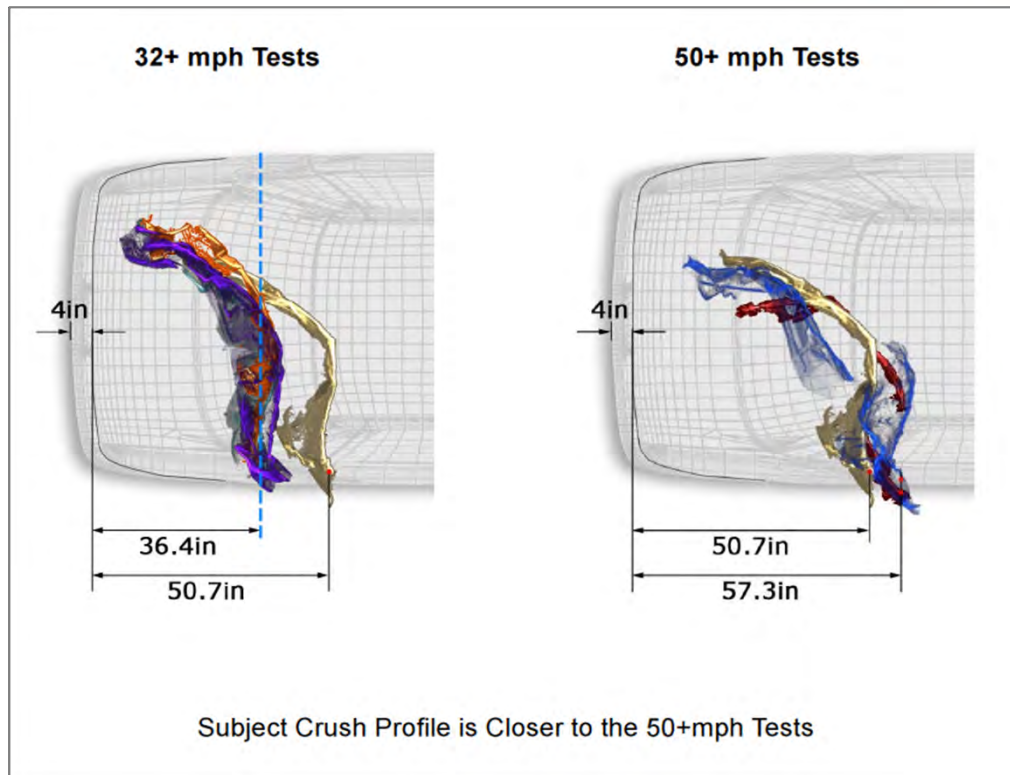
Case Example: Verduzco



Case Example: *Verduzco*



Case Example: *Verduzco*



What will unite Millennials with other jurors?

A white silhouette of a city skyline with various buildings and a bridge, set against the orange background of the title bar.

- Juror panel will be a mixed group that includes Millennials, Generation X, and Baby Boomers
- Shared experiences include 9/11 and technology innovation of last 10-15 years
- Universal themes resonate
- Compelling story brings people in
- Younger jurors will still look to older jurors for wisdom, guidance, and counsel

Contact



Bill Geraghty

Partner

Shook, Hardy & Bacon L.L.P.

wgeraghty@shb.com



Rachael Smith

Associate

Shook, Hardy & Bacon L.L.P.

rxsmith@shb.com



Using Arbitration Clauses to Minimize Potential Litigation Exposure

Andrew L. Chang | *Associate* | Shook, Hardy & Bacon

Background of FAA

- Federal Arbitration Act (FAA)
Enacted in 1925.
- Section 2 of the FAA provides that arbitration agreements must be enforced, “save upon such grounds as exist at law or in equity for the revocation of any contract.”



Recent Supreme Court Authority



- ***Stolt-Nielsen v. AnimalFeeds Int'l Corp.***, 130 S. Ct. 1758 (2010)
 - Arbitration agreements silent as to class procedures cannot be interpreted to allow them.
- ***Rent-A-Center West, Inc. v. Jackson***, 130 S. Ct. 2772 (2010)
 - Delegating enforceability of the arbitration agreement to arbitrator is enforceable under the FAA.
- ***AT&T Mobility v. Concepcion***, 131 S. Ct. 1740 (2011)
 - FAA preempts California rule requiring class procedures to be available in arbitration because “requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.”
- ***American Express Co. v. Italian Colors Restaurant***, 133 S. Ct. 2304 (2013)
 - Enforcing class arbitration waiver notwithstanding cost of proving individual claim would exceed individual’s potential recovery

Advantages and Disadvantages to Arbitration



- **Advantages**
 - Lower costs
 - Greater efficiency and speed in resolution
 - Flexibility
 - Ability to choose expert adjudicators for specialized disputes
 - Confidentiality
- **Disadvantages**
 - Limited review
 - Rising costs

Drafting the Arbitration Provision



- Identify the scope of claims
- Identify the processes to be used
- Identify who will arbitrate
- Identify what parties are subject to the arbitration

Some Common Pitfalls



- Unconscionability
- Forgetting It's a Contract
- Waiver

Recent Examples - Unconscionability



- Don't designate your own employee as arbitrator.
 - *State ex rel. Hewitt v. Hon. Kristine Kerr*, ___ S.W.3d ___, 2015 WL 2061986 (Mo. Apr. 28, 2015)
- Make sure the arbitrator and governing rules you identify actually exist.
 - *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014)

Recent Examples – Contract Formation



- Parties must know about and agree to the arbitration provision.
 - *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014)
 - *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559 (9th Cir. 2014)
- Consideration requires at least a peppercorn.
 - *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. 2014)

Recent Examples – Waiver



- How much litigation is too much litigation?
 - *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690 (4th Cir. 2012) (six months and engaging in discovery not waiver where no prejudice)
 - *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945 (1st Cir. 2014) (waiver after nine months and significant discovery)
- If you want to arbitrate, err on the side of filing early.

SHOOK
HARDY & BACON

Update of the Law ^{CLE}



WHAT'S ON THE HORIZON?

Contact



Andrew L. Chang

Associate

Shook, Hardy & Bacon

achang@shb.com | 415.544.1900





2015 Business Tax Update

John W. (“Jay”) Simpson
Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard | Kansas City, Missouri 64108
816-474-6550 | jsimpson@shb.com

1. **Tax aspects of President Obama’s FY2016 budget proposal.** President Obama announced that the following items would be included in his FY2016 budget proposal:
 - A. Limiting the value of itemized deductions to 28%.
 - B. Ensuring that high income taxpayers (AGI in excess of \$1,000,000) pay tax at an effective rate of at least 30%.
 - C. Decreasing the estate tax exemption amount from \$5,430,000 to \$3,500,000.
 - D. **Taxing income from “carried interests” held by equity fund managers as ordinary income.**
 - E. Decreasing the top corporate income tax rate to 28%.
 - F. Increasing the maximum tax rate on long-term capital gains to 28%.
 - G. Disallowing the step-up in tax basis that occurs upon death.
 - H. Requiring S corporation shareholders to pay self-employment tax on pass through S corporation income.
 - I. Limiting the Section 1031 like-kind exchange exclusion to \$1,000,000 of gain for any real estate exchange.
 - J. Denying an income tax deduction for payments of punitive damages.
2. **Tax extenders for 2015?** In recent history, Congress has typically enacted a pro-taxpayer, two-year “**tax extenders**” package every other year. For 2014, however, President Obama signed the extenders legislation on December 19, 2014, and the extenders expired on January 1, 2015 (i.e., the extenders legislation covered only 2014, not 2015). It remains to be seen what action Congress will take on the extenders in 2015. The affected extenders include popular items such as bonus depreciation, enhanced Section 179 expensing, research tax credits, the mortgage insurance premium deduction, the exclusion for gain from the sale of certain small business stock, a reduced 5-year built-in gain period for S corporation asset sales, and over 50 other pro-taxpayer provisions.
3. **Update on state income tax apportionment rules.** In the late 1960s, nineteen

states became parties to the Multistate Tax Compact. Two of the objectives of the Compact are to encourage (a) uniformity and compatibility of state tax laws and (b) equitable apportionment of income of multistate taxpayers for state income tax purposes. With this in mind, Article IV of the Compact sets forth a three-factor formula (based equally on the **location of a business' payroll, property and sales**) for apportioning the income of a multistate business to the states in which the business operates. In addition, Article III of the Compact states that regardless of the statutory apportionment rules of a particular state, if the state is a member of the Compact, a taxpayer may elect **to apply the Compact's three-factor formula to apportion the taxpayer's income to that state (in lieu of using the state's statutory apportionment rules).**

In recent years, many Compact states have made attempts to move away from the **Compact's three-factor** income apportionment formula. For example, in 1993, California adopted legislation stating that notwithstanding the Compact, all taxpayers must apportion income to California **using a formula that "double-weights" the sales factor.** (Presumably California believed that double-weighting the sales factor would, on balance, require multistate taxpayers to apportion more income to California.)

