



2022

CLE Weeks

December 5-16, 2022





Recent Legal Ethics Developments

You Make the Call

Legal Ethics Developments

- Ethics Implications of Virtual Practice
- Privilege Issues
- Civility
- Client Misconduct



Ethics Implications of Virtual Practice

- <https://www.youtube.com/watch?v=KxIPGPupdd8>



Virtual Practice -- Scenario #1

- You represent the firm of Duke & Duke Commodities Brokers and its principals, Randolph and Mortimer Duke. During settlement discussions with the Division of Enforcement for the CFTC, you send an email to the Division's lawyers in which you offer to settle on behalf of your clients—for \$1.00. You copy Randolph and Mortimer on your email.



Virtual Practice -- Scenario #1

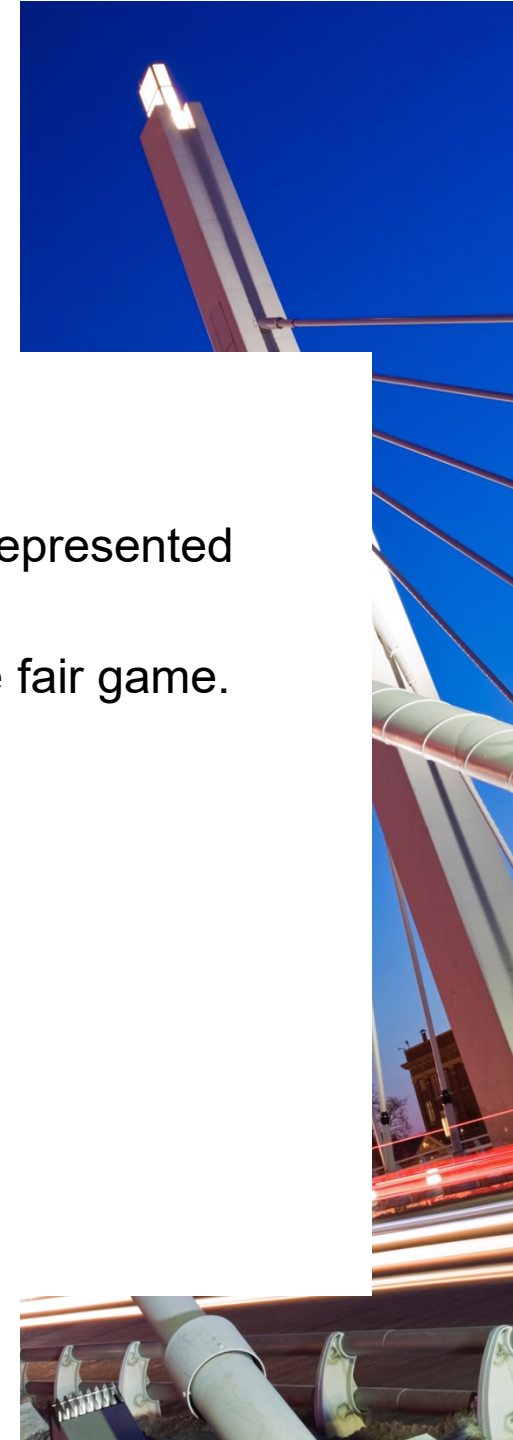
- The CFTC lawyer uses “reply all” and responds to you, Randolph, and Mortimer: “No way. We can show that your clients attempted to corner the market in FCOJ futures. It’s time for them to pay up.”
- ***Has the CFTC lawyer violated the “no-contact” rule in MRPC 4.2?***



	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV
4TH		111	129	137	145	155	164	175
3RD		113	130	139	146	156	166	176
2ND		117	131	136	144	157	165	173
LAST		122	133	141	147	155	166	179
OPEN	102	112	127	135	140	150	161	172
HIGH		122	133	141	147	157	169	177
LOW		110	125	134	140	149	158	167
SETT. PR.	98	112	129	134	142	156	165	170

Virtual Practice – Scenario #1

- **Has the CFTC lawyer violated the “no-contact” rule in MRPC 4.2?**
 - [Yes] – ***I know my rules*** -- MRPC 4.2 prohibits a lawyer from communicating with a represented person about the subject of the representation without consent.
 - [No] – ***C’est la vie*** -- since Randolph and Mortimer were on the original email, they’re fair game.



