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# *The World has Changed…Let's Sort it Out*

Written Materials

Practicing the law is going to be unique now that we are in a COVID world. Plus, the crop of 1st year associates that finished their schooling during the quarantine of 2020 are going to be different. The reality is the in a post quarantine world there likely to be continued distancing. That means that a lot of our supervision will need to be done remotely. The need to use new technologies — or rely more on technology - is likely to bring up competence issues (Rule 1.1). As a result, you need to make sure that you address your own continued competence. Make sure you understand how to use platforms like Zoom, and also understand the ethical implications of using these platforms. Stay abreast of the changes in the platforms, because they are being updated all the time.

Also realize that this is where competence and supervision converge. The only way you'll be able to adequately supervise your new associates when they use these platforms is if you have an intimate understanding of the technology yourself. Giving them proper warnings about things like confidentiality, and maybe more importantly, privilege. Take the time to explain how rues like 1.6(c) are impacted on these remote-communication platforms. They may be the Zoom generation but they've only used it for school. Now you need to warn them about the practice-based concerns.

Okay, now let's get into a larger discussion about Rules 5.1 and 5.3 (the rules on Supervision), some stuff about protesting, competence, and more!

A. SUPERVISION

Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers
(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reason-able assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3. Responsibilities regarding non-lawyer assistants
With respect to a nonlawyer employed or retained by or associated with a lawyer:
(a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

I propose that we look at this issue by reviewing my MPH approach. Mindset, Process and Habits. Let's begin with the right "Mindset" for proper supervision.

MINDSET

Supervision is, at its core, about leadership. Those lawyers in managerial or supervisory roles are not just babysitters- we're not called on to simply keep the junior lawyers in line. Rather, it's about giving proper direction to other lawyers.In fact, I believe we should look at this as "Super Vision, rather than "supervision."

When viewed in that light, one can see that the concept is more about charting a course for other lawyers, rather than simply avoiding disciplinary problems. One could actually view the endeavor as voluntary mentoring, of sorts.

PROCESS

The overall direction that's given in the rules is clear. The mindset that one should have is also not so hard to understand. Things get sticky, however, when we start to delve into the details of the rules in practice. Here are a few specifics that we'll talk about in the program:

1. Who is responsible?

You'd think that it would be an easy question to determine who is responsible for supervising others in the practice, but that's not always the case. In small firms, instance, it's not easy to determine who is a responsible party. It might be a good idea to actually create a written set of responsibilities in a smaller firm- something that most two- or three-person shops might not normally do. But it would make things much clearer if that effort was made. The commentary discusses these issues specifically:

> [3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

Notice the comment about continuing legal education. I find it interesting because I don't think anyone considers that CLE would have any role other than the obvious. This comment, however, makes it clear that relying on continuing legal education could also serve an important role in helping us fulfill our duties under the supervisory rules.

Even in large firms, it's important to set forth who reports to whom. particularly in an era where there is a lot of movement among forms. As new lawyers come and go, the chain of command must be updated periodically.

2. What should our policies include?

The list of contents that should be included in our supervision policies could be endless. A review of the commentary to the rules, however, gives us a bit of guidance. The comments tell us that, at the very minimum, we need to have a discussion about detecting conflicts, resolving conflicts, dealing with deadlines and policies regarding funds (i.e., depositing fees into trust, etc.)

3. Subordinate lawyer responsibilities

Closely related to the issue of supervision is the idea of a subordinate lawyer's responsibility. It's almost like looking at supervision in reverse. This is about how the subordinate lawyer sees the supervision being sent his/her way. For instance, if in the course of supervising a junior lawyer a superior attorney directs that subordinate to do something ethically questionable, the subordinate lawyer needs to determine if the order is actually one that should be followed. Rule 5.2 gives guidance in that regard.

Rule 5.2. Responsibilities of a subordinate lawyer
(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Consider the relevant parts of the commentary to rule 5.1 as well. In comment [1] the rules provide for an opportunity for the subordinate lawyer to be absolved of liability:

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the

subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

The language in comment [2] reinforces a concept that I mentioned at the beginning of these materials, leadership. The text acknowledges that the supervisory attorney may have to take the lead and "assume the responsibility" for making some judgment. It almost seems ridiculous to have to say this, but I understand why it may be necessary. Consider how often we face "paralyzation by analyzation." I can envision a situation where a supervisory lawyer is so concerned with staying out of ethical trouble that they fail to make any movement in a matter. Thus, this comments sort of pushes us along.

> [2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

4. The role of RPC 8.4

Rule 8.4, Misconduct is invoked in some supervisory situations. Nearly every violation of 5.1 or 5.3 needs some underlying violation. One must review what the supervisee did wrong in order to cause that violation-- what was the underlying rule that was violated. Of course, 8.4 could be invoked in a variety of ways because it's so broad. However, there's another way for 8.4 to be in play.

Rule 8.4 may also be seen in conjunction with the previous rules discussed, RPC 5.2. Take, for example, a situation where a subordinate lawyer might be asked to do something unethical by a superior. If the lawyer does what he or she is asked and fails to review their responsibility under RPC 5.2, then they will likely face disciplinary charges. However, the superior lawyer will also be facing problems, not just for failing to supervise, but also for inducing another to violate the rules, in violation of RPC 8.4(a).

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

5. Vicarious liability

Without a doubt, the scariest part of the supervisory rules is the issue of vicarious liability. When are we going to be held responsible for the actions of another, directly. This isn't just a situation where we failed to supervise, but an instance where the underlying violation that was committed by the supervisee will be imputed to the supervising lawyer. Obviously we'd end up with the proverbial double whammy-- getting a violation for two rules.

Vicarious liability can arise under 5.1(c), but there's another way that liability might be imputed. What happens if a supervisory lawyer doesn't fulfill his or her responsibilities under subsection (b)? The commentary leaves the door open:

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

6. What does "professional obligations of a lawyer" really mean?

Take a peek at Rule 5.3 and you'll see that there isn't a requirement that non lawyer assistants comply with the Rules of Professional Conduct. The reason is obvious-- they're not lawyers. So how do we ensure that they stay up to some reasonable standard? The requirement is that we must make sure that their actions are consistent with the professional obligations of a lawyer. That phrase, however, is a little concerning.

One could imagine that such a standard is actually broader than the standard employed for lawyers. After all, at least when we need to ensure compliance with the rules we have, well,

a set of rules! However, the concept of “professional obligations of a lawyer” seems far more vague. That might actually be harder to deal with. Of course, there may simply be no other choice. There isn’t any code to which we could refer, so it looks like the vague standard will have to do.

7. New rules and big changes

Could you imagine that two teeny letters could have big implications? Well in its most recent batch of amendments, the ABA made a change to two letters in the title of RPC 5.3-- that's right, I said two letters in the title -- and that change has profound implications. Rule 5.3 used to be called, "Responsibilities Regarding Nonlawyer Assistants. However, how it's called, "Responsibilities Regarding Nonlawyer Assistance. Did you catch that? The last two letters of the final word-- "Assistants" is now "Assistance." As my grandmother would say, oy vey.

This is a big deal because it reflects a growing trend in the world of ethics. Yes, we are responsible for supervising our own staff, but today that duty extends to other parties like those that we would have once called “independent contractors.” Anyone that we use in assistance, like vendors, are parties that we now have a duty to supervise. We get further guidance in this regard from new Comments [3] and [4] in Rule 5.3. Here is the redlined text:

**Nonlawyers Outside the Firm**

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

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

8. Tech and communication Issues:

Very often we see a supervisory situation between a veteran lawyer and anew associate. Many seasoned attorneys struggle to stay up to date with the particular behaviors of the younger generations and it's clear why-- we are part of different generations and, like those before us, we all have our own quirks. Well one particular quirk needs to be discussed and that's the younger generation's reliance on text messaging. Many young lawyers are relying on

texting as a normal method of communication and we need to be careful because the most recent group of amendments to the ABA Model Rules of Professional Conduct made significant changes that could have an impact. This is a big issue with important ramification, so you'll have to permit me if I deviate slightly off topic....we need to review this "Communication Breakdown."

That doesn't only refer to a fantastic Led Zeppelin song, it also calls attention to a change in the Commentary of an important rule, Rule 1.4, "Communication." Comment [4] of 1.4 used to require that, "Client telephone calls should be promptly returned or acknowledged." But that language has been replaced with, "A lawyer should promptly respond to or acknowledge client communications." Once again, we can see that the drafters made the type of communication subject to the rule more broad- it's no longer phone calls, rather it's now client communications.

I get it-- clients don't always call us anymore, rather, they're far more likely to shoot us an email instead of pick up the phone. We need to understand, and the rules now acknowledge, that our obligation to keep the client informed promptly is not diluted at all if a client chooses to communicate electronically. However, there's an unintended consequence that we have to be aware of-- text messages.

Many clients choose to keep in touch with us via text message. As I mentioned earlier, with the younger generations of both clients and lawyers, texting is the preferred method of communication (any of us who have kids 20 years old or younger can attest to that). And since it's so easy to rifle off a text, many of us probably notice that the number of communications we receive from clients has increased exponentially with the use of this new medium. Consider the real life implications-- we thought we were overburdened before, but with the increased number of client communications we receive in the form of text messages, it now appears that we'll be ethically required to spend our entire day just responding to client communications. Don't get me wrong, I think it's important for lawyers to communicate with our clients, no doubt. But we've

got to get some substantive work done as well, don't we? Maybe a review of the actual language may help give us some direction.