Gillette Co. initially filed California income tax returns using the double-weighted sales factor; but Gillette later (a) filed amended returns in which it elected to use the regular three-factor formula allowed by the Compact and (b) claimed income tax refunds based on the amended returns. California denied the refund claims, and Gillette sued to recover the refunds. In October, 2012, the California Court of Appeal ruled in favor of Gillette, holding that because California had not officially withdrawn from the Compact, it could not avoid the provisions of the Compact that allow a taxpayer to elect to use the **Compact's regular three-factor** apportionment formula. (*Gillette v. Franchise Tax Board.*) California has appealed this result to the California Supreme Court, and – after much delay – it is anticipated that the court will hear and decide the case in 2015.

The Michigan Supreme Court decided a similar issue in July, 2014 (*IBM v. Department of Treasury*). The Michigan Supreme Court ruled in favor of the taxpayer (IBM), holding that a Michigan statute requiring an alternative income tax apportionment formula did **not trump IBM's right to use the Multistate Tax Compact's elective-three factor** apportionment formula to calculate its Michigan tax liability. There was a strange twist in the Michigan case, however, when—late in 2014—the Michigan legislature enacted a statute **that purported to repeal Michigan's participation in the Multistate Tax Compact, effective January 1, 2008.** Based on this legislation, on April 28, 2015, a lower Michigan court held that—**despite the Michigan Supreme Court's prior decision in favor of IBM—**IBM was not entitled to claim tax refunds based on the prior decision. In essence, the **lower court held that the subsequent legislation had retroactively repealed IBM's refund rights.** IBM apparently intends to appeal the decision.

The *Gillette* and *IBM* cases have far-reaching implications because several other states – without withdrawing from the Compact – have enacted statutes that purport to prohibit the use of the standard three-factor apportionment formula set forth in the Compact.

Pending the final results of the *Gillette* and *IBM* cases, many multistate businesses have filed state income tax refund claims in California, Michigan and other Compact states. These refund claims **would be appropriate, for example, if applying the Compact's three-factor apportionment formula would reduce the taxpayer's income tax liability in the state (compared to the tax liability that would result from applying the state's statutory apportionment formula).**

Refund litigation similar to the Michigan and California cases is also pending in Texas, Oregon and Minnesota. Going forward, the key issue may be whether the courts will allow the states to retroactively repeal their participation in the Multistate Tax Compact.

4. **A “Wynne” for taxpayers seeking state/local income tax credits.** On May 18, 2015, the United States Supreme Court held that a component of Maryland's income tax scheme that provided a credit for income taxes paid to other states against the Maryland state income tax, but not the Maryland county income tax, was unconstitutional (*Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. ____ (2015)). In reaching its decision, the Court found that the Maryland taxing scheme impermissibly interfered with interstate commerce, thereby violating the dormant Commerce Clause of the US Constitution.

In Maryland, on a Maryland resident's income tax return, the resident taxpayer computes both a state income tax and a county income tax on his or her taxable income (which taxable income amount includes income earned in Maryland or any other state). Historically, if the taxpayer has paid income tax to another state on his or her income, the taxpayer has been entitled to claim a credit against his or her Maryland state income tax liability, but not his or her Maryland county income tax liability. This has resulted in double taxation for certain Maryland residents who earn income inside and outside of Maryland. Because of this result, the taxpayer in *Wynne* brought an action to challenge **the dichotomy in Maryland's tax credit scheme**. The taxpayer eventually received a favorable decision from the Maryland Court of Appeals (which is Maryland's highest court). The Court of Appeals held that the taxing regime was unconstitutional under the Commerce Clause. Maryland appealed to the United States Supreme Court, which—by a 5-4 vote--ultimately upheld the decision of the Maryland Court of Appeals, ruling in favor of the taxpayer.

As indicated above, the majority opinion in *Wynne* found that Maryland's taxing regime violated the dormant Commerce Clause. This finding was significant because some commentators had speculated that the Court might use the *Wynne* case to rule either (1) that the dormant Commerce Clause does not apply in income tax cases or (2) that the dormant Commerce Clause protects only corporations, but not individuals.

The *Wynne* case represents a significant victory not only for the individual taxpayer in the Maryland case, but also possibly for taxpayers in other states who earn income both within and without their state of domicile. The case makes it clear that there are boundaries that states must respect in terms of imposing income taxes on their residents. The case also provides much-needed confirmation of the Supreme Court's commitment to the dormant Commerce Clause doctrine.

Although the *Wynne* case was decided within the past month, commentators have already suggested that taken to its farthest limits, the case might (1) require Kansas to provide a state income tax credit for Kansas City, Missouri earnings taxes paid by Kansas residents and (2) require Kansas City, Missouri to provide a credit **—against the city's** earnings tax--for Kansas state income taxes paid by Kansas City, Missouri residents. Neither position is at all clear at this point, but practitioners will closely monitor the aftermath of *Wynne*.

5. **Status of Kansas tax exemption for non-wage business income.** Beginning in 2013, and continuing in 2014 and beyond (at least for the time being), the Kansas income tax does not apply to the following types of income that would otherwise be reportable by an individual taxpayer: (a) non-wage business income earned by a sole

proprietorship, and (b) business income earned by a partnership or S corporation. A Missouri resident will not receive the full benefit of this exemption because the Missouri resident will pay Missouri income tax even on income earned in Kansas. Likewise, the full benefit of this exemption is not available to a Kansas resident who has business income that is subject to tax in Missouri (e.g., business income earned in Missouri). This, however, is a significant tax break for a Kansas resident who earns (or is required to report) business income that is not subject to tax in any other state (or that is subject to a lower tax in another state).

This tax break has been viewed as an incentive for S corporations and partnerships to relocate to Kansas in order to allow their Kansas resident owners to avoid paying state income tax. Kansas, of course, now has large revenue shortfalls, so whether the tax break will/should remain in place has been the subject of much debate in the Kansas legislature.

6. **Predicting which revenue generating measures will be adopted by the Kansas Legislature.**

As of June 3, 2015, are you kidding??? Possibilities include raising the cigarette tax, eliminating income tax deductions, raising the sales tax rate and eliminating (or reducing) the income tax exemption for non-wage business income.

7. **Marketplace Fairness Act continues to be debated in Congress.** Very generally, under tax principles set forth in the Commerce Clause of U.S. Constitution, an online retailer is not required to collect use tax on its sales to residents of a particular state unless the retailer has a significant physical presence in the state. The U.S. Congress, however, has the authority to change this result under the Commerce Clause. In May, **2013, the U.S. Senate passed the Marketplace Fairness Act (“MFA”).** Under this legislation, a state—if it adopts and implements several minimum sales tax simplification requirements—would be allowed to require all online retailers to collect use tax on sales to residents of the state. The Senate legislation was sent to the U.S. House of Representatives, but the House took no further action in 2013. Most commentators expected Congress to consider (and perhaps pass) similar legislation in 2014, but this did not occur. It remains to be seen whether Congress will pass MFA legislation in 2015. Be sure to do all of your online shopping before this happens.



Key Considerations in Government Investigations

David M. Maria | *Partner* | Shook Hardy & Bacon LLP

Overview



- Compliance Program
- Preservation
- Investigation
- Remediation
- Disclosure to Government?

Compliance Program

- Guidance on “Effective Compliance Program”
 - USAM Chapter 9-28.800
 - USSG Section 8B2.1
 - DOJ/SEC “Resource Guide to the FCPA”
 - Corporate Integrity Agreements
- Benefits of Effective Compliance Program?
 - Allow the Company to detect (and deter) misconduct
 - Company learns of conduct before the government
 - Credit provided by the government

Preservation

- Identification of potentially relevant custodians
- Cessation of auto-deletion of email
- Litigation hold memorandum
- Additional steps?

Investigation

- Reasonable response to red flags
- Inside or outside counsel?
- Protect privilege to the greatest extent possible
- Thorough, good faith investigation
- Follow up on additional red flags

Remediation

- Impacts government's charging decision
 - See Principles of Federal Prosecution of Business Organizations
- Discipline/termination of wrongdoers
- Termination of improper relationships
- Restitution?
- Changes/improvements to compliance program

Disclosure to the Government?



- Why?
 - Impacts the government’s charging decision
 - Impacts the “culpability score” used to determine the fine
 - Impacts the relationship with the government
 - Can preclude a whistleblower lawsuit
 - SEC disclosure obligations?

Disclosure to the Government?

- Why not?
 - Government may never learn of misconduct
- When?
 - “Placeholder” strategy
 - Other options?

Summary

- Establishment/maintenance of a compliance program
 - Reasonable methods in place to educate employees
 - Reasonable methods in place to deter misconduct
- Reasonable response to red flags
 - Preservation
 - Investigation
- Reasonable remedial action
- Necessary changes to compliance program

Contact



David M. Maria

Partner

Shook, Hardy & Bacon L.L.P.

Washington, D.C.

dmaria@shb.com | 202.639.5644



Responding Like A Pro: A Mock Data Breach Response

Blake Bryant | Principal Security Analyst | FishNet Security

Ozzie Fonseca | Director, Data Breach Resolution Group | Experian Information Solutions

Al Saikali | Partner | Shook, Hardy & Bacon L.L.P.

William Sampson | Partner | Shook, Hardy & Bacon L.L.P.