Virtual Practice – Scenario #1

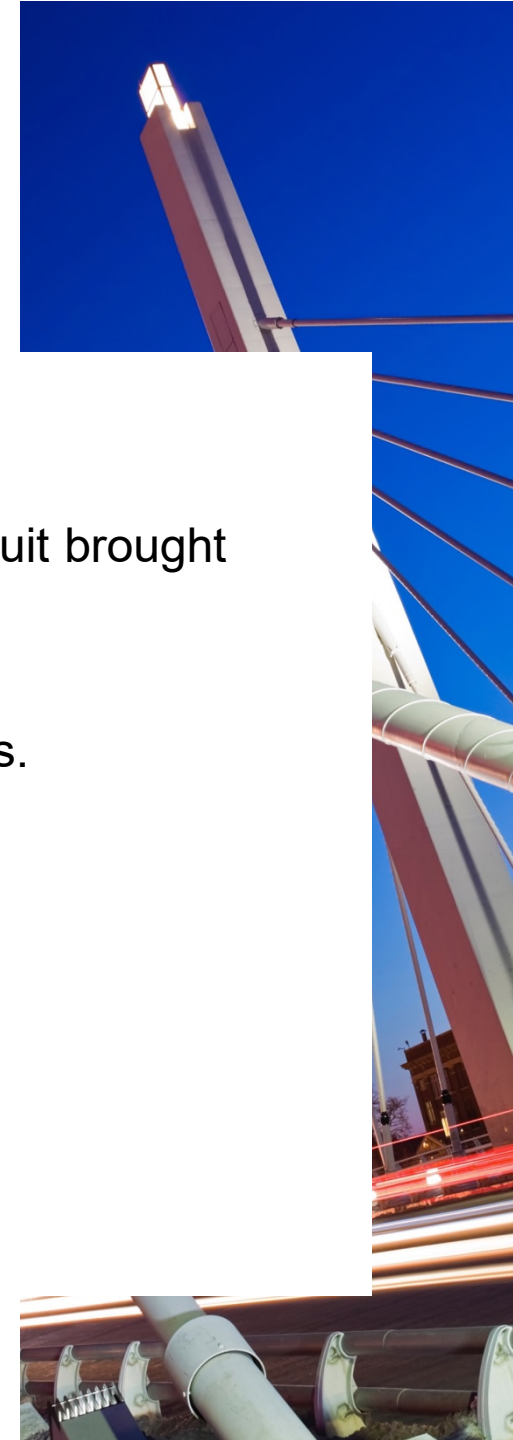
- ABA Model Rule 4.2 – the “no-contact” or “anticontract” rule
- ABA Formal Opinion 503 (Nov. 2, 2022)



Virtual Practice -- Scenario #2

- ***Barksdale School Portraits v. Williams* (D. Mass. 2021)**

- Attorney Jeffrey Rosin represented Elizabeth Williams at a Zoom deposition in a lawsuit brought against her by her former employer, Barksdale School Portraits.
- Mr. Rosin wore a COVID mask throughout the deposition and refused to remove it.
- He dictated answers to Elizabeth on over 50 occasions, and she parroted his answers.



Virtual Practice – Scenario #2

- *Barksdale School Portraits v. Williams* (D. Mass. 2021)
 - Obvious misconduct.