The rule says that we need to "promptly respond or acknowledge" the client communication. Well, what exactly is "promptly?" Yeah-- I don't like that argument either. However, I think the more helpful word is "acknowledge." Does shooting back a quick text that says, "Gotcha" mean we're acknowledging the communication from the client? What about responding with my son's favorite, "Coolio." He's acknowledging what I've texted when he replies with that, so is that enough for us? I don't know how much depth is required in order to properly be deemed to have "acknowledged a text message." I would think that it's something less than a long phone call or a detailed email response, but I'm sorry to say that I don't have a great answer for you on this one. But at least we're becoming aware of the potential pitfalls.

Speaking of pitfalls, this entire analysis brings up an interesting, related question. If we're dealing with rule amendments that are in place largely because of new technology, it seems to beg the question, "should we be using some of this technology in the practice of law?" Is it "coolio" and professional, for instance, to exchange texts with our clients?

I heard bar counsel in a state-not-to-be-mentioned opine at a recent CLE program and he said that he didn't think it was professional. He didn't give any particular ethical reason for the prohibition, rather, it was his opinion that using text messages to communicate with clients was not consistent with our professional ideals and should be avoided. I must respectfully disagree. There are two reasons I disagree: (1) I think the medium can be used responsibly and (2) I don't think many of us have a choice. Let's start with the latter.

I know that many of us don't want to use texting to communicate with clients, but the fact is that many of our clients are demanding that we communicate through texts. Why? Because that's simply how people roll these days (note the hip phraseology, clearly letting you know that I'm "with it" and therefore a viable authority on issues pertaining to popular culture). If we want to keep these clients we need to get with the program. But the question remains, how can we use the medium responsibly?

We can use texting responsibly if we just follow some common sense (easier said than done, I know). For instance, should we use text acronyms? Consider the following two phrases:

1-BTW, will u b at court 2morrow?

2-That's was cute. I'm LMFAO.

Is it professional to speak this way to a client? I believe example #1 would pass professional muster. Yes, it's ultra-casual to put it mildly. But it happens to be an accurate reflection of the way much of society is starting to communicate. Example #2 is another story. Not sure what it means? Go ask your teenager for the definition, but understand something- it's definitely NSFW (I'll be gracious and define that terms for you-- "not safe for work.") Loosely translated and somewhat cleaned up, it means "Laughing My Freakin Butt Off). Incidentally, I'm not one who normally includes references to vulgarity in my ethics programs, but in this context it's important to hear about it. Let's face reality -- we are communicating in text messages with our clients and that means that our associates are doing it too. And if the youngsters are using this type of language in their own texts, it's possible that our young-ish associates will use it in our communications with clients. As a result, we need to understand that these vulgar-oriented communications are part of the text-lexicon. However, I explain this to you so that you can make sure to tell your associates (and everyone else in your office for that matter) that this category of communication is not appropriate in the practice of law. To give you some further guidance in that regard, I offer the following "rule."

I believe that text acronyms can be used in the practice of law consistent with the professional ideals of the practice if you can say the phrase that is represented by the acronym when standing before a tribunal. So, BTW (meaning "By The Way) is fine. LMFAO- not so much.

Keep in mind that there are issues beyond professionalism concerns. Consider the following ethical pitfall associated with texting: Does relying exclusively on text messaging to communicate with our client fulfill our ethical duty to properly inform our client per Rule 1.4? Not

that I said relying "exclusively" on texting and that should tip you off to the answer I propose. I don't think it's much of a problem if it's part of your overall communication arsenal that includes more in depth communications where you actually fully explain the issues surrounding your client's case.

9. Supervision, and the problem of rogue nonlawyer assistants

I read a scary article recently about data leaks. It didn't come out of the legal world, but I think it's applicable to our industry nonetheless. And the danger that made my ears perk up wasn't about the fact that data was leaked in and of itself, but it was about *how* that data was leaked. Apparently, a study commissioned by Egress Software Technologies revealed that "79 percent of IT leaders believe that employees have put company data at risk accidentally in the last 12 months, and 61 percent believe they have done so maliciously."[1] It's that last part of the quote that caught my eye— 61% of IT leaders believe that their employees put their company's data at risk *maliciously*. The ethical concern that came to mind is the following: our nonlawyer assistants could reveal our clients' information purposefully/maliciously, and that invokes our duty to prevent such disclosure by properly supervising those nonlawyer employees.

Lawyers do, indeed, have a duty to supervise those non-lawyer personnel. That responsibility is set forth in Rule 5.3, which states:

> Rule 5.3. Responsibilities regarding non-lawyer assistants
> With respect to a nonlawyer employed or retained by or associated with a lawyer:
> (a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

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[1] https://betanews.com/2019/03/25/employee-malicious-data-leaks/, last checked by the author on March 26, 2019.

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

I believe that the lawyer's duty to supervise under Rule 5.3 would likely include the need to ensure that the firm be on the lookout for rogue employees who might maliciously reveal our clients' information. This seems to be a logical extension of lawyers' existing obligations. It happens to be a very real concern, given what's happening in the world today. For example, according to Forbes, in 2017 a firm with offices in Bermuda suffered a loss of 13.4 million files and another firm in Panama had 11.5 million documents leaked. At the time that I last researched the story it was still unclear about who was responsible for those leaks, but indications were that it was an inside job. Meaning— some employee went rogue.

The problem of rogue employees revealing confidential information seems to have taken on increased importance, given the Wikileaks issues and Edward Snowden revelations. Some might feel emboldened by what they perceive to be whistleblowing actions that help protect society. I am certainly not in any position to make a judgment call about that. But I am able to ring the warning bell from an ethical standpoint. Lawyers need to supervise our staff (per Rule 5.3), to ensure that our nonlawyer personnel don't take matters into their own hands and disclose client information when that employee feels, personally, that it is their societal duty to do so. We need to make sure that the employee's " conduct is compatible with the professional obligations of the lawyer" and that includes protecting client information. Rule 5.3(a).

Of course, some people will argue that it's impossible to defend against the most cunning of employees who are bent on stealing information. That may be so. But the extent of supervising lawyers' liability will depend on the circumstances. What's important is to understand that the potential for rogue employees taking client information exists and it should be considered seriously.

10. Supervision of impaired lawyers

If we're talking about supervision, then let's address our duty to also supervise the *lawyers* in our office. In particular, let's talk about the need to supervise the impaired lawyers in our office.

The idea of helping our struggling colleagues is a big part of the practice, CLE, and the role of the bar association. In particular, Lawyer's Assistance Programs are the very embodiment of that "rescue" mentality. We staff entire agencies whose sole responsibility is to help our colleagues who have faltered. The idea of taking personal action to rescue our colleagues who are suffering with addiction was also set forth in a 2016 opinion out of Virginia.

In LEO 1886 (December 15, 2016) the Supreme Court of Virginia asked, "What are the ethical obligations of a partner or supervisory lawyer who reasonably believes another lawyer in the firm may be suffering from a significant impairment that poses a risk to clients or the general public?" They posited two hypotheticals: one in which a lawyer finds out that there is another lawyer at their firm with a significant substance abuse problem, and the other that portrayed an older lawyer who appears to be suffering the onset of dementia. In both cases, the lawyers' condition is affecting their work.

Virginia confirmed that, "When a partner or supervising lawyer knows or reasonably believes that a lawyer under their direction and control is impaired, Rule 5.1(b) requires that they take reasonable steps to prevent the impaired lawyer from violating the Rules of Professional Conduct." LEO 1886 at 3. The opinion didn't say that you need to dismiss the lawyer. Quite the contrary, they said that, "the firm may be able to work around or accommodate some impairment situations." LEO 1886 at 4. But the managerial/supervisory lawyer does need to step in and do something to protect the client's interests.

The opinion gave some direction for how to deal with this, practically. They quoted from the ABA's Standing Committee on Ethics and Professionalism Formal Op. 03-429 and said,

> "The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients."

Here's the dangerous quirk— not only do lawyers need to accept their duty to deal with this situation after the impairment issues have surfaced, but the opinion explicitly states that this issue should be considered ahead of time, in law firm policies. I'm not so sure that many firms have accounted for this in their HR docs. Specifically, the opinion states:

> "In order to protect its clients, the firm should have an enforceable policy that would require, and a partner or supervising lawyer should insist, that the impaired lawyer seek appropriate assistance, counseling, therapy, or treatment as a condition of continued employment with the firm. For example, the firm could recommend, encourage or direct that the impaired lawyer contact Lawyers Helping Lawyers for an evaluation and assessment of his or her condition and referral to appropriate medical or mental health care professionals for treatment and therapy. Alternatively, making a confidential report to Lawyers Helping Lawyers may be an appropriate step for the firm. The firm or its managing lawyers might instead find it necessary or appropriate to consult with a professional medical or health care provider for advice on how to deal with and manage an impaired lawyer, including considering options for an "intervention" or other means of encouraging the lawyer to seek treatment or therapy." LEO 1886 at 5.

And don't forget, if the impaired lawyer violated the rules by, perhaps, neglecting a client's matter, the firm/supervisors may be required to report that lawyer under Rule 8.3(a). I'm sure you're aware of that duty, but I can see a firm trying to help an impaired lawyer get better, but allow the reporting duty to slip through the proverbial cracks. The moral of this story: if your firm doesn't have an impaired lawyer policy, you need to create one.

11. Supervising Software?

The future of AI in the practice will probably mirror the future we're seeing in other business categories. Specifically, we may see AI being used in "predictive coding."