Sarah Tyre | Managing Director, Public Affairs and Crisis Practice | Burson-Marsteller

Background



- Blitz is a national marketing company that designs promotional campaigns using social media.
- Blitz outsources to “Little & Co.”: (a) the building of a database of potential customers to whom Blitz’s clients can market their products, and (b) sends the promotional materials to potential consumers.
- In exchange for providing personal information, potential customers can create usernames/passwords to access various promotions.
- Little can’t afford to encrypt the database, which contains names, email addresses, and account usernames/passwords for over 500,000 individuals in the U.S.

The Call



- Little’s general counsel receives a call from local law enforcement informing her that one of Little’s employees, Sharon Shady, is suspected of misusing her access to the customer database to sell customer info as part of an identity theft crime ring.
- Law enforcement wants access to Shady’s hard drive to find out what she has been downloading and to identify potential victims. They don’t have a warrant and get very frustrated when you ask for one – “getting a warrant will result in lost evidence.”

Responding to the Incident



- Little informs Blitz of what happened. Blitz is concerned, and instructs Little to engage an outside forensic firm to determine which records Shady accessed.
- Little engages the forensic firm through outside counsel.

Forensic Results and Notice

- The forensic firm's preliminary findings:
 - Shady, who had no reason to use the customer database to perform her responsibilities, conducted scores of searches in the database.
 - Some of the searches would just be first name, making it difficult to identify who Shady was targeting.
 - It will take several weeks to figure out all of the searches she did, and the mailing addresses for those individuals.

The Leak



- Larry Loudmouth, who worked with Shady, catches wind of the incident and tells his brother who works at the Wall Street Review.
- The Review calls Blitz and Little asking for a statement about the incident.

The Lawsuit

- A leading plaintiff's lawyer, sees the article in the newspaper.
- He sends to Little's GC and the GC for Blitz a draft copy of a lawsuit he intends to file against Blitz and Little.
- The local AG's office sees the same article and wants to know why the info wasn't encrypted, why Shady had access to this database, and why weren't they told about the incident sooner?

The Settlement



- The civil lawsuit is filed and a motion to dismiss is granted without prejudice. The plaintiffs amend their lawsuit and the parties agree to mediation.
- The case settles at mediation.

The Post-Incident Assessment



- Blitz and Little both review their administrative, technical, and physical safeguards in an attempt to limit the risk of a similar incident in the future.



Legal Ethics and Social Media

Gary Miller | Partner | Shook, Hardy & Bacon L.L.P.

Vincent Catanzaro | Of Counsel | Shook, Hardy & Bacon L.L.P.

Patrick Castle | Associate | Shook, Hardy & Bacon L.L.P.

Presentation Overview

1. Social Media Primer
2. Counseling Clients
3. Managing Attorneys and Staff
4. Maintaining Client Confidences
5. Spoliation and Preservation of Evidence
6. Wrongfully Obtaining Evidence



[1] SOCIAL MEDIA PRIMER

What is Social Media?



The internet is not something you just dump something on.

It's not a truck.

It's a series of tubes.

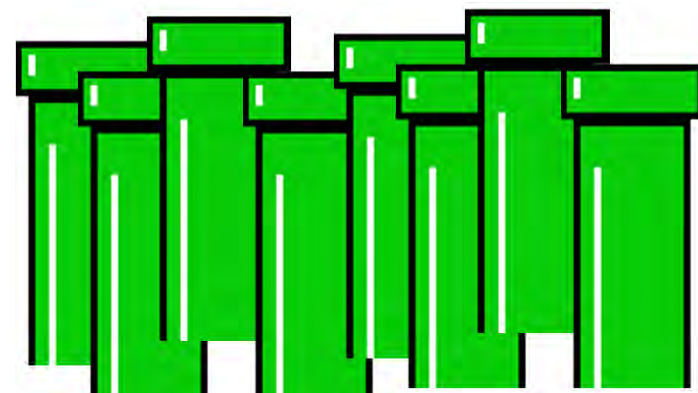
Late Senator Ted Stevens



What is Social Media?



Those tubes can be filled and if they are filled, when you put your message in, it gets in line.



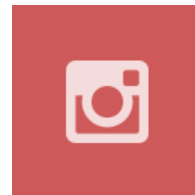
Late Senator Ted Stevens

What is Social Media?



- [1] Computer-mediated tools
- [2] that allow people to create, share or exchange information ...
- [3] in virtual communities and networks.

What is Social Media?



Lots of People



**74% of adult
internet users**

Lots of Data



Every 20 min.

**1,000,000 links shared
3,000,000 messages sent**



Every day

58,000,000 tweets



Every day

70,000,000 photos

What makes social media special?

1. Low Barrier
Fast, simple, free
2. Powerful Consequences
Public, permanent
3. False Privacy
Your network, profile, and device

Resulting in:



Finally got my
debit card!

Love the blue.

Resulting in:



Photos of Taco Bell

Back to Album

Pre



Like Comment



[2] COUNSELING CLIENTS

Rule 2.1: Advisor to Clients

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.

Rule 1.1 Competence

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

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Example Client Issue: Social Media Marketing

Five Key Risks

1. Defamation
2. Intellectual property violations
3. Unauthorized release of client information
4. Harassment or discrimination
5. Deceptive or unfair practices



[3] MANAGING ATTORNEYS AND STAFF

Rule 5.1: Responsibility for Lawyers



(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;

(2) the lawyer **is a partner or has comparable managerial authority** . . . and knows of the conduct at a time when its consequences can be avoided or mitigated **but fails to take reasonable remedial action.**

Rule 5.3: Responsibility for Non-Lawyers



With respect to a nonlawyer employed or retained by or associated with a lawyer[, **partners or attorneys with management authority**]:

(a) . . . 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) . . . shall make **reasonable efforts to ensure that the person's conduct is compatible** with the professional obligations of the lawyer; and

Rule 5.3: Responsibility for Non-Lawyers



(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

In re Herr - Kansas Supreme Court (2013)

2010: Graduated from law school, hired as judicial assistant for Judge on Kansas Court of Appeals

2012: Research attorney for the same Judge

November 2012: Discipline proceeding before Kansas Supreme Court involving former Kansas Attorney General Phill Kline

Herr's Judge was not involved, but Herr watched the proceedings from her office and used her work computer to tweet her reactions



In re Herr

The image is a screenshot of a Twitter profile page for a user named Sparkle Pet (@sparkyllife). The profile picture shows a pair of red lips. The background of the profile header features a black and white floral pattern. On the left side, there is a navigation menu with options: Tweets, Following, Followers, Favorites, and Lists. The main content area displays a tweet from Sarah (@sparklylife) posted 6 hours ago, which reads: "Why is Phil Klein smiling? There is nothing to smile about, douchebag." Below the tweet, statistics show 2,890 tweets, 473 following, and 245 followers. A 'Follow' button is visible. To the left of the tweet, there is a 'Similar to Sparkle Pet' section listing three accounts: Shane Co. (@ShaneCompany), Barbara M. (@momspaker), and Jayhawk Theatre (@jayhawkTheatre). At the bottom of the tweet area, a 'Protected' message is displayed: "@sparkyllife's tweets are protected. Only confirmed followers have access to @sparkyllife's Tweets and complete profile. Click the 'Follow' button to send a follow request." The bottom left corner of the screenshot shows a Fox logo and a timestamp of 9:31 48°.

In re Herr



**Holy balls, There are literally 15
cops here for the Phil Kline [sic].
Thus I actually wore my badge.**

In re Herr



**You can watch that naughty
naughty boy, Mr. Kilein [sic],
live! live.kscourts.org/live.php**

In re Herr



I love that Phil [sic] is talking about Dr. Tiller like they are cool, and not that his witch hunt helped lead to Dr. Tiller's murder.

In re Herr



**I predict that he will be
disbarred for a period not
less than 7 years.**

In re Herr

Associated Press saw tweets and contacted Court

Before being terminated, Herr deleted tweets and “maybe” deleted the internet history on her work computer

Disposition: Herr fired by her judge and formally censured by the Court

In re Herr



More images for [sarah peterson herr](#)

[Sarah Peterson Herr](#) « Above the Law: A Legal Web Site ...

[abovethelaw.com/tag/sarah-peterson-herr/](#) ↗ Above the Law ↗

Sarah Peterson Herr, the lady who was fired yesterday for the tweets, learned an invaluable life lesson. Namely, that truth is almost never a defense. That you ...

[PDF] Supreme Court of Kansas - [Sarah Peterson Herr](#) - 2012...

[www.kscourts.org/pdf/Herr-Admonition-Final-Report.pdf](#) ↗

Sarah Peterson Herr,). Respondent.)) . 1. FINAL HEARING REPORT Procedural History. 1. A review committee, appointed under an alternate disciplinary ...

[Sarah Peterson Herr](#), Kansas Appeals Court Attorney, Fired ...

[www.huffingtonpost.com/2012/11/.../sarah-peterson-herr_n_2161558.ht...](#) ↗

Nov 18, 2012 - Sarah Peterson Herr, a research attorney for a Kansas Court of Appeals judge, posted the comments about former Attorney General Phill Kline ...