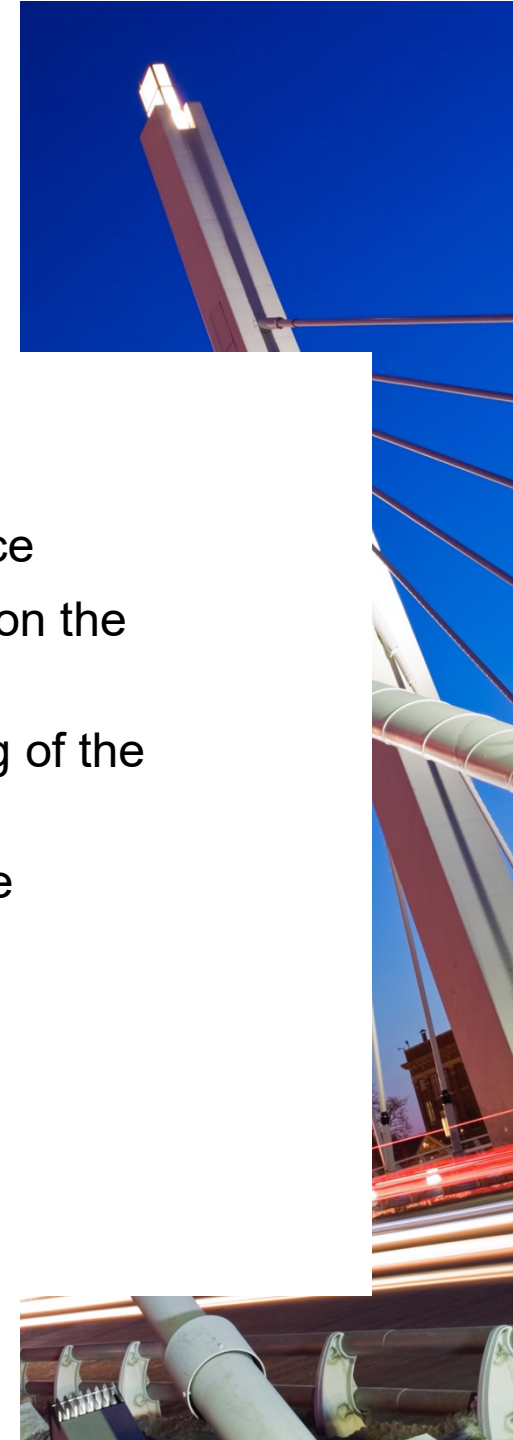
Virtual Practice – Scenario #2

- ***Barksdale School Portraits v. Williams* (D. Mass. 2021)**
 - Obvious misconduct.
 - Plaintiff asked for sanctions under Fed. R. Civ. P. 30(d)(2):
 - Dismiss all Ms. Williams’s counterclaims and defenses with prejudice.
 - Prohibit Ms. Williams from testifying and for the court to instruct the jury to make an adverse inference.
 - The right to play and highlight the Zoom deposition for the jury at trial.
- ***What was the appropriate sanction?***



Virtual Practice – Scenario #2

- ***What was the appropriate sanction?***
 - ***Hang ‘em high*** – dismiss all Ms. Williams’s counterclaims and defenses with prejudice
 - ***Thou shalt not ... testify*** – prohibit Ms. Williams from testifying and instruct the jury on the adverse inference
 - ***The slap on the wrist*** -- allow the use of the Zoom deposition at trial with highlighting of the witness-leading comments
 - ***C’est la vie (again)*** – no sanction at all because COVID has been rough on everyone



Virtual Practice – Scenario #2

- ***Florida Bar v. James*, 329 So. 3d 108 (Fla. 2021)** – witness coaching via text during a telephonic deposition