> "Essentially, predictive coding is a process whereby a machine learns from watching human behavior and then applies what it learns. This is the technology behind how Amazon and Google seem to always know what you are looking for before you start

> looking. The machine's learning algorithms are designed to gather data, analyze it, and then make decisions about what is relevant. And because of the increased computing power on these machines, this is done very quickly."[2]

In other industries predictive coding can help food deliver companies determine how long the food will take to get to you. Then they decide which delivery person, route, etc., will be utilized so they get the food to you as hot as possible. It's also being used to diagnose hypertension, play poker, pass IQ tests, and a range of other novel (and hopefully some useful) things. Many believe that the legal world will start to use AI in the areas of negotiation and strategy development

Think about it— if the machines watch human behavior, then apply what it learns, it could evaluate the probabilities of various outcomes and deliver valuable information that would assist a client in making strategic decisions. While that concept seems to foreshadow the elimination of attorneys, in a strange way I think it also reveals the reason lawyers will actually never vanish from the equation. Yes, the ability of AI to perform these types of tasks in an efficient manner means that there will very likely be a decrease in the number of support staff that lawyers require. There will also probably be a decrease in the need for the vast number of junior associates, since they perform a lot of the routine tasks that AI will now address. But while there will be a decrease in the number of lawyers that might be needed, there will always be a need for human counsel.

From an ethics point of view I think this raises interesting issues about supervision. In particular I think it shows a morphing of the duty. Think about it this way— we may be replacing associates with a technology that can do the job they once performed. There are two angles that must be considered.

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[2]http://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changing_practice_law.html, last checked by the author on 4/2/2017.

First, we must put an increased emphasis on supervising…our technology people. Remember, we may be replacing associates, but the software that replaces them does not run itself. There are always support personnel needed to make these things work. And those support personnel might not be located in your office- they might be some third party contractor or employees of the company that provides the software. Right now you should be thinking about Rule 5.3. Those support personnel would probably be considered the "nonlawyer assistance" that we are required to supervise per 5.3. And don't get fooled into thinking that you don't need to supervise them just because they are an independent consultant. As we've discussed in this program, the "nonlawyer assistance" category is expanding and a tech vendor who helps run our AI services is probably going to be covered by 5.3.

Second- and I know this is stretch, but I don't think it's so crazy… could we soon see an emerging duty to supervise the *technology*? The new Rule 5.3 refers to "nonlawyer assistance." Admittedly, the rule currently refers to the lawyer's need to "make reasonable efforts to ensure that the *person's* conduct is compatible with the professional obligations of the lawyer…" Rule 5.3(b), emphasis added. In referring to those non lawyers, Rule 5.3, Comment [2] states,

> Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

As these systems get more complex, and as we start to eliminate staff and allow lawyers to utilize these systems directly, I can foresee these systems, themselves, being seen as virtual assistance that require supervision by the lawyer. I can see this comment being altered ever so gently to include the systems, in addition to humans.

Maybe I'm wrong. Maybe, instead, it will mean greater emphasis on supervising the programmers, developers, and the support personnel who create and implement these systems. But I wouldn't count it out. I see part of my job as looking into the future and predicting where our ethical duties are headed. I think that it's reality to consider that, in the future, super complex software will be considered nonlawyer assistance that will require the lawyer's direct supervision. Just my two cents. Oh, and maybe three cents….

…and let me tell you where I also think that expanded duty of supervision is heading….robots. Yes, I said robots…and I'm not joking But that's for another program.

B. PROTEST

The world has seen a ton of civil unrest recently. Some might even argue that the peaceful protests became violent in some areas. The purpose of this section is not to discuss when a peaceful protest crosses the line into violence and whether that is good or bad for society. The purpose of this section is not to conduct an analysis on the merits of protest, disobedience, or violence. The purpose of this section is singular— to explore how the limits on lawyer's behavior in those situations are established in the ethics rules. What type of restriction is there on your speech? What are the ethical implications for lawyers if rioting is a crime? And what about other crimes? What are the larger ethical ramifications when lawyers commit crimes, and how they could violate Rule 8.4(b)?

This program was prompted by a few matters I saw in the news, and I'll discuss them somewhat during the program. There were two lawyers who allegedly threw Molotov cocktails into a police car, there were also a couple of lawyers who appeared to brandish guns while a group of protesters marched past their homes. If non-lawyer citizens did those things, they would have to answer to the authorities. But if lawyers do those things they have an additional

tribunal that they must answer to— the disciplinary board. So let's evaluate the higher standard that applies to lawyers in situations like that.

1. Lawyers are held to a higher standard

It is true that there are limits on a normal citizen's right to free speech. But the truth is that there is a much greater limitation on the lawyer's right to free speech. It's like that old Hebrew National Hot Dog commercial— we answer to a higher authority. It's the same thing for lawyers. Lawyers are held to a higher standard.

a. Lawyers occupy an exalted position,

*i. Generally*

One of the reasons that lawyers are held to higher standard is because we occupy we occupy an exalted position or sorts in society. And that's reflected in the ethics rules.

Comment 13 to the Preamble states that, "Lawyers play a vital role in the preservation of society." It makes sense, after all, we are a society of laws and lawyers hold together the fabric of a society based on laws. We can see how distinguished our position is when we realize that we are "a public citizen having special responsibility for the quality of justice," a sentiment also mentioned in the commentary. We're not just any public citizen with normal civic duties, rather, when you take that oath you acknowledge that you have a special responsibility to society.

*ii. Lawyers in public office are held to an even higher standard*

If you are a lawyer who holds public office, you are held to an even higher standard than run-of-the-mill attorneys. Consider the commentary to Rule 8.4:

> Comment [7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

But with that exalted position comes an increased responsibility. We are special members of society, and that means that we get a special standard when it comes to our conduct. The reality is that we aren't able to engage in the same behaviors as the rest of society, and even when we are there are greater restrictions on our ability to exercise those rights.

b. There are greater restrictions on lawyer's rights before we become lawyers

We get the indication that we answer to a different standard even before we become members of the bar. Rule 8.1 is the only rule that applies to lawyers before we are even lawyers and it states:

Kansas (& ABA)

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

Rule 8.1 obviously prohibits bar applicants from lying, but it's part of an overall process that is unique to our profession. Part of the bar admission process includes the character and fitness application. Specifically, we look at past conduct and allow it to be used to predict their future conduct. It's sort of interesting because we don't allow that type of analysis in the criminal justice system. But in the law, we do it all the time. If a law student reveals that they've done something bad in their life, we consider that issue when determining whether they should be permitted entry into the bar. We factor in a law student's past conduct and we use it as a predictor of future conduct. It's proof that we hold lawyers to a different standard— we wouldn't let it happen to a criminal defendant, but we're okay with doing it to a bar applicant.

The reason for that is simple. The bar needs to protect the public and clients from unscrupulous and incompetent lawyers. But whether they achieve that goal isn't so clear. No one disagrees that the aim to protect the public/clients is laudable. But it's not so clear whether

looking at a law student's prior history is an accurate predictor of their future conduct. Indeed, many argue that it's not fair to do so. But we do it anyway.

c. There is a different standard for exercising our Fifth Amendment rights

The 5th Amendment is one of those sections hat everyone knows. A person can not be compelled to testify against themselves in a criminal matter. We've seen it ton TV shows, we've heard it at trials, and we've seen it uttered at Senate hearings. And you'd think that lawyers could use it when they're facing disciplinary charges as well. And we can. Sort of. Most people don't realize that the ethics code contains a bit of a warning about lawyers exercising their 5th Amendment rights. It's found in the commentary to Rule 8.1:

> [2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

d. There are restrictions on our First Amendment rights

One of the most important principles in the United States is our right to speak freely. It is, after all, the very first amendment to the constitution. Of course, it is both well known and accepted that the right to free speech has its limits. The popular adage is that one can't go into a crowded movie theater and scream "FIRE" when there is no actual emergency. But lawyers have that 1st amendment right curtailed all the time. It is almost not even worth talking about that in detail because it's so clear. Just consider the following obvious restrictions: we can't talk about client matters (Confidentiality, Rule 1.6), we can't make misrepresentations in the course of representing a client (Rule 1.4), we can't make misleading statements in advertisements (Rule 7.1), and we are restricted what we can say about a case to the media (Trial Publicity, Rule 3.6)

2. Applying that higher standard to the practice: Protest

So what about lawyers who want to resist? What about the lawyers who want to protest actions— what's permitted? Well to understand that we need to determine what exactly the lawyer is protesting.

a. Protesting Court Actions

If the lawyer's intention is to protest court action, there is an uphill battle for sure. The rules pretty clearly say that lawyers need to follow court orders and obey the tribunal. There is an opportunity for a lawyer to challenge the court, but that is only a sliver of an opening in that regard. That's set forth in Rule 3.4(c):

> ABA
> Rule 3.4. Fairness to opposing party and counsel
> A lawyer shall not:
> (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;

And just in case you think this only applies to our lives when we're practicing law, think again. Take a look at the change made to the Missouri Commentary in 2019. Their comment to 3.4 reads (emphasis added):

> [4] Lawyers have an ethical duty to comply with court orders in both their professional and personal capacities. **As an example, a lawyer's failure to comply with court-ordered child support obligations may violate Rule 4-3.4(c) or other rules of professional conduct.** See Rules 4-8.4(b), 4-8.4(c), and 4-8.4(d). [5] Rule 4-3.4(f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4-4.2.

b. Protesting an obligation imposed by law

What about a lawyer's need to comply with an obligation generally imposed by law? For that guidance we look to the commentary on the rule about Misconduct. The ABA's position is similar to their position about the need to follow orders of the court. The ABA's Rule 8.4 Commentary is tailored, and it states that:

> [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

But as you can see, some states change things up. Consider the New York commentary to the same rule:

NY Rule 8.4 Commentary

> [4] A lawyer may refuse to comply with an obligation imposed by law if such refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid. As set forth in Rule 3.4(c), a lawyer may not disregard a specific ruling or standing rule of a tribunal, but can take appropriate steps to test the validity of such a rule or ruling.