[4] MAINTAINING CLIENT CONFIDENCES

Rule 1.6: Confidentiality of Information



“A lawyer shall not reveal information relating to the representation of a client” absent . . .

1. **informed consent** by the client;
2. **implied authorization** by the nature of the representation; or
3. **extreme circumstances** like preventing fraud, murder, etc.

In the Matter of Kristine Ann Peshek



Winnebago County assistant public defender for 19 years

Created blog:

“The Bardd Before the Bar – Irreverant Adventures in Life,
Law, and Indigent Defense” [*sic*]

About one-third of her posts concerned her work

In the Matter of Kristine Ann Peshek

#127409. This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.'

My client is in college. Just goes to show you that higher education does not imply that you have any sense.

In the Matter of Kristine Ann Peshek

'Dennis,' the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER.

Guess what? It was positive for cocaine.

He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.

In the Matter of Kristine Ann Peshek

Illinois ARDC: Peshek's blog entries contained sufficient information to reveal several clients' identities, as well as those of judges Peshek insulted

Disposition: Suspended for 60 days by Illinois ARDC; reciprocal 60 day suspension by Wisconsin Supreme Court

In re Jesse Raymond Gilsdorf



Gilsdorf represented Fulmer on criminal charges for selling drugs

In discovery, Gilsdorf received a video of Fulmer selling drugs to an undercover agent

In re Jesse Raymond Gilsdorf



Gilsdorf believed the video showed the authorities planting the drugs

He posted the video to YouTube in an apparent bid for public support

“Cops and Task Force Planting Drugs”

In re Jesse Raymond Gilsdorf



Gilsdorf later “watched the video ‘again and again’ on a ‘large television set,’” after which he “changed [his] opinion” and decided the video did, in fact, show his client selling drugs.

In re Jesse Raymond Gilsdorf



Violations (Among Others)

1. No consent under Rule 1.6
2. “[E]ven if [Fulmer] had given permission ... [she] did not give ‘informed consent’ as required by Rule 1.6(a).”

Conclusion: five-month suspension

What about public record information?

Rule 1.6, Comment [3]: **The confidentiality rule, for example, applies** not only to matters communicated in confidence by the client but also **to all information relating to the representation, whatever its source.** A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.



[5] SPOILIATION AND PRESERVATION OF EVIDENCE

Rule 3.4: Fairness to Opposing Party and Counsel



A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, **destroy or conceal** a document or other material having **potential evidentiary value**. **A lawyer shall not counsel or assist another person to do any such act . . .**

Rule 4.1: Truthfulness in Statements to Others



... 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** to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

This is Murray

Board of Visitors

Matthew B. Murray

Matt joined Allen, Allen, Allen & Allen in 2008 as a shareholder and the branch manager of the **Charlottesville office**. A longtime Charlottesville resident, Matt champions the legal rights of **personal injury and medical malpractice** victims in the Piedmont and Shenandoah Valley regions. With a career in personal injury and medical malpractice law spanning over 30 years, Matt brings substantial experience in trying complex cases in state and federal courts. He is deeply committed to his clients and puts forth the efforts and resources necessary to hold wrongdoers accountable for the harm they cause to innocent victims. Matt won a 10 million dollar jury verdict in 2003 - the largest defamation verdict in Virginia history. He has also obtained many million dollar verdicts and settlements for seriously injured victims.



Before joining Allen & Allen, Matt was the lead trial attorney in the personal injury section of Richmond & Fishburne, L.L.P. Board Certified as a Civil Trial Advocate by the National Board of Trial Advocacy, he is also a member of the American Board of Trial Advocates, has an "AV" rating in the Martindale-Hubbell Law Directory, and has been recognized since 1993 in the reference book *Best Lawyers in America*.

Matt currently serves as a Vice President of the **Virginia Trial Lawyers Association** and is a member of its Executive Council. He has served as past President of both the Charlottesville-Albemarle Bar Association and the Thomas Jefferson Inn of Court.

Education

- Albemarle High School - 1965
- B.A. University of North Carolina at Chapel Hill - 1970
- Northwestern School of Law - 1975
- Licensed to practice law in the State of Virginia and the District of Columbia

Experience

- Partner & Trial Attorney, Allen, Allen, Allen & Allen (2008 - Present)
Responsibilities include management of the Charlottesville, Virginia office
- Partner & personal injury litigator, Richmond & Fishburne, L.L.P. (1982 - 2007)
- Partner & trial attorney - Taylor, Brooks, Zunka and Murray (1979 - 1982)
- Assistant Commonwealth Attorney, City of Charlottesville (1975 - 1978)

Honors

- AV Peer Review Rated by Martindale Hubbell
- Best Lawyers in America (1993 - Present)

Managing partner of office of prominent Virginia law firm

30+ years experience

Former president of Virginia Trial Lawyers Association

Northwestern alumnus

This is Murray's Client



This is Murray's Advice

“You have something (maybe plastic) on your head and are holding a bud with your I Love Hot Moms shirt on. There are 2 couples in the background ... both girls have long blond hair. **Do you know the pic? There are some other pics that should be deleted.**”

This is Murray's Conduct



- Signed discovery response: “I do not have a Facebook page on the date this is signed, April 15, 2009.”
- During extensive discovery dispute, claimed opposing counsel “hacked” his client’s Facebook page.

This is Murray's Undoing



- Opposing counsel subpoenaed Facebook, hired an expert, and proved that Murray's client had deleted 16 photos, all of which were eventually produced.
- Murray also intentionally omitted the email instructing his client to delete pictures from his privilege log.

This is Murray's End



Murray's client:

- \$180,000 fine

Murray:

- \$542,000 fine
- Five-year suspension

Spoliation Lessons



N.Y. Cty. Lawyers' Association:

- Removing social media posts is permissible, “provided that such removal does not violate the substantive law regarding destruction or spoliation of evidence.”
- “There is no ethical bar to ‘taking down’ such material from social media publications . . . particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user’s computer. “

Spoliation Lessons



- **Pre-Screening:** advice; generally allowed
- **Deleting:** could be spoliation



[6] WRONGFULLY OBTAINING EVIDENCE

Rule 4.3: Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, **a lawyer shall not state or imply that the lawyer is disinterested.** When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding . . .

“The Philadelphia Lawyer”



- Philadelphia lawyer deposed unrepresented witness, and the deposition testimony was harmful to the lawyer’s case
- The witness revealed she had a Facebook account
- After the deposition, the lawyer checked the witness’s account

“The Philadelphia Lawyer”



- The lawyer then asked Professional Guidance Committee whether he could have a third party attempt to “friend” the witness
- If permitted, the third party would provide the lawyer information from the witness’s Facebook page for evaluation and possible use for impeachment at trial

“The Philadelphia Lawyer”



The Answer: Not Allowed

Rule 5.3: lawyers are liable for professional misconduct by non-lawyers acting at their direction

Rule 8.4: contacting an unrepresented party in this manner would constitute both (a) deception, and (b) misconduct

General Advice to Avoid Problems



1. Have a business vision for social media
Goals to achieve? Dangers to prevent?
2. Develop a policy to achieve the vision
Short, clear, and specific. Principles + rules.
3. Teach and enforce the policy
Unenforced policy can be worse than none.

Questions?



Gary Miller

Partner

Shook, Hardy & Bacon L.L.P.

gmillershb.com

312.704.7703



Vincent Catanzaro

Of Counsel

Shook, Hardy & Bacon L.L.P.

vcatanzaro@shb.com

215.575.3118



Patrick Castle

Associate

Shook, Hardy & Bacon L.L.P.

pcastle@shb.com

312.704.7733



THE ETHYS AWARDS

2015 EDITION

The Best of the Worst Ethics Offenders

Sean Carter

Humorist at Law
Lawpsided Seminars
3620 N Paseo Del Sol
Mesa, AZ 85207
Phone: (480) 262-2653
sean@lawhumorist.com
www.lawhumorist.com

Sean Carter
Humorist at Law
Lawpsided Seminars
Mesa, Arizona

Sean Carter is the founder of *Lawpsided Seminars*, a company devoted to solid legal continuing education with a healthy dose of laughter.

Mr. Carter graduated from Harvard Law School in 1992. His ten years of legal practice focused on corporate securities and mergers and acquisitions. During this time, he represented such clients as GNC, Experian, The Boston Beer Company, Homeside Lending, Safelite Auto Glass, J. Crew and many others, before eventually serving as in-house counsel to a publicly-traded finance company.

In 2002, Mr. Carter left the practice of law to pursue a career as the country's foremost Humorist at Law. Since then, Mr. Carter has crisscrossed the country delivering his Lawpsided Seminars for state and local bar associations, law firms, in-house corporate legal departments and law schools. Each year, he presents more than 100 humorous programs on such topics as legal ethics, stress management, constitutional law, legal marketing and much more.

Mr. Carter is the author of the first-ever comedic legal treatise -- *If It Does Not Fit, Must You Acquit?: Your Humorous Guide to the Law*. His syndicated legal humor column has appeared in general circulation newspapers in more than 30 states and his weekly humor column for lawyers appeared in the *ABA e-Report* from 2003 to 2006.

Finally, Sean lives in Mesa, Arizona with his wife and four sons.