11:53 a.m.: Just say it anyway

11:53 a.m.: Just say 03/28

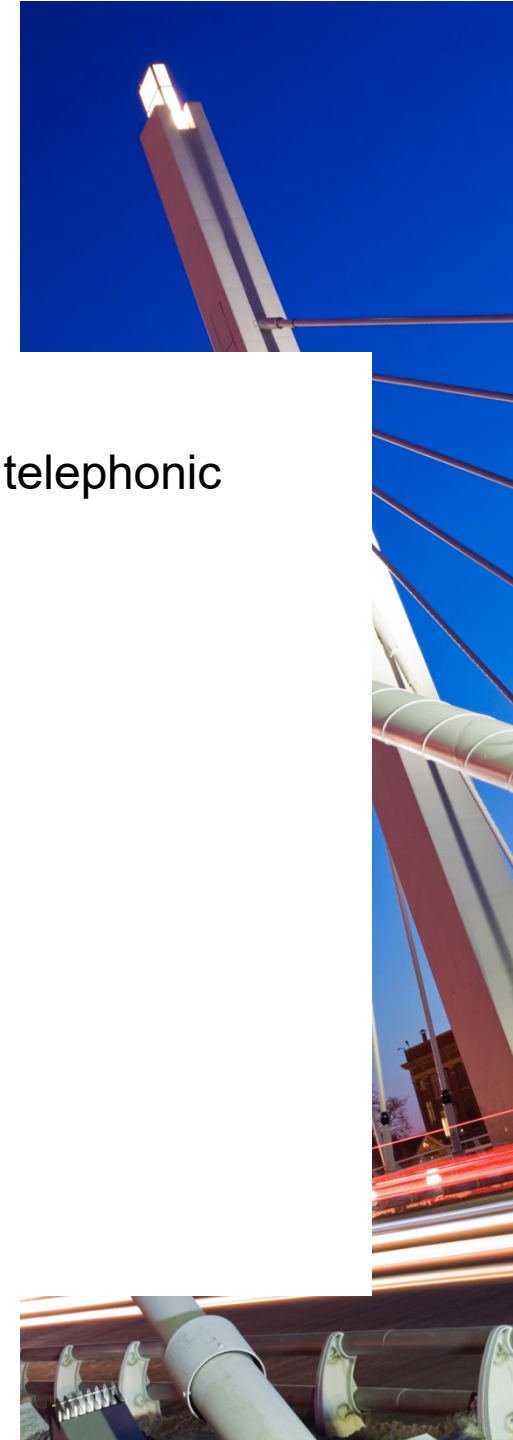
11:54 a.m.: In addition to the 03/28/2018 email containing the signed release I show..

