



ERICSA

1963 - 2023

A GEM 60 YEARS
IN THE MAKING

SAVANNAH

60TH ANNUAL TRAINING CONFERENCE & EXPOSITION

MONDAY, MAY 22 - FRIDAY, MAY 26, 2023

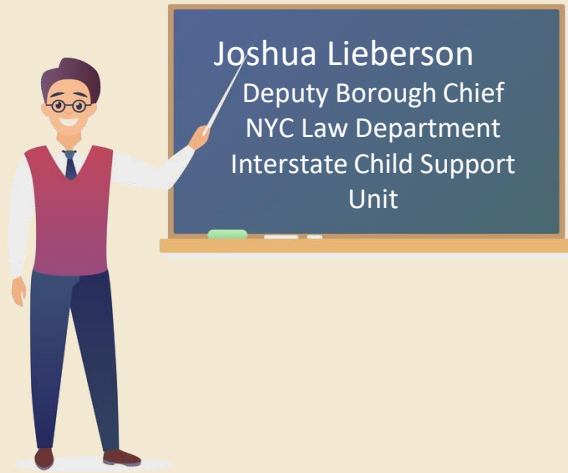
Diamonds in the Rough...or Just the Same Old Coal: Recent Issues in Legal Ethics

Daphne Davidson
Joshua Lieberman
Nicholas Palos



Recently, issues have arisen which, depending on one's perspective, show attorneys in a good light or a bad light. An attorney for the defendant in a civil lawsuit inadvertently (?) sends a smoking gun to the Plaintiff's attorney, who proceeds to use it during cross-examination of the sending attorney's client. Another lawyer for the same individual disclosed sensitive financial and health related information about the plaintiffs. Young, soon to be lawyers searching for jobs have determined that they will not represent certain classes of clients and they will not work for firms that will. Attorneys have lobbed Molotov cocktails into parked police vehicles. Attorneys have become embroiled in election controversies with implications for their future ability to practice law. Challenges have been made to ethical rules imposing explicit Diversity, equity and inclusion standards upon attorneys. More states are imposing continuing legal education requirements in cybersecurity and data protection. Even the U.S Supreme Court has waded into ethical controversies, either because someone leaked unpublished draft opinions, or because of the actions of a Justice's spouse. Congress is threatening to enact a Code of Ethics for SCOTUS. The Court just recently heard a case about the attorney-client privilege and has been asked to maintain the broad scope of this bedrock evidentiary privilege. Leave politics at the workshop door as we explore how some of these sensational stories raise the same ethical conundrums which have vexed the legal profession for ages.





TODAY'S SESSION LEADERS





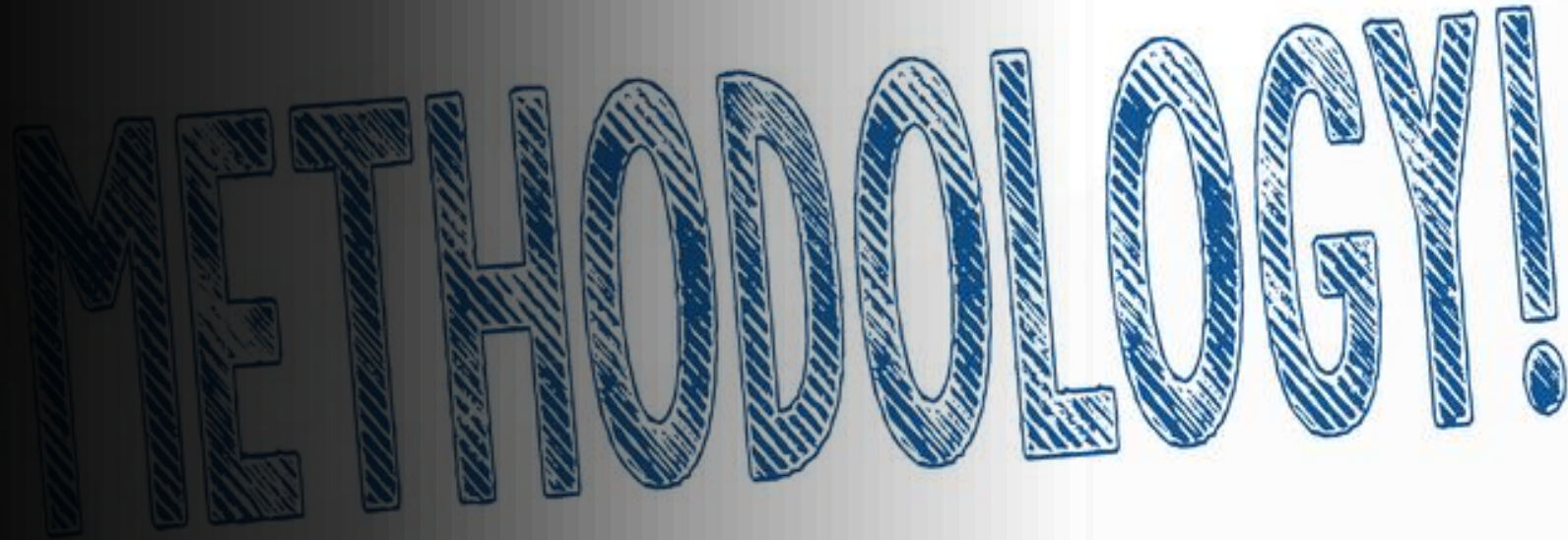
LEARNING OBJECTIVES

- This Legal Ethics session will explore some new developments in the regulation of attorneys by reviewing some interesting developments which have arisen in the past 18 months
- The session will show how the regulation of the legal profession has addressed new areas of individual conduct by applying the rules which have governed the profession for the past half-century



Session Methodology

- This session is divided into four sections, each of which will last approximately ten minutes.
- One of our Session Leaders will introduce the topic by referring to the case study presented and the principles which underly the case.
- The panel of Session Leaders welcome your contribution to a lively, interactive session. Feel free to interpose your opinions, comments and thoughtful contributions



METHODOLOGY!

Does anyone here remember law school?

- **WE DO NOT HAVE ALL OF THE ANSWERS
AND HOPE TO LEARN FROM EACH OF YOU.
PLEASE JOIN IN THE CONVERSATION**
- We are begging you, don't force us to call
on some random audience member . . .
because we might just call on
- **YOU**



Packing At the Bar



Naughty Attorney Gazette: Looking at Legal Ethics In a Lighthearted Manner

NJ Atty's Gun in Court Draws Censure But Splits Board

[In the Matter of Charles Canning Daley](#)

- ❖ Docket No DBB 20-037
Disciplinary Review Board
Decided February 3, 2021
- ❖ No D-40-2020
Supreme Court of New Jersey
Decided May 18, 2021

[In the Matter of Mark Bae Jander](#)

- ❖ Docket No DBB 20-038
Disciplinary Review Board
Decided May 9, 2021
- ❖ No D-100-21
Supreme Court of New Jersey
Decided January 10, 2022

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# In the Matter of Bruce A Wallace, III (1998)

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- Possessed handgun without permit
- Brought to ex-girlfriend's home to kill her and then commit suicide
- Decided he could not go through with it
- 3 month suspension imposed for violation of [NJ RPC 8.4\(b\)](#)
 - 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;
 - ABA MRPC 8.4(b) is exactly the same
 - [Comment 2](#) more fully explicates the Rule.
 - An attorney is bound even in the absence of the attorney-client relationship to a more rigid standard of conduct than required of laymen. **To the public he is a lawyer whether he acts in a representative capacity or otherwise** (citing *In re Katz*, 109 NJ 17, 22-23 (1987))

In the Matter of Charles Canning Daley (2021)



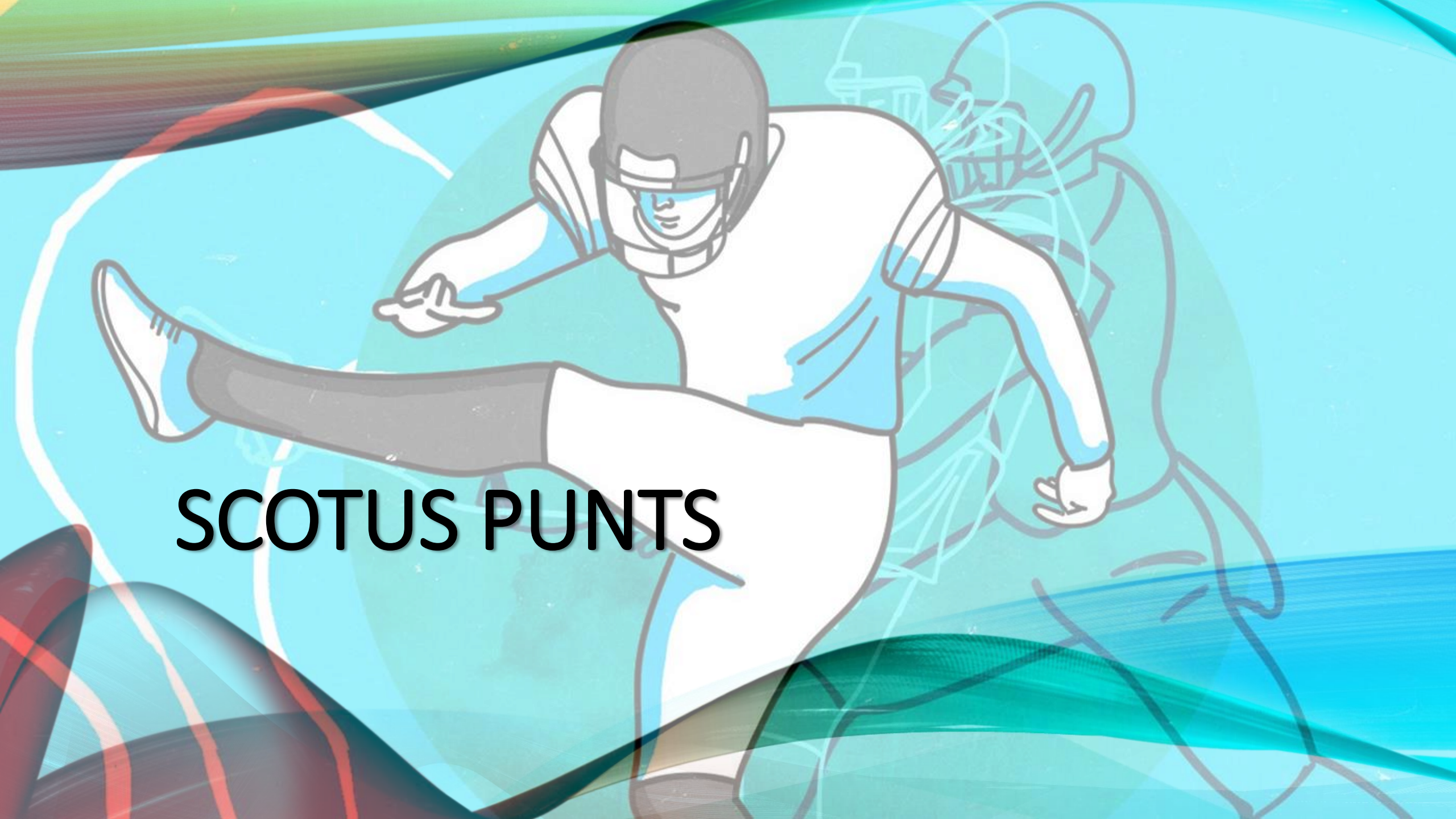
- Key Facts
 - Possessed handgun without permit
 - Handgun was loaded with hollow nose bullets
 - Loaded gun in backpack when entering courthouse
 - Entered multiple courthouses with gun in backpack and not caught
- Disciplinary Review Board Splits
 - Majority of Disciplinary Review Board recommends six-month suspension with future proof of fitness to practice law.
 - Dissent to recommendation to suspend for six months: More appropriate sanction is censure.
- NJ Supreme Court
 - Imposes censure imposed for violation of RPC 8.4(b)
 - Attorney will need to provide proof of fitness to practice based on attestation of approved mental health professional
- Pennsylvania imposed a stayed three month suspension as reciprocal discipline

In the Matter of Mark Bae Jander (1/10/2023)



- Facts
 - Attorney had loaded handgun in litigation bag as he entered courthouse
 - Attorney lawfully purchased handgun but did not have a permit to carry it
 - Attorney pled guilty to unlawful possession of a handgun ([NJSA 2C:39-5\(b\)\(1\)](#))
 - Guilty Plea leads to disciplinary proceedings
 - [Discipline Review Board](#) unanimously finds attorney should be disciplined, but cannot agree on appropriate sanction
 - 4 votes for suspension
 - 4 votes for censure
 - 1 absent member
 - Referral to Supreme Court for determination of appropriate sanction together with a warning to the bar that in the future, such cases will have a presumptive sanction of a three month suspension
- [Pennsylvania imposed Public Reprimand](#) after *joint* application is made for disciplinary action after New Jersey Matter



An illustration of a football player in mid-punt. The player is wearing a white jersey with blue accents on the sleeves, white pants, and a grey helmet with a blue face mask. He is captured in a dynamic pose, with his right leg extended forward and his left leg bent. The background is a vibrant, abstract composition of blue, green, and red wavy lines, suggesting a field or a stylized environment. The text "SCOTUS PUNTS" is overlaid in the lower-left quadrant.

SCOTUS PUNTS

Naughty Attorney Gazette: Looking at Legal Ethics In a Lighthearted Manner

SCOTUS DIGs E-Mail Discovery Case

In Re Grand Jury

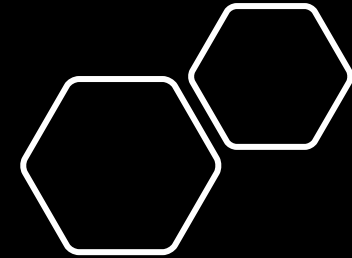
[ABA Formal Opinion 503](#)

Doc No [21-1397](#)

598 U.S. ____ (2023)

[January 9, 2023](#)

[In re Cicchiello](#)



In Re Grand Jury



Matter involves
the Attorney-
Client evidentiary
privilege

- FRE 501 Privilege in General
- FRE 501 Attorney-Client Privilege

Dual Purpose
Communication

- Advice re tax planning and controversy deemed legal advice
- Preparation of income tax return deemed *non-legal advice*

Circuit Split re
dual purpose
communication

- Primary Purpose Test (DC Circuit)
- Relative Significance Test (9th Circuit)
- If dual purpose, no privilege (7th Circuit)



In Re Grand Jury



10/3/2022 -
SCOTUS Grants
Certiorari

01/09/2023 –
Oral Argument

01/23/23 –
Decision
Rendered

Dismissed as
Improvidently
Granted

Circuit Court
Decision
Stands

No review or
guidance in
decision



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In re Grand Jury

- Issues surrounding the use of email still raise questions for attorneys
 - New Jersey Advisory Committee on Legal Ethics Opinion 739
 - ABA Formal Opinion 503
 - *In re Emanuele Robert Cichiello*



NJ ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION 739

- Issued March 10, 2021
 - RPC 4.2
 - In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter
 - Lawyer who initiates a “group email” than includes client should not be able to claim a violation of RPC 4.2 if opposing counsel uses “reply all” response
 - Advisory committee finds an implied consent to opposing attorney replying to entire group, including client



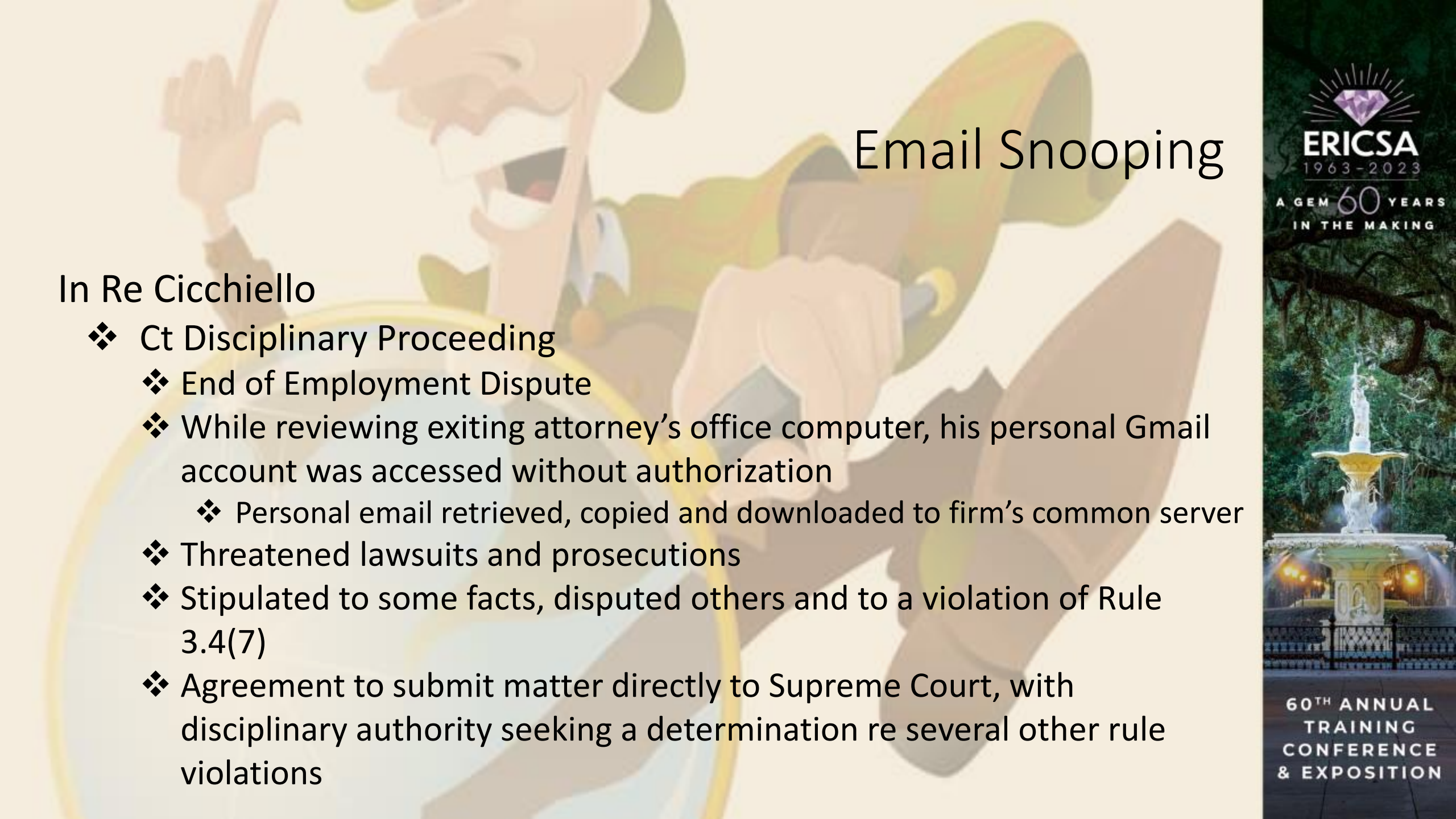
ABA FORMAL OPINION 503

- “Reply All” in Electronic Communications
- Reviews the Ethical implications of including the client on an email which is sent using “Reply All”
- Rules Implicated
 - MRPC 4.2 : In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so
- Establishes a presumption that including one’s client on a “reply all” email constitutes implied consent to the other attorney contacting the client in a “reply all” email
 - Reply would not violate MRPC 4.2
 - Forward email or text to client separately
 - Inform receiving attorney that consent is not granted even if client appears in “reply all” message

ABA FORMAL OPINION 503

- NJ Advisory Committee on Professional Ethics Opinion 739
 - Issued March 10, 2021
 - RPC 4.2
 - In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter
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Email Snooping

In Re Cicchiello

- ❖ Ct Disciplinary Proceeding
 - ❖ End of Employment Dispute
 - ❖ While reviewing exiting attorney's office computer, his personal Gmail account was accessed without authorization
 - ❖ Personal email retrieved, copied and downloaded to firm's common server
- ❖ Threatened lawsuits and prosecutions
- ❖ Stipulated to some facts, disputed others and to a violation of Rule 3.4(7)
- ❖ Agreement to submit matter directly to Supreme Court, with disciplinary authority seeking a determination re several other rule violations



Email Snooping

In Re Cicchiello

Attorney STIPULATES to a violation of [CT RPC 3.4\(7\)](#)

A lawyer shall not: information. (7) Present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter



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Email Snooping

In Re Cicchiello

- ❖ Other Rules Implicated
 - ❖ RPC 1.4 (Communication)
 - ❖ RPC 1.16(a)(3) (Declining or Terminating Representation)
 - ❖ (a) Except as stated in subsection (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (3) The lawyer is discharged.
 - ❖ RPC 4.2 (Communication With a Person Represented by Counsel)
 - ❖ RPC 4.4(a) (Respect for Rights of Third Persons)
 - ❖ 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



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Email Snooping

In Re Cicchiello

- ❖ Other Rules Implicated
 - ❖ RPC 7.3(b) (Solicitation of Clients)
 - ❖ RPC 8.4(2) (Misconduct)
 - ❖ It is professional misconduct for a lawyer to(2)
Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.
 - ❖ RPC 8.4(4) (Misconduct)
 - ❖ It is professional misconduct for a lawyer to(4)
engage in conduct that is prejudicial to the administration of justice.



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**DONALD TRUMP
IS DANGEROUS TO
YOUR LAW
LICENSE**



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04.10.2021 / Tuesday

Nº 768345589

Naughty Attorney Gazette: Looking at Legal Ethics In a Lighthearted Manner

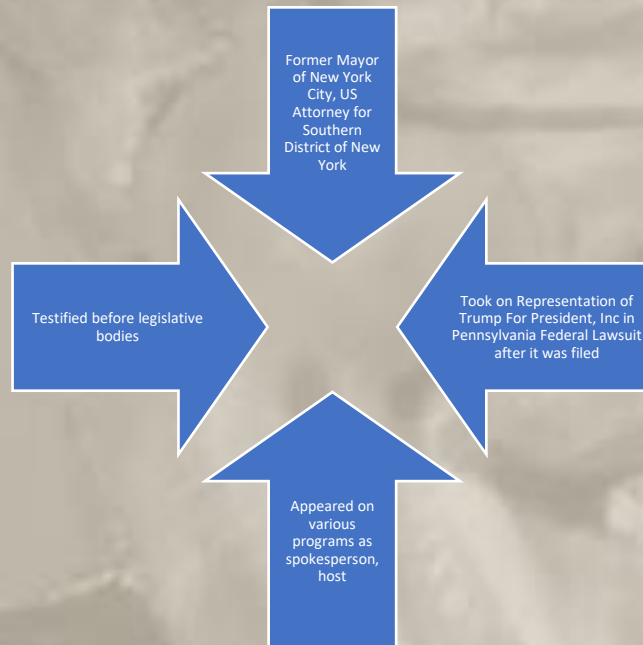
Lawyers for Former President Trump Face Sanctions and Disciplinary Proceedings



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Rudy Giuliani: Formal Disciplinary Proceedings in New York and District of Columbia





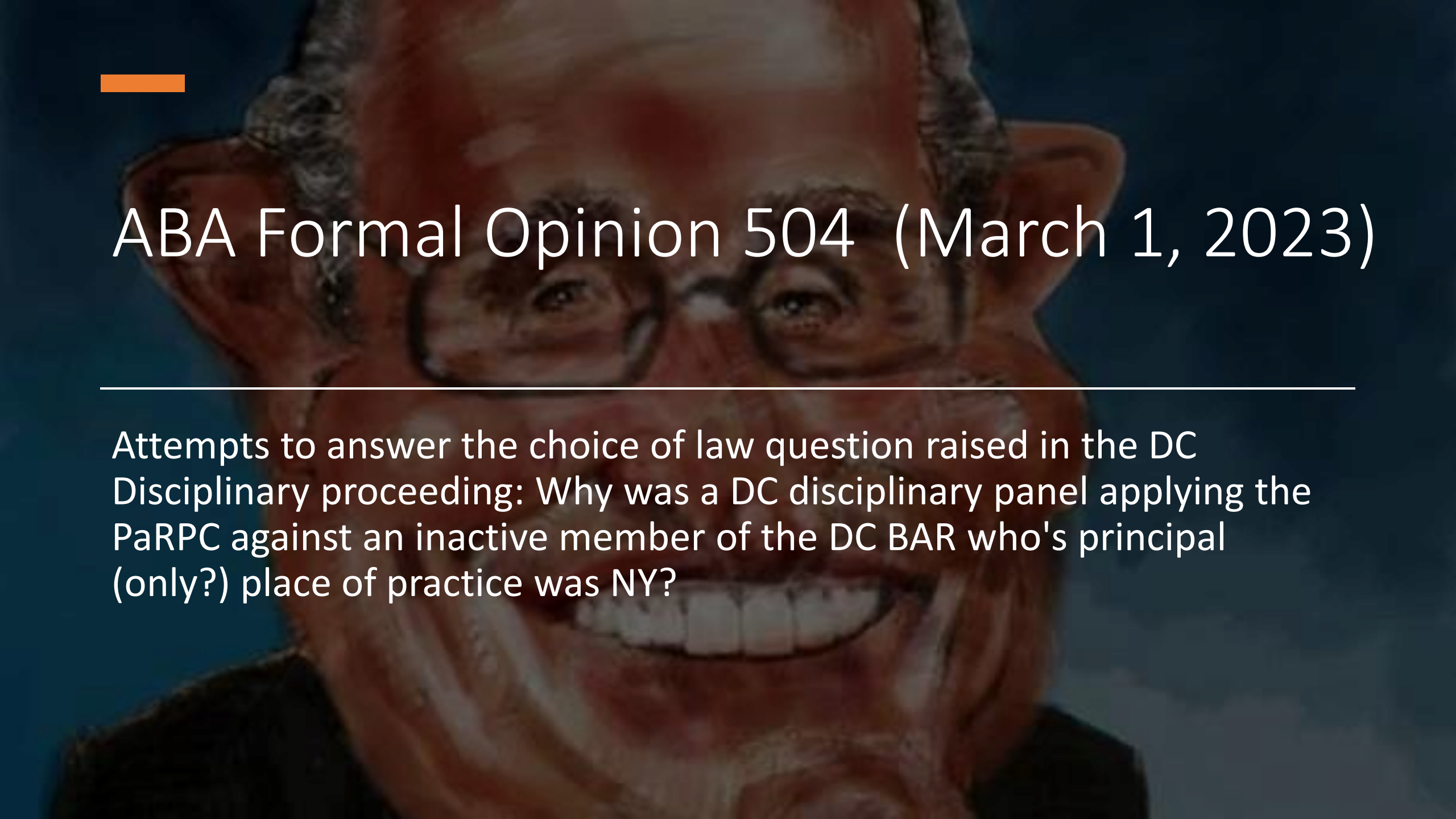
New York Proceeding

- ❖ Formal Proceedings Commenced with application for emergency suspension of license to practice law
 - ❖ Extraordinary preliminary action
 - ❖ Conduct immediately threatens the public interest and warrants interim suspension from practice of law to protect the public from violations
- ❖ NY Rules of Professional Conduct Implicated
 - ❖ **3.3(a)(1)**: Shall not knowingly make a false statement of fact or law to tribunal
 - ❖ **4.1**: Shall not knowingly make a false statement of fact or law to a third person
 - ❖ **8.4(c)**: Shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation
 - ❖ **8.4(h)**: Shall not engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer
- ❖ June 24, 2021: Suspension until disciplinary matters have been completed and until further order of court
- ❖ No report regarding completion of disciplinary matters

D.C. Proceeding

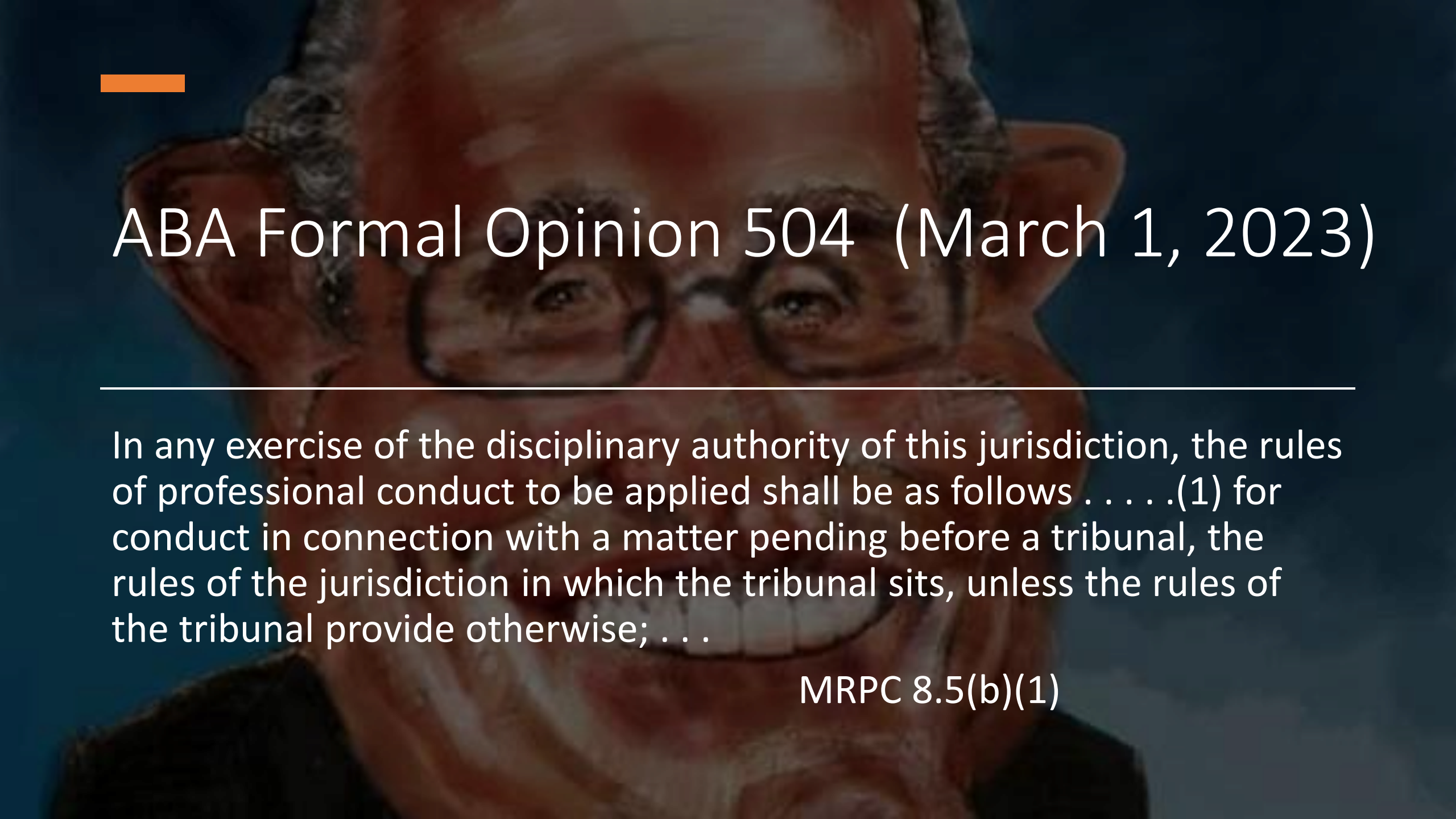
- ❖ July 7, 2021: Reciprocal Suspension based on NY suspension
- ❖ Matter focused on actions during Pennsylvania litigation only
- ❖ Alleged only violations of Pennsylvania's Rules of Professional Conduct
- ❖ Rules Implicated
 - ❖ **3.1**: brought a proceeding and asserted issues therein without a non-frivolous basis in law and fact for doing so
 - ❖ **8.4(d)**: engaged in conduct prejudicial to the administration of justice
- ❖ Hearing took place and concluded on December 15, 2022
 - ❖ Preliminary finding of violation on one of two counts but no details as to which
 - ❖ Office of disciplinary counsel seeks disbarment
 - ❖ Chair of hearing committee compares frivolous charge to case where individual sued dry cleaner for \$54,000,000.00 for lost pair of pants, which resulted in 3 month suspension





ABA Formal Opinion 504 (March 1, 2023)

Attempts to answer the choice of law question raised in the DC Disciplinary proceeding: Why was a DC disciplinary panel applying the PaRPC against an inactive member of the DC BAR who's principal (only?) place of practice was NY?



ABA Formal Opinion 504 (March 1, 2023)

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; . . .

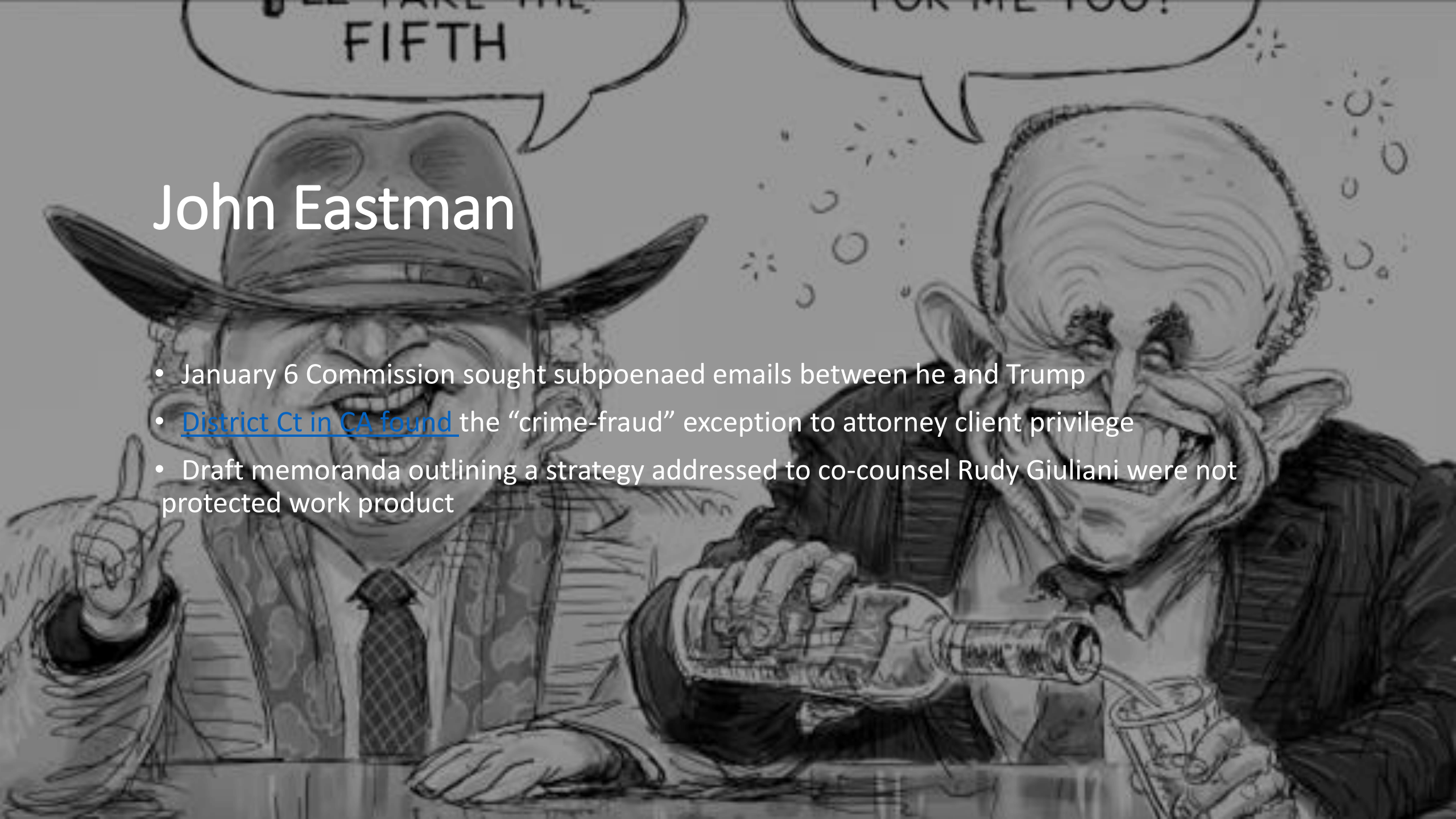
MRPC 8.5(b)(1)



John Eastman

- ❖ Offered Theory of how VP Pence could force election to House of Representatives by blocking “disputed” slates of electors
- ❖ Was involved in the Texas lawsuit against Michigan, Pennsylvania and Georgia
- ❖ Proceeding brought by State Bar of California in State bar Court
- ❖ Charges not brought under Rules of Professional Conduct but under the California Business and Professions Code
- ❖ Code Sections Implicated
 - ❖ **6068(a):** It is the duty of an attorney to do all of the following: To support the Constitution and laws of the United States
 - ❖ **6068(d):** It is the duty of an attorney to do all of the following: To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law
 - ❖ **6106:** The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.





John Eastman

- January 6 Commission sought subpoenaed emails between he and Trump
- [District Ct in CA found](#) the “crime-fraud” exception to attorney client privilege
- Draft memoranda outlining a strategy addressed to co-counsel Rudy Giuliani were not protected work product

Naughty Attorney Gazette: Looking at Legal Ethics In a Lighthearted Manner

One Way or Another, I'm Gonna Get Ya



6/26/18



"So we want to say to all of you, that

VSR



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The background features a stylized illustration of a person with dark skin and short hair, wearing a blue and white striped shirt. They are positioned behind vertical bars, suggesting imprisonment. The color palette is warm, with shades of orange, red, and purple. On the left side, there is a vertical gradient bar transitioning from light blue at the top to dark blue at the bottom.

One Way Or Another, I'm Gonna Get Ya

The prosecutor in a criminal case shall . . .

(f) Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and to exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

MRPC 3.8(f)



One Way Or Another, I'm Gonna Get Ya

The prosecutor in a criminal case shall . . .

- (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . .
- (f) Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and to exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

MRPC 3.8



One Way Or Another, I'm Gonna Get Ya

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

MRPC 3.6(a)

The image features a brown NFL football with white laces and the NFL shield logo, resting on a green grass field. In the background, a player in a white jersey is lying on the ground. The scene is framed by vibrant, wavy borders in orange, red, and blue at the top and bottom. The text "The Defense Drops the Ball" is centered in a bold, black font.

The Defense Drops the Ball

Naughty Attorney Gazette: Looking at Legal Ethics In a Lighthearted Manner

Attorneys for Alex Jones Can't Keep a Secret . . .



TOP SECRET

TOP SECRET

FOR YOUR EYES ONLY

CONFIDENTIAL

CLASSIFIED

FOR YOUR EYES ONLY

Attorney archive link Faux Pas

- Attorney for Alex Jones in the Sandy Hook Trial inadvertently give the Plaintiff's Attorney access to a Drop Box which had requested materials, but which also included information from Defendant's telephone which was used to cross-examine the Defendant'
- Information turned over was completely contradictory to position being taken by Defendant in litigation
- Counsel failed to attempt to use the Texas claw-back rules to have the material returned
- Plaintiff's counsel suspected the inclusion of this information was inadvertent



Obligation of attorney sending electronic documents

- Act **competently** to avoid revealing a client's confidential information
- Use **reasonable care** to ensure that metadata that contains confidential information is not transmitted
- Cannot act to limit the duty to use reasonable care to avoid disclosure of confidential

OBLIGATION OF RECEIVING ATTORNEY (“RA”) WHEN RECEIVING CONFIDENTIAL INFORMATION

- Where SA notifies RA that confidential information is in the information sent, RA should not view and must follow instructions of SA
- If RA discovers confidential information, RA must give notice of discovery to SA

Oops, they did it again

- Multi-state litigation (lawsuits against Alex Jones in Connecticut and in Texas concerning his comments about the Sandy Hook school shootings)
- Plaintiff Medical and psychiatric records were part of discovery database (over 4,000 pages out of over 390,000 pages)
- Defendants sought protective order to designate plaintiff's medical and mental health records as confidential
- Some of highly confidential material used in motions
- Unrequested Medical information concerning Connecticut plaintiffs sent by Connecticut counsel to Texas counsel with material counsel actually requested



Oops, they did it again



Violation of Rules of Professional Conduct found but no sanction imposed



Connecticut Rules implicated

RPC 1.1 – Competence

RPC 1.15(b)– Safeguarding Property



Comparable Model Rules

MRPC 1.1

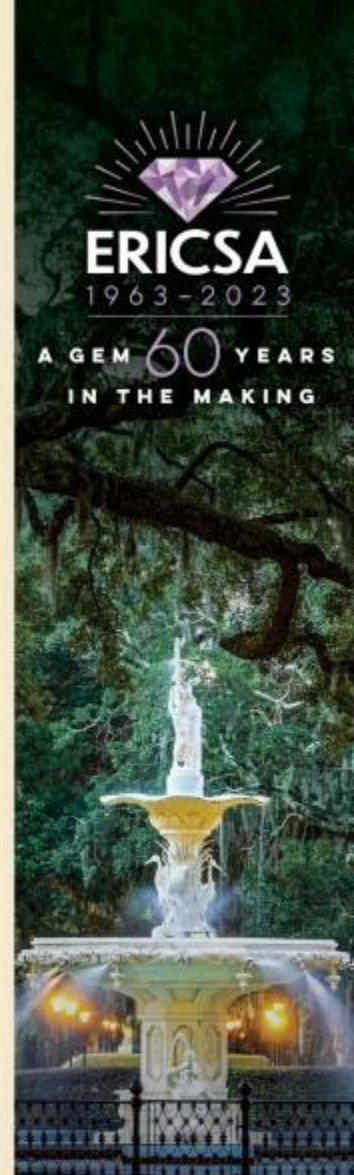
MRPC 1.15(a)

The graphic features a light beige background. On the left, there are two green gears of different sizes, with a vertical teal line extending downwards from the larger one. On the right, there is a blue gear with a glowing yellow lightbulb positioned over it. The lightbulb has a black outline and a white base with grey lines. The text 'FINAL' is in large, bold, green capital letters, and 'THOUGHTS' is in large, bold, blue capital letters with a slight shadow effect.

FINAL THOUGHTS



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Question???



Comments???





Thanks for Coming

Don't Forget to Complete the Evaluations in the
Conference App

See you next year in Grand Rapids, MI