The “Academy” has reviewed disciplinary reports from across the country to compile its list of the “Best of the Worst” in various categories of ethics violations. Awards will be given in categories that correspond with the most common ethical violations. While each of the nominees has violated an ethical rule in a grievous manner, they can serve as warnings for attorneys to avoid similar (although likely, far less flagrant) violations.

The Eager Beaver Award

While most ethical violations result from an attorney's misconduct in the practice of law, some lawyers are too eager to wait for admission to the bar to begin violating its ethics rules. Their misdeeds prevent them from ever becoming lawyers, particularly, when they violate the following rules:

RULE 4-5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by this Rule 4 or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

RULE 4-8.1 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
- (c) knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule 4-8.1 does not require disclosure of information otherwise protected by Rule 4-1.6.

[1] The duty imposed by this Rule 4-8.1 extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule 4-8.1 applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own

conduct. Rule 4-8.1(b) also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

NOMINEES

Old School (In the Matter of the Application of T. Z, Misc. No. 3, September Term, 2014):

A Maryland applicant was refused admission to the bar as a result of a “demonstrated consistent pattern of financial irresponsibility.”

The Party Animal (141 Ohio St.3d 101, 2014-Ohio-5200): An Ohio applicant was denied permission to sit for the bar exam as a result of multiple alcohol-related driving violations.

Beyond Borders (No. 2086 Disciplinary Docket No. 3, Board File No. C1-14-554, 109 DB 2014): A Pennsylvania lawyer was suspended for one year for the authorized practice of law in neighboring Delaware.

Shattered Glass (S196374, State Bar Ct. No. 09-M-11736): A California applicant was denied admission to the bar for fictionalizing stories as a journalist in the late 1990s.

Up in Smoke (La. Supreme Court No. 14-B-0390): A Louisiana lawyer received a three-year suspension for, in part, misrepresenting his marijuana use on his bar application.

LESSON: A lawyer must be careful to follow the admissions rules to the letter. Furthermore, lawyers must realize that they will be accountable for actions that occur even prior to being admitted to the practice of law as they reflect on his/her “moral character.” And perhaps, the thing that reflects most on this character is the lawyer’s willingness to be candid about prior misdeeds in the bar application process, regardless of how “irrelevant” the lawyer may consider them.

The Outlawyer

As officers of the court, lawyers have an obligation to abide by the law. The nominees in this category have committed egregious acts of criminality resulting in the loss of their privilege to practice law; and in some cases, the loss of their freedom. In the process, they have violated the following rule:

RULE 4-8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

NOMINEES

A Christmas Carol (Case No. 2012AP1949-D): A Wisconsin lawyer had his license revoked for lending money in excess of legal usury rates.

Much Ado About Nothing (Case No. 29S00-1205-DI-277): An Indiana lawyer was suspended for at least a year for taking a bag of mulch from a gas station without paying for it.

Finders Keepers (Case No. 11-C-17711): A California lawyer was suspended for six months for attempting to sell back a found diamond bracelet to its rightful owner.

Peeping Tom (Case No. 29833M): The Maryland Attorney Grievance Commission filed charges against a lawyer after he pled guilty to secretly videotaping female tenants staying at his house.

LESSON: In the case of the law, it's not enough to know it, but to follow it as well. And while most attorneys value their freedom too highly to commit serious crimes, we have an obligation to

avoid “a pattern of repeated offenses, even ones of minor significance when considered separately” (i.e., the “little” crimes).

Most Creative Billing

Under Rule 4-1.5, a lawyer is prohibited from charging or collecting “an illegal or clearly excessive fee.” Of course, there is no bright line test to determine whether a fee is clearly excessive. Instead, it is a balancing test. Yet, the attorney who crosses this fuzzy line may face disciplinary action. This same fate may also await those lawyers who charge a fee that is “excessive” through over-billing or inflated expense reimbursements.

RULE 4-1.5 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.

RULE 4-1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

NOMINEES

Friends With Benefits (Board File Nos. 2011-12 & 2011-45): Two Iowa attorneys were reprimanded in a case where one attorney prepared a will in which the other lawyer was a named beneficiary.

Get On Up (Slip Opinion No. 2014-OHIO-4835): An Ohio lawyer was suspended for two years (the second year stayed on conditions) for overbilling four separate counties for court-appointed legal services.

9 to 5 (Misc. Docket AG No. 75, September Term, 2012): A Maryland lawyer was disbarred for inflating his billable hours to his law partners.

Chicago (Commission No. 2014PR00038): An Illinois lawyer was suspended for two years for inflating the billable hours charged to a client.

LESSON: In addition to being scrupulously honest, it's important for lawyers to be meticulous and timely with billing matters. Overbilling that results from failure to keep timely records will be nonetheless punished, as will failure to *immediately* return excess funds to the client.

The Houdini Award

Unfortunately, some lawyers have an almost “magical” way of causing money to disappear from the accounts of their clients and even law partners. The nominees in this category worked their “magic” in spectacular fashion, violating the following ethics rules:

RULE 4-1.15 SAFEKEEPING PROPERTY

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Client or third party funds shall be kept in a separate account designated as a "Client Trust Account" or words of similar import maintained in the state where the lawyer's office is situated or elsewhere if the client or third person consents.
- (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
- (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

RULE 4-8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (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.

NOMINEES

Bounce (14PDJ047): A lawyer was suspended for one year and a day (all but three months stayed) for, among other things, bouncing a check from his COLTAF account to the local DA office.

Freaky Friday (Commission No. 2013PR00019): The Illinois Review Board has recommended a three-year suspension for a lawyer who stole funds from his aging former secretary.

The Family That Preys (Commission No. 2014PR00073): Illinois authorities have filed a complaint against a lawyer for stealing funds from a trust established by the lawyer's parents for the benefit of the lawyer's children.

Amazon Women on the Moon (Commission No. 2014PR00120): An Illinois law firm associate was suspended for two years (all but 90 days stayed) for using her employer's credit card accounts to purchase personal items from Amazon.com and other online retailers.

Forgetting Sarah Marshall (Case No. 2011AP1400-D): A Wisconsin lawyer had his license revoked for stealing funds held in trust for the benefit of his client suffering from Alzheimer's disease.

LESSON: Attorneys must *always* keep separate their funds and those belonging to clients. Any commingling (regardless of the amount and frequency) will be punished harshly by disciplinary authorities. It's important to note that lawyers will become involved in these behaviors after decades of honorable legal service. This should serve as a reminder that *any* lawyer could fall prey to greed and financial mismanagement. Furthermore, lawyers have an obligation to protect client funds from theft by others.

Best Supporting Actor (In a Criminal Activity)

While a lawyer has an obligation to provide zealous representation to a client, a lawyer must not cross the line to providing *illegal* representation. Specifically, a lawyer may not aid or abet a client in their criminal actions. This admonition applies to both the lawyer's role as an advisor and advocate. Therefore, a lawyer should not advise the client to commit a crime nor should the lawyer actively assist the client in doing so.

RULE 4-8.4 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;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

NOMINEES

Jewel of the Nile (Commission No. 2010PR00133): The Illinois Review Board has recommended a three-year suspension for an attorney who counseled his client to falsely deny their intimate relationship in a deposition.

Trading Places (Slip Opinion No. 2014-Ohio-3676): An Ohio lawyer was suspended for two years for falsely claiming to be the owner of a law firm in an effort to help a friend hide assets from his wife in a divorce.

Very Bad Things (Case Nos. 13-10-AI; 13-49-JC): A Michigan lawyer was suspended for one-year for conviction of felony gun possession, at which time, he confessed to helping a friend bury a woman's body.

The Fugitive (2014 OK 44, Case Number: SCBD-6130): An Oklahoma lawyer resigned after it was discovered that he had been harboring a fugitive in his law office.

Shampoo (Docket No. 14-DB-008): The Louisiana Hearing Committee has recommended disbarment for a lawyer who bought his client a shampoo that was touted as a way to avoid positive hair follicle drug tests.

LESSON: A lawyer's advice or assistance in subverting the judicial process will be dealt with harshly because it goes to the heart of the lawyer's function in society. A lawyer who demonstrates blatant disrespect for the proper administration of justice will often be seen to have forfeited the privilege to be a member of this learned profession.

The AT&T Award

In years past, AT&T encouraged us to “reach out and touch someone.” The nominees in this category were in dire need of such encouragement, either failing to make necessary contact with clients or making such contact but failing to be candid in such interactions. In the process, they engaged in the most common ethical violation – failure to communicate. In some cases, this duty to communicate requires the lawyer to report improper behavior to authorities within an organization; and if necessary, those outside of the organization.

RULE 4-1.4 COMMUNICATION

- (a) A lawyer shall:
 - (1) keep the client reasonably informed about the status of the matter;
 - (2) promptly comply with reasonable requests for information; and
 - (3) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows 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.

RULE 4-1.13 ORGANIZATION AS CLIENT

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking for reconsideration of the matter;
 - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
 - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) If, despite the lawyer's efforts in accordance with Rule 4-1.13(b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 4-1.16.

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
 - (2) to secure legal advice about the lawyer's compliance with these Rules;
 - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (4) to comply with other law or a court order.