11:55 a.m.: Don't give an absolute answer

11:55 a.m.: All I can see at this time but I cannot rule out existence

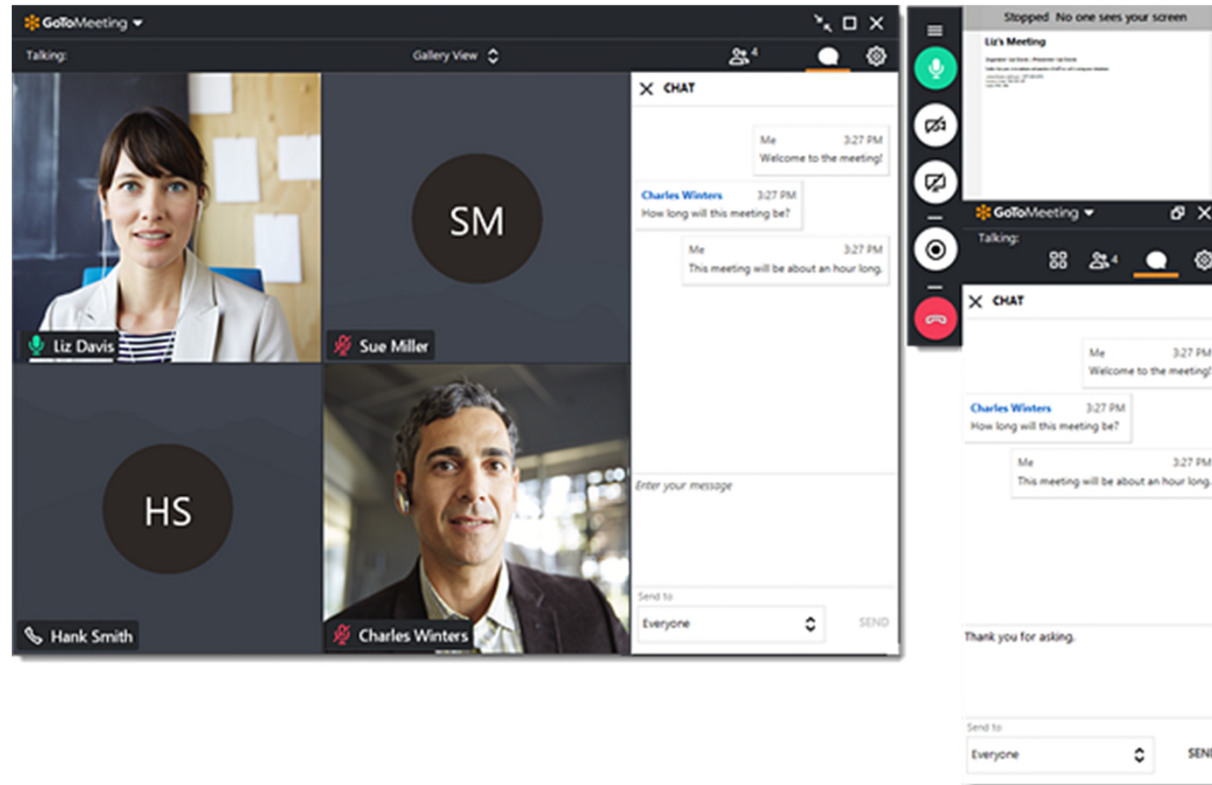
11:55 a.m.: It's a trap

11:56 a.m.: Then say that is my best answer at this time



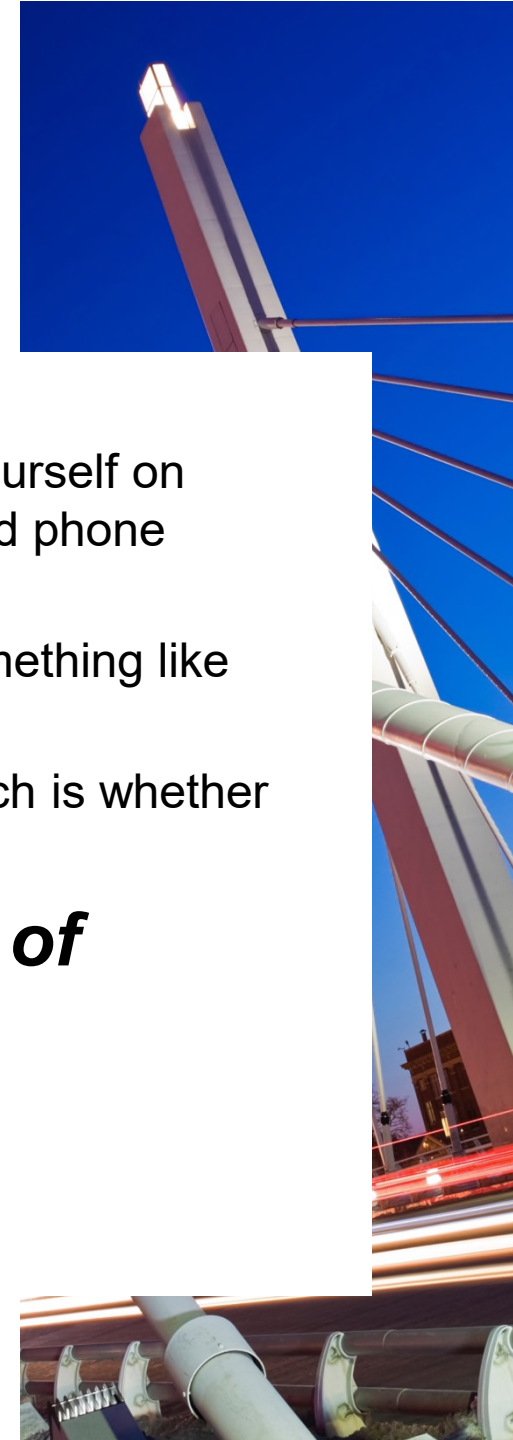
Virtual Practice -- Scenario #2

- ***State Bar of Arizona v. Claridge (Ariz. 2022)*** – witness coaching during trial conducted via GoToMeeting



Virtual Practice – Scenario #3

- You're a busy white-collar criminal-defense lawyer. You use a smartphone. You pride yourself on replying promptly to clients, and, to facilitate that, you keep track of email addresses and phone numbers for your clients using your smartphone's contacts feature.
- But you also like to have fun and keep in touch with your friends...so you download something like Facebook or TikTok from the app store.
- When you open the app for the first time, it asks you a number of questions, one of which is whether the app can have access to your contacts. You press "allow."
- ***Did you just violate the confidentiality requirements of MRPC 1.6?***