3. When a lawyer commits a crime:

The dangerous part of protest for lawyers is when a peaceful demonstration turns to violence. If a lawyer engages in violent acts during a protest that are considered criminal, then they could end up with disciplinary problems. The ethics rules impose sanctions if the lawyer commits certain criminal acts, and those dictates are included in Rule 8.4.

> Rule 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;

As you can see, the prohibition turns on whether a crime is considered to impact an attorneys "fitness as a lawyer." The commentary elaborates on when that standard is met. Consider Comment [2] to Rule 8.4:

> [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, which 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.

Different states deal with this issue differently. The trigger for when a lawyer is culpable for a crime under the ethics rules is different throughout the country. Consider the following interesting expansion from Delaware:

> INTERPRETIVE GUIDELINE. Lawyer's income taxes.
> The following statements of principles are promulgated as Interpretive Guidelines in the application of the Delaware Lawyers' Rules of Professional Conduct:
>
> Criminal acts that reflect adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, as construed under these Rules, shall be deemed to include, but not limited to, the following:
> (1) Willful failure to make and file federal, state, or city income tax returns or estimated income tax returns, or to pay such estimated tax or taxes, or to supply information in connection therewith at the time or times required by law or regulation;
> (2) Willful attempt in any manner to evade any federal, state, or city income tax.

Some states give us a little more insight into what would b e actionable, like this additional comment section from North Carolina:

> [3] The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown by clear, cogent, and convincing evidence that the lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act although, to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

Finally, take a look at how still another state broadens the action that would be considered criminal— South Carolina still has the "moral turpitude" language in their rule:

> RULE 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) commit a criminal act involving moral turpitude;
>
> Comment [2] adds: The South Carolina version of this Rule also specifically includes criminal acts involving moral turpitude as professional misconduct. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

When it comes to crimes, protesting and riots, the problem is the blur. There is a hazy connection between lawful opposition to the law and violent uprising. The grey area is the

dangerous area because many argue that daring action must be taken to resist lawful, but immoral acts of the government. That's something we could debate for hours. And that's why it's such a tough issue.

The intersection with the ethics rules is easy to see. What if you want to bring the system down — does that make you an anarchist? And if you are an anarchist, do you have the fitness to practice law in our system. Is that type of behavior going to run afoul of Rule 8.4(b)? No one would question the importance of reforming the system. That's explicitly promoted in the rules. But what about when you cross over to taking down the system. And toward that end, when does a person's actions actually cross over that line? When does legitimate protest, even daring legitimate protest, turn into anarchy that might be actionable. It all depends upon the circumstances.

If one wants to genuinely understand the types of crimes that are actionable under the rules, then one needs to look at the cases that have been decided in that regard. It's the only way to get a true handle on things given the fact-sensitive nature of the analysis. Toward that end, consider the cases that the State of Delaware provide in their rules. They can help all of us understand this section a bit better.

Incidentally, notice how many of these crimes are not related to the practice of law at all. In many of these situations, the lawyer involved was not practicing law at the time they committed the crime, nor were they done in the course of the practice. Some were, but not all.

Possession of child pornography

> Improper Firearm Possession
> Attorney's conviction for felony possession of a firearm was conclusive of a violation of subsection (b). In re Funk, 742 A.2d 851 (Del. 1999).

Fraudulent business scheme

> Delaware State Supreme Court approved the state Professional Responsibility Board's report and found that the attorney's conduct in getting together with a friend, selling paintings to each other, making claims against a corporation that accepted payments for transactions, and then pursuing a legal action to recover not only a money back guarantee, but also treble damages and attorney fees, violated Law Prof. Conduct R. 8.4(b), 8.4(c), and 8.4(d), and warranted a public reprimand (especially in light of the attorney's lack of prior discipline and remorse). In re Gielata, 933 A.2d 1249 (Del. 2007).

Criminal felonies

In an attorney disciplinary matter, an attorney was disbarred as a result of committing various felonies (violently physically attacking that attorney's spouse in front of their children, destruction of evidence and continual violation of a protective order) in the State of Maine which violated Law. R. Prof. Conduct 3.4(a) and (c) and 8.4(b), (c), and (d); the Supreme Court of Delaware rejected the attorney's defense that the conduct was the result of 2 brain injuries, as the medical evidence did not address mental state at the time of the crimes and there was nothing in the record to suggest that the attorney raised any defense to those crimes based on the claimed infirmity. In re Enna, 971 A.2d 110 (Del. 2009).

Attorney's conduct in connection with a motor vehicle accident

…was a violation of Law. Prof. Conduct R. 8.4, where the attorney: (1) reported false information (i.e. that the attorney did not drink prior to the accident) to a lawenforcement officer relating to an actual offense or incident in violation of 11 Del C. § 1245; and (2) ingested alcohol after the incident with the intent to circumvent the police investigation. In re Davis, 43 A.3d 856 (Del. 2012).

False Police Report

Sanction of a public reprimand of attorney was the appropriate where the attorney violated Law Prof. Conduct R. 8.4(b), (c) and (d); the attorney had made a false report to the police in a 9-1-1 call that a hostage situation was taking place, in violation of 11 Del. C. § 1245, in order to obtain an expedited police response. In re Schaeffer, 45 A.3d 149 (Del. 2012).

Drug possession

Attorney was suspended for 2 years under Law. Prof. Conduct R. 8.4(d) where the attorney pled guilty to possession of controlled substances and drug paraphernalia (both misdemeanors) with no aggravating factors; there were, however, a number of mitigating factors including political involvement and substantial pro bono work. In re Nixon, 49 A.3d 1193 (Del. 2012).

Financial fraud:

Because an attorney knowingly executed Department of Housing and Urban Development settlement statements containing false information which ensured loan funding by lenders, such constituted a criminal act that reflected adversely on the attorney's honesty, trustworthiness, or fitness as a lawyer in other respects in violation of the rules of professional conduct. In re Sanclemente, 86 A.3d 1119 (Del. 2014).

In the course of the practice

Attorney who violated the Delaware Rules of Professional Conduct, as well as 18 U.S.C. § 1010, by making false certifications in Department of Housing and Urban Development settlement statements (HUD-1 statements) was disbarred; the attorney acted with the intent of facilitating 22 real estate closings that defrauded those who relied on the accuracy of the HUD-1 statements. In re Sullivan, 86 A.3d 1119 (Del. 2014).

Misappropriation of funds:

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney's misappropriation of legal fees constituted theft under the criminal code, which was an ethical violation. In re Vanderslice, — A.3d —, 2015 Del. LEXIS 303 (Del. June 19, 2015).

There are a variety of obvious places that a lawyer can turn for emotional support. There's family, friends, religion, and more. But most lawyers don't realize that the ethics rules are a source of inspiration as well. Let's look together at the rules on competence, advising, misconduct and more. Oh, and there's one other part fo the rules that we'll review — an area of the code that is often overlooked by attorneys — the Preamble to the rules. They provide some uplifting direction during troubled times.

## C. MILLENNIALS AND ETHICS

### 1. Introduction

The most talked about generation in a long time is bringing a changed mindset to the practice, and that's good. But there's a big chance that the changed way of approaching the practice is going to morph some key ethics concepts. Now, I need you to understand that this is not your typical "generation bashing" type of program. When I discuss the ethical issues that are raised by the Millennials I'm approaching it from a helpful point of view. I hope to be able to warn everyone about the ways the ethics rules interact with a new mindset.

There a a few important points that we need to get straight right off the bat. Personally, I think these fall into the competence category. Rule 1.1 says that, "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[3] Well, if we are going to understand the ethical implications that are unique to certain lawyers in the practice, then competence demands that have a basic understanding of the generation itself.

First, I think that there is a misconception about who we talk about when we say "Millennials." It seems as if that term has morphed into describing anyone who is in a younger generation. But that's not the case. Millennials are generally believed to be people born

[3] All rules in this program are from the Delaware Rules of Professional conduct which are the same as the ABA model rules, but not subject to copyright protection.

between 1981 and 1996. That means that the oldest are almost 40 and the youngest are 24. People who are younger than that are considered to be in what's called "Generation Z." That latter generation is not the focus of this program.

The fact that we commonly smush those two generations is actually an important point. That's because some of the unique differences that people ascribe to the Millennials are not really unique to that group at all. Instead, some of those differences are just the normal type of friction that exists between older and younger generations. So we need to be careful— all of us, in all generations — we need to focus on the important, genuinely unique characteristics of the generation. And that point deserves a drop more elaboration.

It seems difficult to determine of there is really anything unique about the generation at all. I'm starting to think that the differences are real, but far less drastic as are being reported. For example, Deloitte released a report entitled, "The Deloitte Global Millennial Survey 2019."[4] In the very beginning of the report they noted the following general results:

> Among this year's key findings:
> - Economic and social/political optimism is at record lows. Respondents express a strong lack of faith in traditional societal institutions, including mass media, and are pessimistic about social progress.
> - Millennials and Gen Zs are disillusioned. They're not particularly satisfied with their lives, their financial situation, their jobs, government and business leaders, social media, or the way their data is being used.
> - Millennials value experiences. They aspire to travel and help their communities more than starting families or their own businesses.
> - Millennials are skeptical of business's motives. Respondents do not think highly of leaders' impact on society, their commitment to improving the world, or their trustworthiness.
> - They let their wallets do the talking (and walking). Millennials and Gen Zs, in general, will patronize and support companies that align with their values; many say they will not hesitate to lessen or end relationships when they disagree with companies' business practices, values, or political leanings.