RULE 4-8.1 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
- (c) knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule 4-8.1 does not require disclosure of information otherwise protected by Rule 4-1.6.

NOMINEES

Lost and Found (2014 NY Slip Op 03359 [119 AD3d 33]): A New York lawyer was suspended for three months for failing to inform client that he had lost \$120,000 worth of promissory notes)

Cheaper By The Dozen (Commission No. 2012PR00057, Commission No. 2012PR00058): Two-year suspensions have been recommended for two Illinois lawyers who had very little to no direct contact with their 2,200 debt relief clients.

He Said, She Said (No. M2014-01446-SC-BAR-BP, BOPR No. 2013-2277-4-AW): A Tennessee lawyer received a stayed one-year suspension for failing to confirm with his client that she was no longer proceeding in her divorce action.

A Few Good Men: A New Jersey lawyer was admonished for failing to tell a client that her medical malpractice case had been dismissed.

Lesson: Many lawyers fail to communicate with clients when they have failed to achieve the desired result (or have neglected to take action in the first place). Some lawyers will then proceed to make the problem worse by making false reports to the client. This foolish pride almost always exacerbates the problem because as the old Watergate saying goes, "It's not the crime. It's the cover-up."

The Joan Rivers Award

Lawyers have an obligation to keep client confidences. This obligation is at the heart of the lawyer's ability to provide zealous representation for the client. Without the assurance of confidentiality, clients will be less likely to provide their lawyers with all of the facts necessary to properly access the client's case. Notwithstanding the foregoing, an attorney's confidentiality obligation is not absolute as there are situations in which the disclosure of client confidences is not only proper but required. The nominees in this category had no such justifications for "spilling the beans."

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
 - (2) to secure legal advice about the lawyer's compliance with these Rules;
 - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (4) to comply with other law or a court order.

NOMINEES

Lilies of the Field (Cause No. 49S00-1304-DI-282): An Indiana lawyer was suspended for 90 days for copying confidential documents and forms upon his departure from employment.

Old Yeller (295 Ga. 217, S14Y0661): A Georgia lawyer received a public reprimand for posting confidential client information on the Internet in response to negative reviews on a consumer website.

Bye Bye Birdie (In re Herr): A court research attorney was informally admonished for live Tweeting oral arguments in a high-profile disciplinary case.

The Boxtrolls (Cause No. 20S00-1207-DI-428): An Indiana lawyer was suspended for not less than two years for improperly disposing of confidential client files, which eventually found their way into the hands of a newspaper reporter.

LESSON: The duty to preserve client confidences is so important that lawyers will be sanctioned for disclosures, unless such disclosures are necessary to prevent substantial harm to the interests of the client or others.

Least Competent in a Legal Representation

In some cases, lawyers will fail to fulfill their duty of competent representation due to either a lack of expertise or diligence. In either case, the lawyer does a great disservice to the client and violates one or more of the following ethics rules:

RULE 4-1.1 COMPETENCE

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

RULE 4-1.3 DILIGENCE

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

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 4-1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] 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.

NOMINEES

Alive (Commission No. 2014PR00092): An Illinois lawyer was censured for filing the first lawsuit over the Malaysia Air flight that disappeared in March 2014, in doing so, she created a theory of liability that was not supported by the evidence.

Groundhog Day (Slip Opinion No. 2014-OHIO-5459): An Ohio lawyer received a two-year stayed suspension for filing the identical brief in 31 of 35 criminal appeals.

The Absent-Minded Professor (Case No. 2013AP360-D): A Wisconsin lawyer received his fifth reprimand for “gross and inexcusable inattention to details.”

LESSON: While there is no clear definition of what constitutes “competent representation,” disciplinary authorities are not afraid to impose sanctions for legal work that falls below a certain level of proficiency.

Best Use of Deception in Legal Marketing

In an increasingly competitive legal market, many lawyers are eager to find a way to distinguish themselves from the competition. Yet, in doing so, they run the risk of violating the following ethics rules governing the communication of a lawyer's services:

RULE 4-7.1: COMMUNICATION 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 if it contains a material misrepresentation of fact or law.

A communication is misleading if it:

- (a) omits a fact as a result of which the statement considered as a whole is materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve;
- (c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;
- (d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
- (e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;
- (f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;
- (h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;
- (i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;

RULE 4-7.4 COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. Any such communication shall conform to the requirements of Rule 4-7.1. Except as provided in Rule 4-7.4(a) and (b), a lawyer shall not state or imply that the lawyer is a specialist unless the communication contains a disclaimer that neither the Supreme Court of Missouri nor The Missouri Bar reviews or approves certifying organizations or specialist designations.

- (a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;
- (b) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation.

RULE 4-7.5 FIRM NAMES AND LETTERHEADS

- (a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 4-7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 4-7.1.
- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

NOMINEES

The Best Man (Case No. 13G0661): A North Carolina lawyer was reprimanded for an Internet ad calling her "Jacksonville's best auto injury lawyer."

Life of Pi (Case No. 45S00-1301-DI-33): An Indiana lawyer received a private reprimand for his involvement as a franchisee with Law Tigers, whose website contains testimonial violations.

The French Connection: A New Jersey lawyer was suspended for three months for claiming to a client that he had "powerful contacts" that would help in making a deal with authorities.

Google Me (Case No. 13G0121): A North Carolina lawyer was censured for using the names of other attorneys and law firms in a keyword advertising campaign to direct traffic to his website.

LESSON: As lawyers, we are held to a higher standard of candor in our marketing communications. It isn't enough to simply avoid committing consumer fraud. We must actually be sure not to mislead our prospective clients in *any* manner. As Dr. Martin Luther King once said, "A fact is the absence of contradiction but the truth is the presence of coherence." As lawyers, we are not only obligated to tell prospective clients the facts, but the truth as well.

And this does not only apply to our dealings with clients in private practice, but also in the context of full-time employment. Lawyers must avoid representations on resumes and job applications that either embellish or diminish a lawyer's skill and training.

Worst Love Scene

While it is admirable for a lawyer to show love for clients and even opposing counsel and parties, there are obviously limits to such expressions. Unfortunately, some lawyers ignore such limits and, in the process, create conflicts of interests.

RULE 4-1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) Except as provided in Rule 4-1.7(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.

RULE 4-1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

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

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule 4-1.8(j) prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

NOMINEES

I Know What You Did Last Summer (Case No. 14-097): A complaint has been filed against an Ohio lawyer who sexted her client hundreds of times while representing him in a divorce case.

No Girls Allowed: A Connecticut lawyer with a history of romantic relationships with clients he represents in family law matters has been suspended for four months and barred from representing women for the rest of his career.

The Imposter (2014 OK 72, Case No. SCBD-6121): An Oklahoma lawyer consented to disbarment after he was caught posing as a public defender and visiting inmates in jail, demanding sexual favors in exchange for legal representation.

In Her Shoes: A Florida attorney was suspended for 60 days for making improper romantic overtures to opposing counsel in an ongoing matter.

The Joker (295 Ga. 452, S14Y0007): A Georgia lawyer was disbarred for offering to barter his legal services in exchange for intimate relations with the client.

LESSON: Even the most private of relationships are subject to public scrutiny when the lawyer is professionally involved with the participants.

The Hitchcock Award

While most disciplinary cases are based on obvious violations of the canons of ethics, there are some cases that are brought to the absolute shock and horror of the respondent. These lawyers had engaged in some wrongful activity that, on its face, did not rise to the level warranting a bar investigation. However, it should be noted that the ethics rules are designed to ensure that lawyers don't act in *any* manner that reflects adversely on our honesty, trustworthiness or fitness as a lawyer in other respects.

NOMINEES

A Fine Mess (Case No. 13-B-2424): A Louisiana lawyer was disbarred for rigging elections for officers in a horse owner and trainer association.

Big Daddy (Case No. 14-DHC-12): A North Carolina received a two-year stayed suspension for withdrawing money from a custodial account established to pay for his daughter's college expenses and using those funds for vacations and cosmetic surgery for his new wife.

Dead Beat (139 Ohio St.3d 152, 2014-Ohio-807): An Ohio lawyer received a two-year suspension (the second year stayed upon conditions) for failure to pay child support.

Home Alone (Case No. 11-C-11890): A California lawyer received a one-year suspension (all but 120 days stayed) for leaving his nine-month old daughter alone in a hotel room while taking his three-year-old son for a walk.

LESSON: A lawyer is accountable to the disciplinary authorities for even actions that occur outside of the practice of law. Furthermore, the disciplinary authorities will consider transgressions without regard to whether they are technically "crimes" or even acts that are *malum per se*. Even a technical infraction of the law can give rise to a disciplinary action under certain circumstances.

Most Creative Tale

RULE 4-3.3 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.

RULE 4-4.1 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 4-1.6.

RULE 4-8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

NOMINEES

Back to School (Case No. 14M4670): A North Carolina lawyer was publicly reprimanded for twice signing verifications for CLE credit that he had not earned.

Stroke of Midnight (Misc. Docket AG No. 2, September Term, 2014): A Maryland lawyer has been suspended for at least one year for falsely claiming that he had two strokes, which caused him to miss his registration deadline.