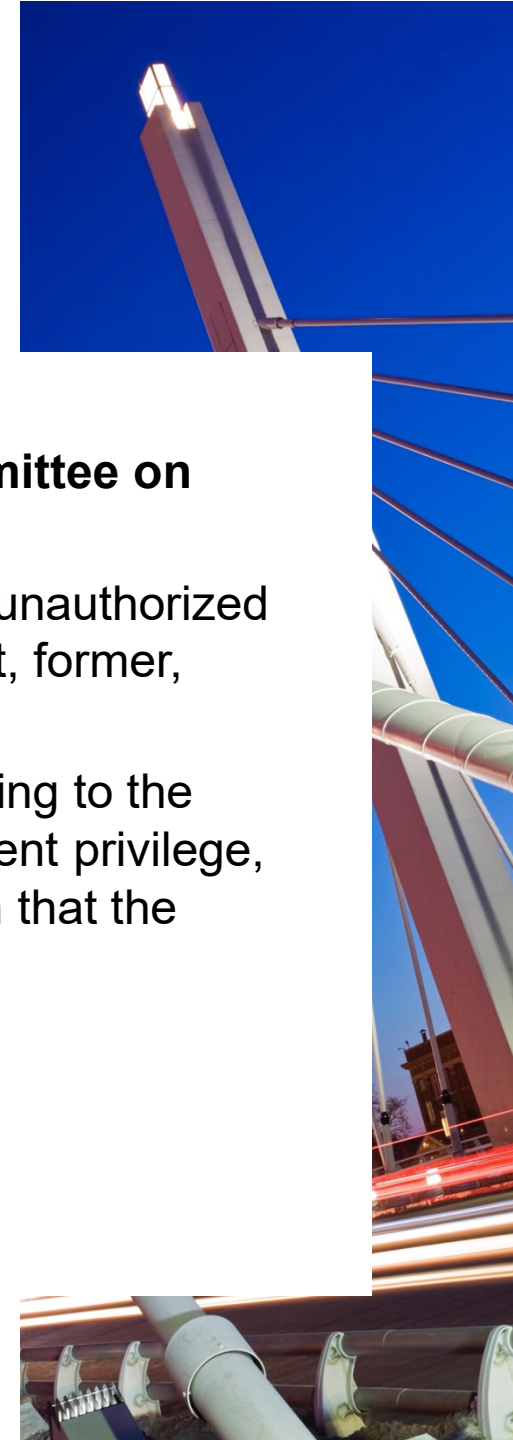
Virtual Practice – Scenario #3

- *Did you just violate the confidentiality requirements of MRPC 1.6?*
 - Yes
 - No
 - What's an app? Is Foley serving lunch?



Virtual Practice – Scenario #3

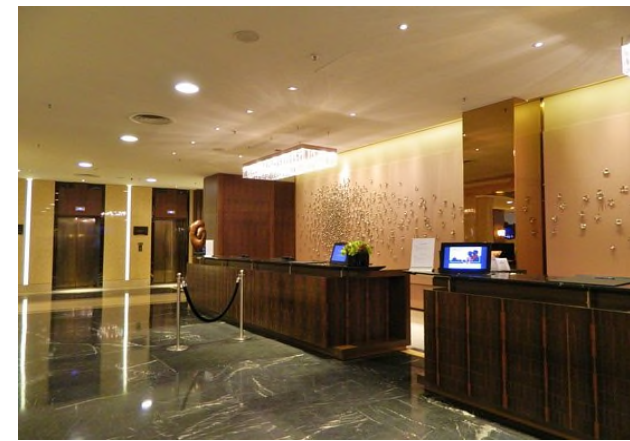
- **Ethics Opinion 1240 (Apr. 8, 2022) from the New York State Bar Association Committee on Professional Ethics**
 - NYRPC 1.6(c): a lawyer must “make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to” the confidential information of current, former, and prospective clients.
 - NYRPC 1.6(a): confidential information “consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.”