Here's the problem: if you look at those factors closely, you can apply them to just about everyone in the country! Lack of faith in the media? Disillusionment about how their data is being used? Aspiring to travel? *Seriously?* I mean, who *doesn't* feel that way these days? But there's more…

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[4] https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html, last checked by the author on April 1, 2020.

Here's a great example about why I put a little less stock in the statistics they provide as well. The Deloitte report addressed Millennials and Gen-Z. It noted that only 52% of Gen-Z want to buy a home of their own. So I guess we're supposed to believe that the statistic reveals a difference from previous generations. I guess Gen-Z is supposed to be less motivated to buy a home. However, members of Gen-Z were born between 1997 and 2012. That means that they are anywhere between 8 and 23 years old. Half of that generation are still wearing onesies. What middle schooler do you know is concerned with buying their own home? it just makes me wonder about relying too heavily on the supposed monumental differences between the generations.

Second, we need to mention something about politics. I don't mean that we need to get political. There is absolutely *no way* I'm going there. But there is something important that I've noticed — people's understanding of these issues are obscured by politics. Both the right and the left of the political spectrum have a take on the Millennial generation and their biased views of the generation affect our collective ability to discuss the issues objectively. Here's what I mean…

Millennials are said to be the most socially progressive generation in history. Whether that's actually true is slightly debatable. I mean, I think the Abbie Hoffmans of the world would disagree. But whether that is true is not my point. My point is that the concept itself is manipulated by both sides of the political spectrum. When the socially progressive nature of the generation is touted by the left, it is overblown. Progressives hold the generation up as the most enlightened generation in history. Anyone who disagrees is cast aside as backwards (case in point, "OK Boomer"). But when the socially progressive nature of the generation is reported by the right, it is equally overblown, except instead of praising the generation, they are demonized. Conservatives cast the idealistic nature the generation as naive, or the silly byproduct of misguided youth.

I suspect that neither exaggeration is true. As usual, the truth probably lies somewhere in the middle. The generation certainly puts a greater emphasis on ethical principles (as we will

see below), but my instinct tells me that the reality is overstated by both sides because it allows them to push their respective political narrative. So let's get into the differences that genuinely do exist, and let's explore how the manifest themselves in the ethics rules.

2. How Millennials are changing things for the good:

**A. How Millennials will change our ideas about competence**

One of the unique aspects of the Millennial generation is their reliance on technology (shocker, no?) The blog Above the law put it interestingly. "Millennials will Google you," they said, and they rely more on SM platforms for communication.[5] I've experienced that firsthand — I spoke with Millennials once who informed me that sometimes members of that generation don't even exchange phone numbers or emails anymore— they simple exchange Instagram handles or Snapchat profiles and communicate that way.

This, you should understand is a good thing. They are pushing us ore and more to adopt technology. And, come on, it's not like this is a new development. There has already been an emerging duty of competence when it comes to technology. The Millennial are simply solidifying that.

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

In addition, Comment [8] to Rule 1.1 is explicit about technology: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." Finally, a

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[5] The elements that describe the unique aspects of the Millennial generation set forth herein were taken from an article on the Above the Law blog, which can be found at https://abovethelaw.com/2017/10/4-trends-shaping-the-future-of-the-legal-profession/, last checked by the author on March 14, 2020.

variety of state advisory opinions from the last several years have made it clear that lawyers have a duty to understand technology.[6] At this point it should be considered common knowledge.

Here's a warning about this tech issue, however. The Millennials' best qualities might also leave them vulnerable to the following mistakes. I think tthere is a danger that the outsized role that social media plays in their lives will cause them to believe that the trending views on Twitter and social media are a genuine reflection of society's mood and desires. They need to realize that trends on SM are only a reflection of the voices on SM, and the number of people using that platform is much smaller than overall society. As of September 2019, there were 48.35 million monthly active Twitter users in the US.[7] Meanwhile, almost 130 million people voted in the 2016 election. That's 27%. If you want to get deeper into the demographics, consider that among adults, only 22% of US adults use Twitter.[8]

[PROGRAMMING NOTE: These next few items will be only briefly mentioned in the spoken version of the program because of their tenuous relationship to ethics. There is a slight connection, but only a slight connection, so only a short time will be devoted to them]:

**B. Millennials are changing our ideas about mentoring.** They value access and feedback.

**C. Millennials are changing our ideas about the role they play in the firm.** They want to see the big picture. They want to forge deeper relationships for people they respect. Also, they value teamwork.[9]

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

[7] Statistics from https://www.omnicoreagency.com/twitter-statistics/, last checked by the author one March 14, 2020.

[8] Statistics from https://www.omnicoreagency.com/twitter-statistics/, last checked by the author one March 14, 2020.

[9] This particular element was found in an article on inc.com, which can be hound at https://www.inc.com/magazine/201704/coeli-carr/millennials.html, last checked by the author on March 14, 2020.

**D. Millennials are changing our ideas about the organization with whom we associate and the businesses we patronize**. They expect the people they do business with to have ethically inspired business practices. This might cause a shift within the firm. Certain vendors and partners could be reevaluated.

**E. Millennials are changing our ideas about the work day.** They prize flexibility.

3. How Millennials are changing things for the not-so-good:

**A. How Millennials will change our ideas about communication and Rule 1.4 by their reliance on brief modes of communication**

Here is a very basic directive about communicating with a client:

You've got to actually do it.

The problem is that a lot of lawyers don't. That's the reason that I think it's such a big motivator for grievances. I simply can not tell you how many times I have been investigating an ethics matter and I am faced with an angry grievant who is complaining that the lawyer simply never responded. That's not the only gripe— sometimes the lawyer communicates with the client…eventually. Take a look at section 1.4(a)(1) above and you'll see a key word— "promptly." It doesn't seem like a mandate to contact a client promptly would be that tough, but it seems to be getting a but more difficult, given the new rules and the realities of the current practice. Here's what I mean…

A short while ago the ABA made a change to their model rule regarding communication. Comment [4] of 1.4 used to require that, "Client telephone calls should be promptly returned or acknowledged." But that language has been replaced with, "A lawyer should promptly respond to or acknowledge client communications." Once again, we can see that the drafters made the type of communication subject to the rule more broad- it's no longer phone calls, rather it's now client communications.

I get it-- clients don't always call us anymore, rather, they're far more likely to shoot us an email instead of pick up the phone. We need to understand, and the rules now

acknowledge, that our obligation to keep the client informed promptly is not diluted at all if a client chooses to communicate electronically. However, there's an unintended consequence that we have to be aware of-- text messages.

Many clients choose to keep in touch with us via text message. In fact, with the younger generations of both clients and lawyers, texting is the preferred method of communication (any of us who have kids 20 years old or younger can attest to that). We've already seen above how Millennials rely on brief form of communication like Instagram as well. And since it's so easy to rifle off a text, many of us probably notice that the number of communications we receive from clients has increased exponentially with the use of this new medium. Consider the real life implications-- we thought we were overburdened before, but with the increased number of client communications we receive in the form of text messages, it now appears that we'll be ethically required to spend our entire day just responding to client communications. Don't get me wrong, I think it's important for lawyers to communicate with our clients, no doubt. But we've got to get some substantive work done as well, don't we? Maybe a review of the actual language may help give us some direction.

The rule says that we need to "promptly respond or acknowledge" the client communication. Well, what exactly is "promptly?" Yeah-- I don't like that argument either. However, I think the more helpful word is "acknowledge." Does shooting back a quick text that says, "Gotcha" mean we're acknowledging the communication from the client? What about responding with my son's favorite, "Coolio." He's acknowledging what I've texted when he replies with that, so is that enough for us? I don't know how much depth is required in order to properly be deemed to have "acknowledged a text message." I would think that it's something less than a long phone call or a detailed email response, but I'm sorry to say that I don't have a great answer for you on this one. But at least we're becoming aware of the potential pitfalls.

It's not just the frequency of the communication, but the quality of the content as well. That's why the commentary to Rule 1.4 has sections like this: "Adequacy of communication depends in part on the kind of advice or assistance that is involved." See Rule 1.4 Comment

[5]. In fact, there are lot of places in the code where the quality of the content in our client discussions is an issue. To see what I mean, just look through the code to see what's required when we get "informed consent" from a client. Both Rules 1.0 and 1.7 discuss the details that need to be in our conversations with the client when we get informed consent. In those situations the rules demand a more intense conversation and they even set forth certain factors that should be discussed between lawyer and client. That's because as lawyers we need to be cognizant not just of whether we are talking to our clients, but also about the content.

**B. How Millennials will change our ideas about misconduct— the danger of researching the competition and deception**

Millennials understand that the internet is a great place to find valuable information. They've been using it their entire life and they are well versed on that technology. But they may not be so well versed on the limitations. And I don't mean the technical limitations, of course, I mean the ethical limitations. There is that there is a line that shouldn't be crossed, and that line has to do with deception.

There is a lot of information that's out there for lawyers to harvest while representing a client. Some of it is public information and available to everyone. But some of the good stuff is behind a wall. The questions lawyers must consider is, can a lawyer "mine" for information? How far can a lawyer go? The only way we could mine for information is if we somehow obtain access to a person's Facebook page. We know that hacking into someone's profile would be criminal and, therefore, a violation of Rule 8.4(b). But what about using some other assertive tactic that's short of criminal behavior? To explore that, consider the following hypothetical:

> You represent someone who is involved in a dispute. You think your adversary will be filing a complaint soon, so you're getting prepared for the apparent litigation. You know that you will need to call Susan as a witness in that litigation, but you don't know much about her. Before you commence litigation you ask your client, Andrew, to "friend" Susan on Facebook. You tell Andrew, "just try to be social and let's gather information we could use against her in litigation."

When I present that hypo to people face-to-face, I get a lot of furled brows and pursed lips. "That doesn't smell right," they say. One person from the Midwest hit the nail on the head when he said, "That's just dirty pool." Both reactions reveal two things: the behavior doesn't feel

right, and yet it's hard to articulate the exact problem.

The conduct isn't an outright lie. Neither the lawyer or it's agent is actually making an improper misrepresentation. If it were, the statement(s) might violate one of the rules on misrepresentation in the disciplinary code. I call those rules the "Fab Five of Attorney Lies." The 5 rules that address misrepresentation are Rules 8.1, Rule 3.3, Rule 4.1, Rule 7.1, and Rule 8.4. Each one of these explains when misrepresentations are inappropriate and they address those improper statements in different contexts. This appears to be some sort of manipulative conduct, rather than an outright lie, which makes it a bit more difficult to assess. After all, much of what we do in the adversary system has some manipulative flavor to it, right?

This fact pattern isn't one that I came up with on my own- it's a question that was raised to the Philadelphia Bar Association Professional Guidance Committee. In March of 2009 the Committee released Opinion 2009-02 that addressed the topic. An inquirer asked the Committee to determine if it was reasonable for a lawyer to use a third person to gain access to someone's social media page in order to gather information that might be used against that person. The third person wouldn't be instructed to speak any untruths, only to remain silent about their true motives. The Committee opined that the behavior would be improper.

The Committee stated that "the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive" 2009-02 at 3. You might recall that Rule 8.4(c) is a critical part of the rule on Misconduct (or as I've referred to it elsewhere in this text, "the Stupid Rule"). That section states that it is professional misconduct for a lawyer, "to engage in conduct involving dishonesty, fraud, deceit or misrepresentation…" The opinion further explained that the conduct was problematic because , "it omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" 2009-02 at 3. Thus, it isn't an affirmative misrepresentation that triggers the ethical violation, rather it's the omission of a material fact that constitutes deception.

The Committee made that clear when they stated, “The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony. 2009-02 at 3.[10] Thus, the Committee disapproved of the conduct because it was deceptive.

**C. How Millennials will change our ideas about supervision and Rules 5.1**

Millennials value feedback and that’s a good thing. They listen to constructive criticism and that’s certainly something to be respected. But sometimes it feels as if they not only value feedback, but need feedback. Now, one could interpret that statement in a positive way 00 they need feedback in order to do their job better. Sure, that could be. But what I’m concerned with is the fact that they need feedback or they can’t complete their job. There is a difference between needing feedback so you can excel and being unable to do your job on your own because you need constant feedback from someone else.

Not only is there a concern that the need for constant feedback will hamper the Millennial’s ability to do their job, I’m concerned that it might impact their supervisor’s ability to do their job. We know that lawyers need to supervise others. That’s what Rule 5.1 is all about:

> Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers
> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reason-able assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

[10] It should be noted that the opinion doesn’t only state that the omission is deception. The Committee mentioned very briefly that they believed that the conduct also constituted the making of a false statement of material fact to the witness and would therefore be a misrepresentation that violates Rule 4.1. Unfortunately, the opinion says absolutely nothing else about the apparent 4.1 violation, so it’s unclear how they arrive at that conclusion.

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

What concerns me, however, is that if there is an overwhelming need for constant feedback and validation in order for Millennials to complete their job. The supervisory attorney will be required to provide that feedback, but if it's so onerous, then that supervisory lawyer won't be able to get their own job done.

**D. How Millennials will change our ideas about liability to third parties**

Millennials seem to express a greater desire to consider the impact of their behavior on larger society. That's admirable. But in the practice of law it could have an interesting effect. I think they are going to cause a paradigm shift in the practie— one that moves away from the concept of zealously advocating the interest of our client, and toward ushering in an expansion of lawyer liability to non-client third parties. The question is whether that's necessarily a bad thing. Let me explain why I think that expansion of liability might happen…

Remember that old concept of "privity" that you learned about in law school? The idea that a person only owes a duty to someone with whom they have privity of contract? Well, we all know that the concept has basically been abolished. We've seen liability to third parties in all parts of the law, like products liability, etc. The one place where privity has continued to hold out however, is the law. For years and years, the courts have held that for a lawyer to have professional liability for errors, etc., there must be privity of contract.

Over the years, however, the courts have chipped away at that concept. It hasn't been destroyed in every area of the law, but there's one place where the privity concept has been damaged significantly— estate planning. I recently read an article written by attorney Matthew G. Gerrald in which he discussed attorney liability and he explained:[11]

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[11] https://www.linkedin.com/pulse/privity-rule-bar-attorney-malpractice-actions-matthew-g-gerrald, last checked by the author on 6/15/2017

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. 49 Cal. 2d 647, 648, 650 320 P.2d 16, 17, 19 (1958)
>
> This "balancing of factors" test would subsequently become the model for many states' analysis of estate-planning malpractice claims, including California… Today, only a minority of states continue to apply the traditional privity rule. Most states now permit disappointed beneficiaries to pursue claims against estate-planning attorneys, though they have not settled on a consensus alternative to strict privity. As discussed below, some states permit tort claims, while other states permit third-party beneficiary contract claims. Another group allows both types of claims, and a few states have yet to take a definitive position.

This change in the substantive law has been occurring in other countries as well. It's important for us to consider the changes in other countries because of globalization — it's brought the world closer, and for that reason there is a much larger chance that we will be affected by legal developments in foreign lands. In particular, there's one change happening in Israel that is a perfect extension of the ideas I've ben discussing above. While I am loathe to include large excerpts from other works, an article written by Professor Nita Ziv in the Fordham Law Review is simply too good to pass up. In that article, Professor Ziv explains how attorney liability to third parties is expanding beyond the estate planning world.

*Fordham Law Review 77 FLR 1763, at page 110:*

> The Israeli courts have taken the duty to nonclients a step further. In a number of cases litigated in the last decade, the courts were asked to recognize the civil liability of lawyers for monetary damages caused to an unrepresented, opposing party as a result of a legal transaction in which the lawyer had represented a client. In all cases, the legal transaction involved either the purchase of a home or some other transaction of real property by the nonclient, and, in all cases, the lawyer had represented the developer, the contractor, or a lender. The legal documents governing the transaction were drawn up by the lawyer, who looked after the interests of his clients alone and did not adequately protect the interests of the opposing, weaker party. As a result of these unbalanced deals, the third parties lost assets and sued the lawyers for their damages. The lawyers claimed that they owed fiduciary duties and a duty of care to their clients only and thus could not be held liable for the damages that occurred to opposing parties.

They further argued that, if the court recognized their liability to protect the interests of nonclients, this would entail a breach of their duties to their clients.

In two recent cases, the Israeli Supreme Court rejected these arguments. Instead, the court inquired into the actual relationships that evolved between those involved in the transaction. The judges examined the power disparities between the parties; the type of transaction that was at stake (acquisition of a personal home or a mortgage of a small business); the extent of the lawyer's involvement in setting up the legal transaction; the way the lawyer had presented herself during the deal; the level of trust that was actually bestowed upon the lawyer by the third party; how foreseeable the damage had been at the time of the transaction; and, in general, the "fairness" of the event.

*Fordham Law Review 77 FLR 1763, at page 111:*

It recognized that lawyers have duties of care toward nonclients in circumstances of severe imbalance of power between parties, deep lawyer involvement in the transaction, actual reliance upon the lawyer by the nonrepresented party, and when that party was not advised by the lawyer to consult or hire an independent lawyer.

The Court further ruled that in order to fulfill this duty the lawyer may be expected to take legal measures to protect the opposing party, even if it might be disadvantageous for the client.

Fordham Law Review 77 FLR 1763, at page 112:

Nahum v. Durnbaum is a particularly telling case. In this instance, a lawyer represented a lender in a complicated legal transaction in which the opposing party, a couple who urgently needed a loan, agreed to draconic borrowing terms and to the imposition of a lien on their home as security for the loan (the transaction included excessive interest rates, severe penalties for nonpayment, and harsh terms of immediate foreclosure). The borrowers were not represented during the legal transaction and the lawyer did not advise them that they ought to consult with a lawyer on their part. As expected, the loan was not repaid according to its terms, and the family lost its home and acquired additional heavy monetary losses.

*Fordham Law Review 77 FLR 1763, at page 113:*

The lawyer who represented the lender was found to have violated his duties of care toward the nonclient borrowers. The court determined that he acted negligently toward them and was thus liable for part of the damages suffered. Chief Justice Barak noted that the lawyer should have devised the transaction differently, in a way that would guarantee more protection to the borrowers, protection that contract law itself affords in land transactions of this sort. At the least, stated Chief Justice Barak, the lawyer should have notified the borrowers that they were entitled to certain protections by law, since they were mortgaging their personal home, and he should have advised them not to sign the mortgage contract before they received all the money. By not doing so, the lawyer violated his direct duty toward the nonclient, notwithstanding the disadvantage this may have caused his client.

*Fordham Law Review 77 FLR 1763, at page 114:*

> The notable point in this case is that the borrowers filed suit against the lender, but lost the case on contractual grounds. The civil court held that the contract could not be invalidated on legal grounds of undue duress or coercion. In other words, the client-lender had acted "within the bounds of law"; nevertheless, the lawyer was held to a different, elevated standard of behavior. By recognizing a direct duty of the lawyer to the nonclient borrower, and by holding the lawyer to a higher normative standard than his client, the court struck a balance between client interests and inferiorly situated, nonrepresented third parties who put faith in the lawyer. In the words of Chief Justice Barak,
>
> > The deal the lawyer had cooked up created a complex legal situation. The understanding of this situation requires knowledge in the law . . . . Of course, due to the legal complexity of the transaction[,] the appellate, as a lawyer, enjoys a significant advantage of knowledge and control. The respondents, on the other hand, were at an inferior position and they trusted the legal talents of the [lawyer]. They trusted his integrity, skills and honesty.
>
> Through the definition of negligence, the court gave meaning to the public role of the lawyer: the lawyer could not claim that he satisfied his professional duties by utilizing all of the means the "law" made available to his client. As a lawyer, the expectation was that he perform his duties not only by following the letter of the law, but also by adhering to its spirit and purpose.

Returning to the issue of the Millennials, one needs to consider whether their unique approach to the world is going to further the expansion of non-client liability among lawyers. The generation is noted for being disposed to put greater consideration on the lawyer's impact on others. They are not as eager to zealously defend the interests of their clients if, in doing so, they are creating negative effects on the larger world. There is certainly something admirable to that approach, but it is markedly different from the approach that characterized the preceding generations of lawyers. But given what's happening in the larger legal world, maybe their way of looking at the practice is the wave of the future?

[PROGRAMMING NOTE: I'm going to discuss this in greater length during the program. Here is a summary of the points I'm going to make, in case you're not able to take notes during the actual seminar]:

<u>4. An interesting question: Will the generation change? Will they retain those values so strongly as they advance in the practice?</u>

<u>5. Some additional mentoring advice</u>

I read an article on inc.com that explained the approach of a guy named Bob Kulhan when it comes to dealing with Millennials:

> …Kulhan, founder and CEO of the consultancy Business Improv…The core of Kulhan's methodology, described in Getting to "Yes And": The Art of Business Improv, is losing the put-down response "Yes, but," which, he says, denies, negates, and restricts the offerings of younger workers who thrive on collaboration. "It's a sure way to undermine morale and motivation," says Kulhan. In contrast, if you say "Yes, and," you signal an openness to sharing information and moving toward a jointly created solution.

I don't like that approach. I think you should only agree with them if their position is worthy of merit. If it's not, take a different approach. I have a 3 part process.

> *1- Decide if you agree with their approach, and if you do, then agree.*
> Consider their approach objectively. Is it just as good or better? Remove your biases. If their position is worthy of being agreed to, then "Yes, and" them all you want.
>
> > But if it's not a position worthy of pursuing, then don't yes them…instead, take the following 2 steps…
>
> *2- Acknowledge and recommend an alternative.*
> Acknowledge their perspective and add to it. Good phrases include: I understand. I hear you. That's an interesting way of looking at it;
> Then, recommend an alternative. Try to get them to adopt it voluntarily. Don't use the words, "Go do this." or "You should do that." Recommend an alternative by speaking to what moves them.
>
> > The approach should be, "Have you considered….." That way you empower them. Plus, it is a question that opens a conversation. Now you could educate them.
> >
> > This is not babying anyone. It's being respectful. It's nurturing. It's being a leader.
> >
> > If that doesn't work…
>
> *3- Give them a directive.*
> If they don't buy in, tell them the way you want it done, specifically, and demand that it be done that way by a certain date. Just be bold.
>
> However, do not default to this. Do not half-ass the other steps because you think they are stupid or because you just don't want to do them. This step is a last ditch type of thing.

D. COMPETENCE

Understanding the latest technology is required for lawyers to maintain their minimum level of competence. That mandate is found in the rules, and it's also been reinforced in state

ethics opinions. For instance, in ABA jurisdictions,[12] Rule 1.1, Competence, states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In addition, Comment [8] to Rule 1.1 reminds us that, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…" Finally, some state ethics opinions state that a lawyer's duty of competence is broadening. In The State Bar of California's, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193 we learned that, "An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law." Cal. Op. 2015-193. Combine that evolving duty of competence with our duty to safeguard client information set forth in Rule 1.6 (Confidentiality) and the result is that lawyers have an ever-expanding number of steps that we need to take in order to comply with these mandates. Take for example the need to update our computer software.

The company which sells Norton anti-virus software published an article entitled, "5 reasons why general software updates and patches are important."[13] One of the critical reasons they list for installing software updates is that updates patch security flaws. The article states:

> "Hackers love security flaws, also known as software vulnerabilities. A software vulnerability is a security hole or weakness found in a software program or operating system. Hackers can take advantage of the weakness by writing code to target the vulnerability. The code is packaged into malware — short for malicious software. An exploit sometimes can infect your computer with no action on your part other than viewing a rogue website, opening a compromised message, or playing infected media. What happens next? The malware can steal data saved on your device or allow the attacker to gain control over your computer and encrypt your files. Software updates

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[12] One note about the rules: I'd like to reference the ABA Model Rules of Professional Conduct because most states' rules are a derivative of that code. However, copyright restrictions prevent me from doing so. As a result, the within rules are actually the Delaware Rules of Professional Conduct which are the same as the ABA code, but not subject to the same copyright restrictions.

[13] https://us.norton.com/internetsecurity-how-to-the-importance-of-general-software-updates-and-patches.html, last checked by the author on March 26, 2019.

often include software patches. They cover the security holes to keep hackers out."

It should be pretty clear how this ties into a lawyer's ethical duty. The rules require that we remain vigilant in understanding and addressing the risks associated with technology (Rule 1.1), that we take reasonable steps to safeguard client data (Rule 1.6), and that we act with reasonable diligence in representing a client (Rule 1.3). It doesn't take much legal analysis to understand that those duties certainly require lawyers to take steps that ensure that the computer systems and software programs we use remain secure. Articles like the one referenced above make it clear that the main purpose of these updates is to do just that— maintain the integrity of our systems. So if updates are the process by which the computer industry ensures that security, then it is incumbent upon lawyers to be diligent in installing those updates. And my reference to Rule 1.3 is important. The ethical duty to be diligent is an ongoing obligation, much like the need to update our software— it's a continuing effort that must be attended to consistently.

I have always been fascinated by the commonalities between boxing and the law. Both involve fighting. Note that I didn't say boxing and *litigation*, because I don't mean to limit the fighting within the law to instances where lawyers are involved in litigation. The reality is that lawyers seem to always be fighting in the practice, regardless of whether we are in a courtroom. It could be in administering an estate, it could be in negotiation a real estate deal… you name it, lawyers end up fighting somehow.

Just like in boxing, there are rules governing how we fight in the practice of law. In both vocations the rules limit how far we can go in our efforts to obtain an advantage over our adversary. Let's take a look at the parallels from two angles— in the ring and outside the ring.

Some rules govern how a boxer conducts themselves inside the ring, but other regulations affect boxers in the profession, generally. That's also true in the law. That's why I've broken this program down into two sections — hand-to-hand combat, and the issues that address larger considerations in the profession.

E. HOW ETHICS HELPS US DEVELOP THE LEGAL SKILL OF ADAPTABILITY

**1. Going on the offensive (Rule 4.4)**

There has been an age old battle about whether lawyers should be aggressive on behalf of their clients. I feel like I talk about the "zealous advocate" issue at every one of my programs, so I'm not going to do that in detail now. Let me just throw a few words about the zealous advocacy issue by quoting Comment [1] to Rule 1.3:

> [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 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.

But for the rest of this program, I want to focus on the smaller aspect of tactics rather than talk about the overall philosophical approach to our representation.

It's clear that lawyers are expected to go on the offensive in representing our clients, but we have a lot of tools at our disposal. In a negotiation we are expected to keep the pressure on the adversary, in litigation we are expected to press an adverse witness, in discovery we seek information to gain an advantage for our clients. And it's the same thing in boxing. "To box offensively is beyond just being more aggressive, throwing more punches, or putting more power. Mounting an attack in the ring requires an understanding of the types and levels of offense available to you during a fight. To be effective while boxing offensively is to use the right type of offense according to the situation." https://expertboxing.com/mounting-a-smart-boxing-offense last checked September 19, 2020.

Rule 3.4 is one of the ethics rules that set forth the various tactics that are available to us as lawyers. But just like in boxing, there are low blows and some things that are out of bounds. Notice how each subsection of this rule both sets forth the tactic, as well as the limitation on that very same tactic:

> Rule 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 efforts 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 gi ing such information.

**2.. The best offense is a great defense**

Being on the offensive isn't only about hitting the other side hard. There is a lot of benefit in boxing to being a good defensive fighter. That's what made Floyd Mayweather so great:

> Every serious boxing fan knows that the biggest key to Mayweather's success has been his legendary defense. It's not hard to figure out that if you can't hit him, you can't beat him. The shoulder-roll defense is only one part of why he's been so good defensively… https://bleacherreport.com/articles/2195207-breaking-down-the-attributes-that-make-floyd-mayweather-boxings-p4p-king, last checked by the author on September 20, 2020.
>
> The shoulder roll is a defensive move where you deflect a punch by rolling your shoulders away from it. The punch lands harmlessly on your shoulders as your opponent shoulder is loaded to come back with a hard counter. https://expertboxing.com/how-to-shoulder-roll, last checked by the author on September 20, 2020.

Defense is a great offense in the law as well, and the drafters know it. Look at the tactics set forth in Rule 4.4— they are all basically defensive moves.

> Rule 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.

But the drafters also know that these defensive tactics could be used as weapons by lawyers. They could be "aggressive defensive" tactics, just like in boxing:

> …The first step to fighting offensively is not just a regular defense, but an AGGRESSIVE DEFENSE. Instead of just blocking, slipping, and then running away, you should make sure to be aggressive with your defense. Move towards him, stare him down, and let him know you're not just a punching bag… https://expertboxing.com/mounting-a-smart-boxing-offense, last checked by the author on September 20, 2020.

That's the reason that the drafters qualified all of our tactics in Rule 4.4. The word "substantial" is critical. The drafters know that lawyers will use delay and burden in an offensive kind of way, and to a certain extent that's okay. But when those defensive tactics become a substantial purpose of what the lawyer is doing, well, then you've crossed the line.

**3. Feigning and deception (Rule 8.4)**

What about deception as a tactic? You've heard of boxers playing possum, right? That's when a boxer fakes being hurt or fakes being tired, then they cover up and lets the other

boxer punch to their heart's content. The opponent lets out a barrage of punches that only serves to tire out the puncher. If the boxer covering up were actually hurt or tired, then the barrage of punches might put them down. But with this tactic the boxer being punched is not actually tired or hurt, they are faking it because they specifically want the opponent to tire themselves out. Once the opponent stops the barrage, the boxer playing possum then comes alive and releases their own offense against the now clearly-tuckered-out opponent.

Can a lawyer engage in such deceptive tactics? You know the answer…and that prohibition is in Rule 8.4:

> Rule 8.4. Misconduct
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

I've always found it interesting that the commentary to Rule 8.4 doesn't really address the deception angle. There is no guidance about what constitutes inappropriately deceptive conduct. The only real guidance we get are from advisory opinions, like the following out of Alaska. This segment from the opinion is long, but I think it's worth reading in it's entirety because it explains the issue the authorities were facing pretty clearly:

> "The present inquiry involves the use of email "tracking" software, applications that permit the sender of an email message to secretly monitor the receipt and subsequent handling of the message, including any attachments. The specific technology, operation, and other features of such software appear to vary among vendors. Typically, however, tracking software inserts an invisible image or code into an email message that is automatically activated when the email is opened. Once activated, the software reports to the sender, without the knowledge of the recipient, detailed information regarding the recipient's use of the message. Depending on the vendor, the information reported back to the sender may include: when the email was opened; who opened the email; the type of device used to open the email; how long the email was open; whether and how long any attachments, or individual pages of an attachment, were opened; when and how often the email or any attachments, or individual pages of an attachment, were reopened; whether and what attachments were downloaded; whether and when the email or any attachments were forwarded; the email address of any subsequent recipient; and the general geographic location of the device that received the forwarded message or attachment. At the sender's option, tracking software can be used with or without notice to the recipient. There do not appear to be any generally available or consistently reliable devices or programs capable of detecting or blocking email tracking software." Op 18-01 at 3

Here's my question— Do we even *need* an opinion on this? Is there anyone out there who, after reading that excerpt, thinks that this committee is going to say, "Yeah. That's ok." Because if there is, they need to hand in their bar license right now.

No, the opinion said that the use of tracking technology is not permitted. Specifically, they explained that the tracking software would violate Rule 8.4(c). Misconduct. They explained that "The undisclosed use of email tracking software by a lawyer, without the informed consent of the recipient, conceals the fact that the sending lawyer is secretly monitoring the receipt and handling of the email message and its attachments by the original recipient as well as each subsequent receiving party." Op 18-01 at 3. It is deceptive conduct, pure and simple.

The software could reveal a slew of protected information. For instance, what if a client has a new address, one that they might want to keep hidden? That could be disclosed. Plus, it could obviously give off a lot of info about the party's strategic concerns. Citing an opinion out of Alaska on the same topic, the Illinois committee stated. "The second example involved a tracked email attaching a proposed settlement agreement. In that case, the tracking software would reveal to the sending lawyer the pages of the proposal that the receiving lawyer and client reviewed, as well as how often and how long each reviewed any particular page of the proposal. As the Alaska opinion noted, the use of such software gives the sending lawyer access to "protected information and extraordinary insight as to which sections of a document the lawyer and her client found most important." The Alaska opinion concluded that the use of tracking software impermissibly and unethically interferes with the client-lawyer relationship and the protection of client information." Op 18-01 at 4, footnotes omitted.

The opinion discussed another concern- the technology could violate Rule 4.4 because,

> "covertly obtaining this protected confidential information should be considered the type of unwarranted intrusion into the client-lawyer relationship condemned in Comment [1] to Illinois Rule 4.4(a). Rule 4.4(a) provides that a lawyer shall not use methods of obtaining evidence that violate the rights of a third person; and Comment [1] explains: "It is impractical to catalogue all such rights, but they include … unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." Op. 18-01 at 4, footnotes omitted.

**4. Some practical direction on being a resilient lawyer**

A big part of fighting, whether it's in the legal context or in the boxing world, is about adapting to changed circumstances. Mike Tyson has a legendary statement. I believe he said, "everyone has a plan until they get punched in the mouth." Ultimately, that's about being able to adapt to changed circumstances. Being able to adapt in the law is an outgrowth of Rule 1.1:

> Rule 1.1. Competence.
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, preparation reasonably necessary for the representation.

In order to develop resilience…in order to adapt…a lawyer needs to engage in some preparation. We need to develop the *skill of adaptability.* Let's use a hypo to explore how this manifests in the legal context, and let's also review how we can develop that skill of adaptability:

Ok, here's the situation: You're in some sort of battle for a client. Maybe you're negotiating for your client's purchase of a business…or you're trying to get your client a reduced charge…or you're making arguments about tariff engineering to the Department of Commerce on your client's behalf. Whatever. You did your homework, you have a plan, and you have a strategy. And about 10 minutes into the conversation, it happens. The other side came up with a great point, and I mean a GREAT point and you don't know how to respond.

The feelings rush through you at the same time, and in an instant you start to sweat. People are speaking around you and you see their mouths move, but you don't really hear what they're saying. Your mind races…WHAT DO I DO NOW? How do you beat back that panic and extricate yourself from this bad situation? Let's review by considering my favorite process…the MPH approach. You need the right Mindset, you must engage the proper Process, and develop the best long term Habits. Here is an outline of the ideas we'll talk about in the spoken version of the program…**it's all about the Rs**

- Mindset: it's about **Regaining control**
  - **Remember**
- Process
  - Don't **React**
  - Instead: **Rest. Review. Reassess, Respond.** (let's break those down below)

**Remember** that everyone goes through this, and honestly, it's to be expected.
We all will get punched in the face. We are all going to have well thought out plans derailed. The excellent lawyers adapt.

**Don't React**
Don't snap back, don't shout back, don't act out of anger. Taking a panicked response will create more havoc. You'll end up in an argument, and you'll have a client who gets upset. *In such situations you'll end up being preoccupied with that havoc and you won't be able to find a beneficial way out of the situation. Instead: Rest. Review. Reassess, Respond.*[14]

**Rest.**
I don't mean take nap, I mean just take a beat. You don't have time to have a long pause — the bad guy is still coming at you. But you can take an *instantaneous* beat.

Do what boxers do when they get tagged hard. They put up their hands into a defensive posture and try to cocoon. They do something that lets them catch their breath, rest a drop, and develop a response.

Now here is part of the preparation angle I talked about above when I referenced Rule 1.1. You have to develop some sort of defensive posture that you can go to immediately to buy yourself time to regroup. You need to think about this ahead of time— it's part of developing your lawyering skills..,.

The lawyer's version of putting up their hands in a defensive way is shuffling papers, and reading notes (maybe you will develop some other tactic, but that's the one that I think works best). Immediately go through your file. Make it look like you're searching for a paper. Of course there is no paper. But search for it, and find it. Find that paper. Stare at it as if you are reading it. That's how you buy time and take that rest.

PRACTICE THIS SO IT BECOMES HABIT. M-P-H. The habit lets you take an instantaneous beat.

While your eyes are glued to that paper, Review and Reassess.

**Review:** Ask yourself, what went wrong? Can I salvage this situation?
**Reassess:** Determine what needs to be said to you can get back on your plan. Or, in the alternative, do you need to change tactics somehow?

[By the way, sometimes boxers need to keep their hands over your head until he end of the round so they can regroup on their stool. You might need to do that also. The lawyer's version is to excuse yourself. Go to the bathroom, Go grab coffee. Go chat with the client. But I really

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[14] Some of these ideas came from a great article about fighter pilots. If you want to read it, you can find it here: https://www.fastjetperformance.com/blog/why-fighter-pilots-know-that-quick-reactions-are-for-losers, last checked by the author September 20, 2020.

don’t think you’ll need that. All you’ll need is to shake your head after getting punched in the face, and you can do that when you’re staring at a piece of paper.]

Take the time while you’ve got your hands over your ears to review, reassess and formulate a response. Then deliver your reassessed response…

**Respond.**
That’s how you break the other side’s momentum and reestablish control