Silence of the Lambs: A New Jersey lawyer was suspended for one year for failing to discuss that his client in an employment discrimination lawsuit had subsequently gotten a better job than the one she lost.

All the President's Men (2014 NY Slip Op 07159 [123 AD3d 234]): A New York lawyer was disbarred for attempting to cover-up his neglect of client matters by fabricating documents.

Throw Momma From the Train (Commission No. 2012PR00088): An Illinois lawyer claims that his 82 year-old mother has stolen funds from client accounts and falsified bank statements.

LESSON: Disciplinary authorities will severely punish transgressions that demonstrate a lawyer's dishonesty. There are several rules that require lawyers to be honest in their dealings with the court, clients and third parties. And when such a rule is not implicated specifically, lawyers are still subject to discipline for violations of Rule 4-8.4(c), which is a "catch-all" rule for dishonest behavior.

Best Original Excuse

There may be a thousand good reasons why a lawyer will violate his or her ethics duties, but there is seldom a single good *excuse*. That being said, there are some factors that may mitigate the sanction imposed upon the lawyer. The nominees in this category were particularly creative in their quest for absolution/leniency. Unfortunately, their creativity may have caused them to run afoul of the following ethics rule:

RULE 4-8.1 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
- (c) knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule 4-8.1 does not require disclosure of information otherwise protected by Rule 4-1.6.

NOMINEES

Superman III (Commission No. 11PR0128): An Illinois attorney was suspended for one-year (six months stayed) for trust account violations, despite his contention that the violations were the result of erroneous transfers on the part of his bank.

A Fish Called Wanda (Case No. 2014-238-M.P.): A Rhode Island lawyer was suspended for 18 months for trust account violations, despite mitigating testimony that he suffered from a major depressive disorder.

The Devil Made Me Do It (No. 544, 2014, Board Case No. 111845-B): A Delaware lawyer was publicly reprimanded for filing an action in Maryland in violation of a court order under great pressure from the client to do so.

First Blood (No. S-13-963.): A Nebraska lawyer was suspended for 30 days for his mishandling of a guardianship and probate matter without consideration of his PTSD resulting from his status as a combat-wounded Vietnam veteran.

Les Miserables (Case No. 13-21-GA): A Michigan lawyer received a two-year suspension for multiple acts of misappropriating funds from his law firm, avoiding disbarment after producing nine character witnesses and 50 letters in support.

Robin Hood (Case Nos. 11-O-11276 and 11-O-15541): The California State Bar Court Review Department recommended a partially-stayed two-year suspension for a lawyer who lied about the status of a case to a settlement company for the purported reason of preserving needed funds to keep his staff employed over the Christmas holiday.

LESSON: Most disciplinary authorities consider unpersuasive excuses as an *aggravating* factor in meting out sanctions. As a result, lawyers should be willing to accept full responsibility when warranted by the circumstances. In fact, this same principle should apply in all situations in which the lawyer is at fault and not just in the context of a disciplinary hearing.

The Lifetime Achievement Award

The nominees in this category have amassed a lifetime of ethics violations. In some cases, they have done so in a very short period of time. In other cases, they have “earned” this award through a career dedicated to malfeasance and negligence. In either event, their contributions to the legal ethics lore are acknowledged.

NOMINEES

Grumpy Old Men (2014 ND 62): A North Dakota lawyer admitted in 1972 was disbarred after multiple inappropriate sexual advances towards clients dating back to at least 1995.

800 Bullets (Case No. 13-O-11104): A California lawyer consented to disbarment for his misconduct in handling loan modification matters, for which there had been complaints by more than 800 clients.

Nine Lives (Case No. 2012AP967-D): A Wisconsin lawyer received a one-year suspension upon his ninth disciplinary action (four previous reprimands and four previous suspensions).

Once Bitten (Case No. 14-0507): A Wisconsin lawyer admitted in 1962 and with no prior history of discipline had his license revoked for \$7,500 of trust account violations.

LESSON: It’s important for us to remember that none of these nominees set out to build a career of repeated ethics violations. In fact, it’s likely that each of these nominees began their careers with the best of intentions. However, they developed a set of bad habits that destroyed their intentions. The rest of us must be vigilant to avoid falling into these same traps.

Most Over-Animated Courtroom Outburst

While attorneys are encouraged to zealously represent their clients, it's possible to cross the line in zealotry. Each of the nominees in this category has done just that and, in the process, has violated the following ethics rules:

RULE 4-3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (d) engage in conduct intended to disrupt a tribunal.

NOMINEES

Snakes on a Plane (File No. 14DHC7): The North Carolina Bar has filed a complaint against an attorney who repeatedly used the "F-word" in a proceeding before a magistrate.

Legally Blond: A Tennessee judge filed a complaint against a local ADA for accusing him of sexism.

Shout at the Devil (Commission No. 2012PR00035): An Illinois lawyer was suspended for 90 days for yelling at a judge and other disruptions of the tribunal.

LESSON: While most lawyers will not cross these lines of acceptable behavior, some lawyers will flirt with it by engaging in acts of "minor" disrespect. Furthermore, lawyers must be mindful that their obligation to respect the judicial process (and its participants) doesn't simply extend to the judicial setting. Lawyers have a continuing obligation to show deference to the court and respect for opposing parties and counsel.

The Pit Bull Award

In general, persistence is a great quality for a lawyer to possess. However, just as in everything, there are limits. And while lawyers are obligated to provide our clients with zealous representation, we should not become zealots in the process.

RULE 4-3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 4-3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 4-3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RULE 4-3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (d) engage in conduct intended to disrupt a tribunal.

RULE 4-4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

- (a) 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, or use methods of obtaining evidence that violate the legal rights of such a person.

NOMINEES

The Spy Who Loved Me (No. M2014-01989-SC-BAR-BP, BOPR No. 2013-2222-1-AJ): A Tennessee lawyer was censured for installing spyware on her husband's computer to falsely frame him for an extramarital affair.

Double Jeopardy (Case No. 13-BG-844): A D.C. lawyer was suspended for 30 days for filing repetitive frivolous filings against a defendant who was acquitted in the underlying criminal matter.

The Social Network (Case No. 112,037): A Kansas lawyer was suspended for six months for sending a Facebook message to the biological mother in an adoption procedure, urging her to reconsider for the benefit of his client, the biological father.

False Witness (Commission No. 2014PR00101): A complaint has been filed against an Illinois lawyer, who first filed an ethics complaint against opposing counsel, falsely accusing him of forging a lease.

Mommie Dearest (Case No. 10-O-00334): A California lawyer was disbarred for attempting to control her adult son by refusing to disburse funds to which he had been awarded in litigation.

Worst Legal Strategy

When the going gets tough, some tough lawyers get ridiculous. This is certainly the case with the nominees in this category, who decided to take a bad situation and make it *much* worse by employing desperate (and unethical) legal strategies in violation of the following rules:

RULE 4-1.15 SAFEKEEPING PROPERTY

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Client or third party funds shall be kept in a separate account designated as a "Client Trust Account" or words of similar import maintained in the state where the lawyer's office is situated or elsewhere if the client or third person consents.

RULE 4-3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

RULE 4-4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

- (a) 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 or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

RULE 4-8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

NOMINEES

Jefferson in Paris (Case No. 111,425): A Kansas lawyer accused of ineffective assistance of counsel in a capital murder defense was disbarred after showing up to his disciplinary hearing dressed as Thomas Jefferson.

Kramer v. Kramer (Case Nos. 12-O-11079; 12-O-13430): Disbarment has been recommended for a California lawyer who attempted to obtain a default judgment against his former client by serving the lawsuit for non-payment of legal fees upon himself as agent for the former client.

The Untouchables (Misc. Docket AG No. 49, September Term 2012): A Maryland lawyer was disbarred for placing his personal funds in client escrow accounts in an attempt to shield them from creditors.

Witness (Docket No. 13-DB-036): The Louisiana Attorney Disciplinary Board has recommended a suspension of one year and a day for a criminal defense attorney who offered a witness \$300 (and later \$500) to not show up for trial.

Double Threat (Case No. 13PDJ094): A Colorado lawyer received a stayed six-month suspension for threatening to file a lawsuit against a client who filed the ethics complaint against him.

Lesson: The lawyer who employs a “win at all costs” attitude will invariably find out that the costs of violating the ethics rules are simply too high. Not only will the lawyer usually fail in obtaining the desired outcome for the client but the lawyer will also fail to retain the privilege of practicing law.

Miss (Mister) Uncongeniality

In the course of litigation, some lawyers behave as if civility and decency is optional. Increasingly, such lawyers are being subject to discipline for their lack of decorum. Here are some examples:

RULE 4-4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

- (a) 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 or use methods of obtaining evidence that violate the legal rights of such a person.

RULE 4-8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (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.

NOMINEES

Cape Fear (Case No. 201,255-8): A Washington lawyer was suspended for two years for showing up at the home of successor counsel and shouting threats of disciplinary action he was going to take against her.

You've Got Mail (2014 WL 2968528): A New York lawyer was cautioned that sending profanity-laced e-mails to opposing counsel would not be tolerated.