Scenario #4 – Privilege Issues

- You represent a growing technology firm on a number of IP licensing agreements. You send an email to your client’s CEO containing privileged advice.
- The CEO is traveling in Berlin for the latest round of licensing negotiations and wants a hard copy of your email.
- He emails the front desk at his hotel—*info.berlin@Hilton.com*—with the subject line “*Please print one copy. I’m waiting at the front desk. Thanks.*”
- ***Has the CEO waived the privilege?***



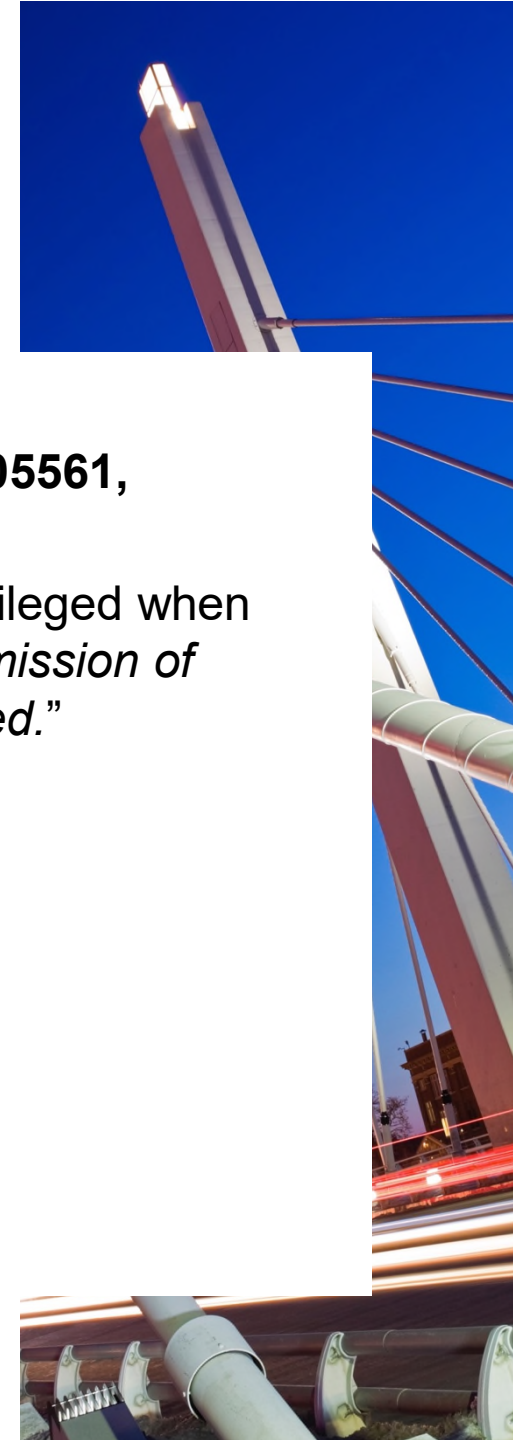
Scenario #4 – Privilege Issues

- ***Has the CEO waived the privilege?***
 - [Yes] the hotel front desk is a “third party.”
 - [No] that’s ridiculous; why can’t I get a simple piece of paper?



Scenario #4 – Privilege Issues

- ***Fourth Dimension Software v. Der Touristik Deutschland GmbH, Case No. 19 CV 05561, 2021 WL 4170693 (N.D. Cal. Sept. 14, 2021)***
 - California Evidence Code § 952 allows attorney-client communications to remain privileged when disclosed to third persons “*to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.*”
 - CEO’s disclosure to the general hotel email address was not “reasonably necessary.”
 - Already in possession of an electronic copy
 - No indication that the email was to be treated confidentially
 - Sent to a generic email address



Scenario #5 – Civility/Making Threats in Negotiation

- You represent a former employee of This Buds For You, a California cannabis company, in a wrongful-termination case. This Buds for You is in the process of an M&A transaction, in which it will be acquired by InBud, the world's leading global cannabis company.
- When you request your client's employment records from This Buds for You, you receive no response, so you send an email in which you threaten to contact InBud and tell it about This Buds's numerous violations of California's cannabis regulations, delivering illegal products, and bribing a deputy DA when another employee was arrested.
- You then offer to settle. You don't link any of the alleged illegal conduct to your settlement demands.
- ***Is this extortion?***



Scenario #5 – Civility/Making Threats in Negotiation

- Under California Penal Code § 518 extortion occurs when one obtains property from another with his or her consent induced by a wrongful use of force or fear.
- *Is this extortion?*
 - [Yes] prepare to report to Club Fed.
 - [No] this is good old-fashioned hardball.



Scenario #5 – Civility/Making Threats in Negotiation

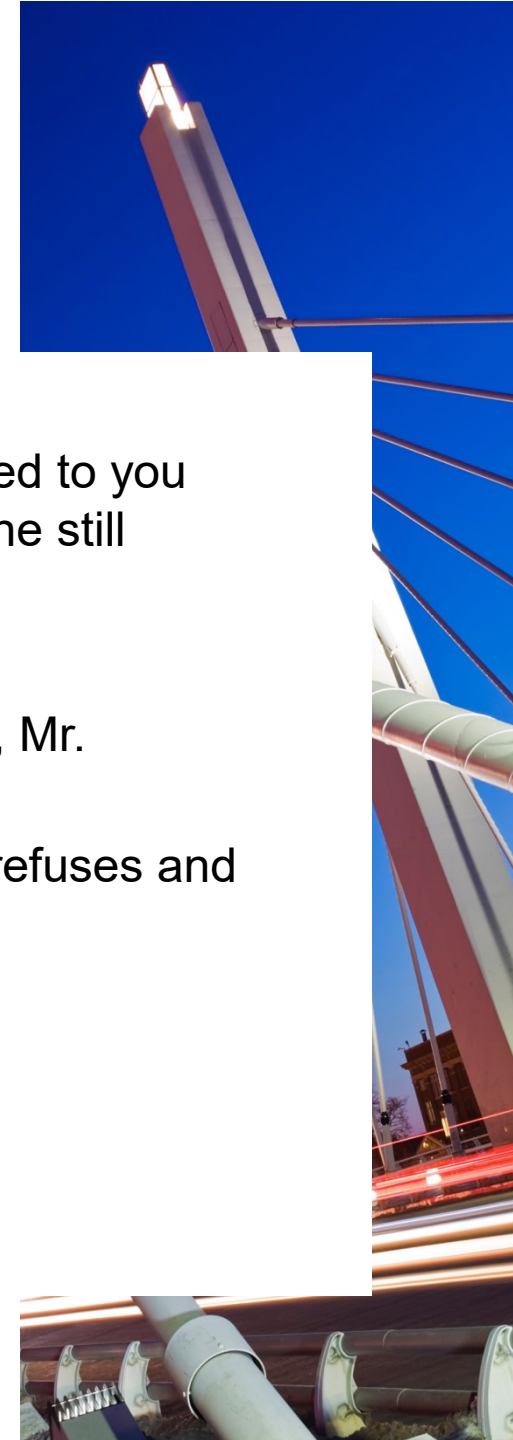
- ***Falcon Brands v. Mousavi & Lee LLP*, 289 Cal. Rptr. 3d 521 (Cal. Ct. App., 4th Dist. Jan. 27, 2022)**
 - “[I]t is the fact that the threat [was not] directly linked to the monetary demand that is the critical factor.”
 - “[T]he ... correspondence *standing alone* may not have crossed the line into misconduct.
 - ***But the rest of the story...***



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Scenario #6 – The Dishonest Deponent

- You represent Mr. Mayhem, a defendant in a car-accident case in Texas. He has confided to you before his deposition that his eyes were on his phone when the accident occurred. But he still maintains that the accident was not his fault.
- You advise Mr. Mayhem to testify honestly.
- But, when asked during his deposition where he was looking at the time of the accident, Mr. Mayhem lies and testifies that he was not looking at his phone.
- During the next break, you privately direct Mr. Mayhem to correct his testimony, but he refuses and instructs you to stay quiet.



Scenario #6 – The Dishonest Deponent

- ***If you follow Mr. Mayhem's instructions to remain quiet, are you assisting perjury?***
 - [Yes] – this has been settled since ABA Ethics Opinion 93-376 (holding that once a lawyer learns his or her client committed perjury, his or her continued representation “without rectification or disclosure would assist the client in committing a crime or fraud...”)
 - [No] – this is Texas, and it's the Wild West down there.



"But that was a long time ago. The law west of the Pecos now is \$225.00 an hour."

Scenario #6 – The Dishonest Deponent

- *State Bar of Texas, Professional Ethics Committee Opinion No. 692*
 - *But see ... ABA MRPC 3.3(b) – the duty to correct clients' false statements*

- *But what can you do moving forward with Mr. Mayhem?*



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