Bad Words (Case No. 49S00-1106-DI-318): An Indiana lawyer, who had previously been suspended and reinstated after "life changing therapy" was disbarred for profane attacks against opposing parties (and even a former client) in courthouse environs.

My Cousin Vinny (Lawyer Disciplinary Proceeding No. 12-03-204): A West Virginia lawyer, who showed up to his disciplinary proceeding in shorts, a t-shirt and running shoes, was suspended for three years for romantic relationships with two incarcerated clients.

LESSON: Lawyers may be subject to disciplinary action for incivility, even if such incivility does not occur in the presence of the judge. In fact, such behavior may be punished even if it occurs outside of any legal (or quasi legal) forum. So long as a lawyer is acting in a professional capacity, the lawyer has an obligation to be a little minimally polite.

The Archie Bunker Award

Increasingly, disciplinary authorities are taking action against lawyers for words and deeds that indicate prejudice with regards to race, national origin, religion, age, gender, disability and sexual orientation. In some cases, lawyers have been found to engage in conduct prejudicial to the administration of justice. In other instances, lawyers run afoul of applicable civility creeds.

NOMINEES

American History X: Two Florida public defenders were fired for using inflammatory language about Palestinians in Facebook comments.

The Hangover: A New Jersey lawyer was suspended for three months for his sarcastic and sophomoric statements to opposing counsel.

Dixie (2014 Opinion No. 107): The Idaho Court of Appeals overturned a conviction where the prosecutor improperly injected race into the case by singing a few lines of “Dixie” during closing arguments.

Critic's Choice Award

While lawyers often find it tempting to criticize a judge who has ruled against them, we must be careful to avoid that temptation. Such criticisms only serve to diminish the esteem of our judicial system and create animosities that impede our search for justice.

RULE 4-8.2 JUDICIAL AND LEGAL OFFICIALS

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

NOMINEES

Gulag (Case No. 13-0180): A West Virginia lawyer was suspended for three months for attacking an ALJ in an appeal brief for her “tyrannical inclinations” and “Communist delusions”.

Poltergeist (Case No. M2012-02596-SC-R3-BP): A Tennessee lawyer was suspended for 30 days for calling the judge a “bully and clown” in an e-mail asking for reconsideration of an application for fees.

The Raven (98 DB 2014): A Pennsylvania lawyer was placed on disability inactive status after she was arrested for threatening a local judge via Twitter.

The Campaign (Docket No. 13-DB-059): The Louisiana Attorney Disciplinary Board recommends a suspension of one year and one day for a lawyer who orchestrated an online campaign to influence a judge's decision in a case.

Bad Blood (2014 OK 1, 318 P.3d 1114, Case Number: SCBD-5775; 6009): An Oklahoma lawyer was disbarred for stalking a judge's wife.

Worst Temper in a Non-Legal Setting

Some lawyers carry the contentious nature of litigation into the personal lives and their interactions with others in society. And while this can be simply annoying in some contexts, it can be criminal when taken to the extreme, causing the lawyer to violate Rule 4-8.4(b).

RULE 4-8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

NOMINEES

K-9 (2014 OK 93, 338 P.3d 639, Case Number: SCBD-6154): An Oklahoma lawyer was suspended for six weeks for leading the police on a high-speed chase and resisting arrest.

Bully (2014-SC-000399-KB): A Kentucky lawyer was suspended for 181 days for threatening text messages and voicemails he sent to an 18-year-old boy who was bullying his daughter at school.

In the Heat of the Night (2014 NYSlipOp 05787 [121 AD3d 227]): A New York lawyer received a public censure for tackling and choking another man after a dispute at Saratoga Spa State Park.

The Patriot (14PDJ030): A Colorado lawyer was suspended for six months after making a threatening call to Charles Schwab because he was locked out of his wife's 401k account.

Risky Business: A New Jersey lawyer was censured for his part in a road rage incident in which he followed a car through several towns and brandished a knife at the occupants.

LESSON: Continued hostility in the practice of law will begin to manifest itself into an attorney's private life.

Most Impaired in a Legal Setting

Usually, a drug-related crime involving a lawyer occurs outside of the practice of law. However, in some cases, the lawyer can't keep these two activities separated. In these cases, the lawyer's physical and mental condition materially impairs his/her ability to provide competent representation in violation of Rule 1.16.

RULE 4-1.16 DECLINING OR TERMINATING REPRESENTATION

- (a) Except as stated in Rule 4-1.16(c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the rules of professional conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

NOMINEES

The Fly: An Indiana lawyer was given a stayed 60-day suspension after writing checks from her escrow account to cover gambling losses.

Disclosure (139 Ohio St.3d 346, 2014-Ohio-2483): An Ohio lawyer was suspended for one year (six months stayed) for drunk sexting a law student clerk employed at this firm.

The Verdict (Commission No. 2014PR00087): The Illinois Administrator has filed a complaint against a lawyer who showed up to court so impaired that the judge dismissed the parties and continued the case.

The Final Cut (Case No. SC14-1218): The Florida Supreme Court issued an emergency suspension for a lawyer who has complained for more than a decade about being the victim of mind control and torture.

LESSON: Some lawyers fall prey to the delusion that it is possible to separate their private and professional lives only to later learn that the two will invariably blend together, producing negative results in both areas.

Most Impaired in a Non-Legal Setting

Under the influence of drugs and alcohol, lawyers commit some of the most outrageous acts.

RULE 4-8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

NOMINEES

Arthur (Cause No. 45S00-1401-DI-3): An Indiana lawyer was suspended for six months (all but 60 days stayed) as a result of seven driving offenses.

The Naked Gun (PDJ-2014-9037): An Arizona lawyer was suspended for one year for leaving the scene after fatally striking a woman with her car.

The Great Gatsby (Case No. 11-C-17662): A California lawyer was disbarred for his criminal conviction for vehicular manslaughter.

LESSON: The abuse of drugs and/or alcohol in an attorney's private life can become cause for disciplinary action.

Comeback of the Year

Disciplinary authorities will often attempt to help a lawyer return to active duty status by requiring that the lawyer complete a program sponsored by that jurisdiction's lawyers assistance program. Likewise, disciplinary authorities may place other conditions on an attorney's reinstatement when it is deemed necessary to ensure that the lawyer does not relapse into unethical behavior. Lawyers who comply with such conditions can increase their chances of reinstatement and even reduce the length of their suspensions from the practice of law. On the other hand, lawyers that fail to take advantage of such opportunities almost completely eliminate their chances for reinstatement.

RULE 4-8.1 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 on to have arisen in the matter; or
- (c) knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule 4-8.1 does not require disclosure of information otherwise protected by Rule 4-1.6.

NOMINEES

Fast & Furious (2014 OK 110, Case Number: SCBD-6089): An Oklahoma lawyer has been reinstated after his 2008 felony manslaughter DUI conviction.

Stuck on You (Case No. 680, 2014): A Delaware lawyer was reinstated to active status provided that he may not engage in solo practice or act as a managing partner responsible for firm books and records.

1. Please circle the number indicating the degree to which your objectives were met (10 being the highest):

10 9 8 7 6 5 4 3 2 1

2. Please rate the quality of each presentation by circling your choice below:

Blake Bryant | Responding Like a Pro: A Mock Data Breach Response

Excellent Above Average Average Poor

Sean Carter | Ethics: The Ethys Awards, 2014-2015

Excellent Above Average Average Poor

Ozzie Fonseca | Responding Like a Pro: A Mock Data Breach Response

Excellent Above Average Average Poor

Dr. Marci Rossell | The Economy in 2015: Reasons for Optimism

Excellent Above Average Average Poor

Sarah Tyre | Responding Like a Pro: A Mock Data Breach Response

Excellent Above Average Average Poor

Andrew Carpenter | Class Action Face-Off

Excellent Above Average Average Poor

Patrick Castle | Legal Ethics and Social Media

Excellent Above Average Average Poor

Vincent Catanzaro | Legal Ethics and Social Media

Excellent Above Average Average Poor

Andrew Chang | Quick Hits: Using Arbitration Clauses to Minimize Potential Litigation Exposure

Excellent Above Average Average Poor

William Geraghty | Communicating with the Millennial Juror

Excellent Above Average Average Poor

David Maria | Quick Hits: Key Considerations in Government Investigations

Excellent Above Average Average Poor

Gary Miller | Legal Ethics and Social Media

Excellent Above Average Average Poor



Al Saikali | Responding Like a Pro: A Mock Data Breach Response

Excellent Above Average Average Poor

William Sampson | Responding Like a Pro: A Mock Data Breach Response

Excellent Above Average Average Poor

Jay Simpson | Quick Hits: 2015 Business Tax Update

Excellent Above Average Average Poor

Rachel Smith | Communicating with the Millennial Juror

Excellent Above Average Average Poor

Gregory Wu | Class Action Face-Off

Excellent Above Average Average Poor

3. Please rate the following categories:

Materials

Excellent Above Average Average Poor

Lunch

Excellent Above Average Average Poor

Ability to hear speakers

Excellent Above Average Average Poor

Ability to view presentations

Excellent Above Average Average Poor

4. How could this seminar have been improved?

5. Comments:
