



PROGRAM MATERIALS

Program #30239

October 20, 2020

Navigating the Ethical Minefield of the New Normal Due to COVID-19: Legal Malpractice Issues Emerging from the Pandemic

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**Navigating the Ethical Minefield of the
New Normal Due to COVID-19
Legal Malpractice Issues Emerging from
the Pandemic**

October 20, 2020

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Bressler, Amery & Ross P.C.

About Us

FIRM OVERVIEW

Bressler Amery & Ross, P.C. is a leading full-service law firm with more than 165 attorneys across six offices – in **Alabama, Florida (2), New Jersey, New York, and Washington D.C.**

Bressler, Amery & Ross, P.C. provides legal advisory services to banking, financial, manufacturing, insurance, and technology sectors. For nearly 40 years, Bressler attorneys have been industry leaders. The firm has achieved national recognition in the legal services industry and has appeared on the U.S. News “Best Law Firms” list.

OUR CLIENTS

Bressler represents large, mid-size, and small companies. Our clients range from emerging companies to Fortune 500 corporations across multiple industries.

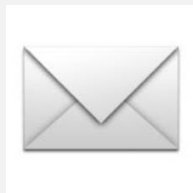
Practicing Law in the New Reality

- **COVID-19 and an Increased Reliance on Technology**

- Start with some basics:

- Technology has transformed the way we communicate. Perhaps now more than ever.

- Letter



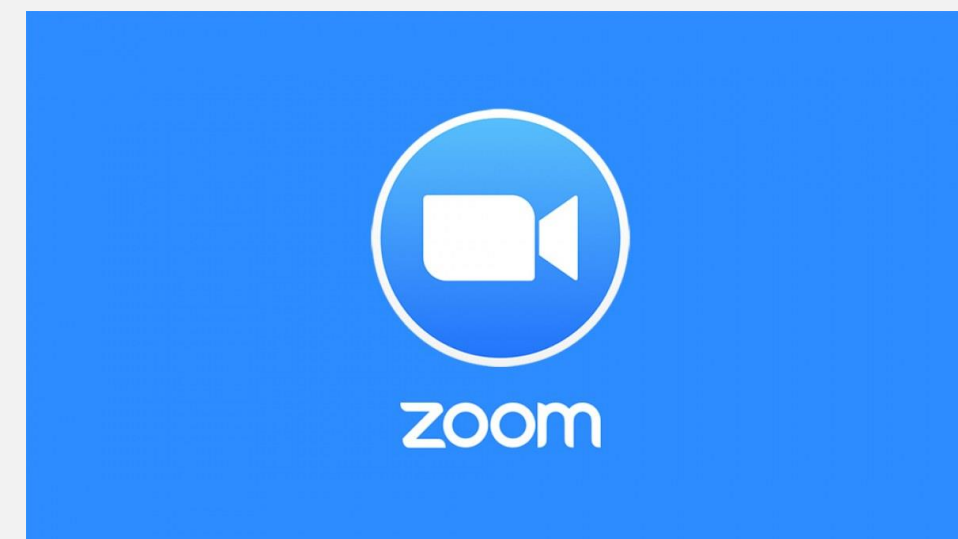
- Telephone Call



- E-mail



- Text Messages






Conveying Meaning

- **Be mindful of the effects that the pandemic has had on others, especially when using technology to communicate:**

Spoken Word	Written Word
How we say it	Words taken at face value
Expression on our faces	N/A
Harshness, softness of tone	N/A
Body language	N/A
Sarcasm	N/A
Context	N/A
Non-verbal cues	N/A



E-mails

- Before sending an e-mail to a co-worker, have you ever gone back and changed words because the message was open to multiple interpretations?
- The most subtle change can make a big difference.
 - “We need to speak, call me”
 - “Are you available for a phone call to touch base?”

Problems with E-mail as Formal Communication

- **Ease:** tendency to use e-mail as a default form of communication when a phone call or formal letter would be more appropriate
 - E-mail is simply too easy to transmit without second thought
 - Unable to convey tone
 - Constant connection drives need for instantaneous response
- **Retention:** despite the ease of use, and the voluminous number of emails sent daily, emails are the easiest communications to retain, and live in posterity forever
- **Alternatives:** phone / video chat

The Accidental E-mail

Whether the accidental “reply all” or the erroneous “auto-correct” in the “To:” or “CC:” field, it’s happened to all of us

- **Potential Consequences:**

- Unintentional waiver of privilege
- Disclosure of confidential / proprietary information
- Disclosure of HIPAA-protected PHI


- **Generally Accepted Practice / Procedure:**

- Upon discovery, immediately take steps to identify the error, inform the erroneous recipient, and request deletion, destruction
- “Message Recall” is ineffective



Use of Electronic Devices

- Be Wary Of Public Wi-Fi Connections
 - Public Wi-Fi Is Not Secure
 - Risks Exposure of Confidential Information Stored Or Transmitted on Your Device
 - Exposes Your Network To Malware And Hacking Attacks

 - Be Aware of Location
 - Working Remotely from home – comply with IT Department's or IT Professional's procedures to safeguard data.
- 

Informing Clients After Data Breaches

- ABA Formal Op. 483 (Oct. 17, 2018)
 - Lawyers' Obligations After an Electronic Data Breach or Cyberattack
 - Reaffirms the duty to safeguard client data and notify clients of a data breach
 - Implement procedures/policies to protect client data
 - Obligation to Monitor for Data Breach (MRPC 5.1 & 5.3)
 - Obligation to Provide Notice of Data Breach (MRPC 1.4)
 - Consider this in connection with Formal Op. 477R (May 11, 2017) (setting forth lawyers ethical obligation to use reasonable efforts to secure protected client information when communicating using the Internet)

Communications and Professionalism

- Emoticons and Emojis

- Definitions:

- **Emoticons** are the simpler of the two types of characters.

- As defined by one court, “[a]n ‘emoticon’ is an icon formed by grouping keyboard characters together into a representation of a facial expression. Emoticons are used to suggest an attitude or emotion in computerized communications.” Ghanam v. Does, 845 N.W.2d 128, 133, n.4 (Mich. Ct. App. 2014).

Communications and Professionalism

Well-known examples:

:)

:(

;-)

:P

Communications and Professionalism

Well-known examples:

Smiley-face :)

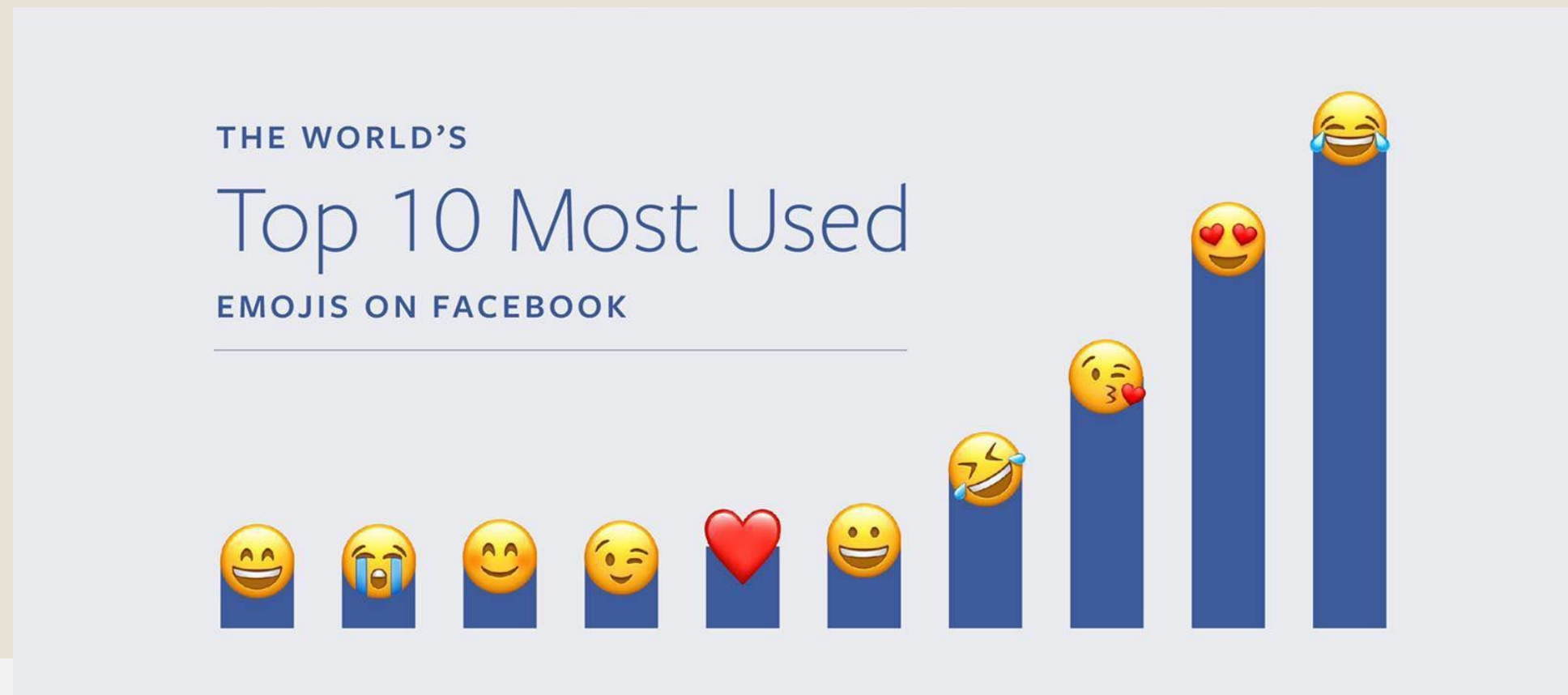
Frowny-face :(

Winking-face ;-)

Sticking-your-tongue-out face :P


Communications and Professionalism

- **Emojis** are more advanced, tiny images of characters – detailed pictographic symbols.
- “[A]ny of various small images, symbols, or icons used in text fields in electronic communications to express the emotional attitude of the writer, convey information succinctly, [or] communicate a message playfully without using words...”

















Why Do They Matter?







- Emojis are so popular that they have virtually replaced words in texts and social media posts.
 - Emoji are showing up in court cases exponentially, and courts should be familiar with them.**
 - Emoji are showing up as evidence in court more frequently with each passing year.
 - As they become more common, the ambiguity in how emoji are displayed and what we interpret emoji to mean could become a larger issue for courts to contend with.
- 

Replacing Words with Images

-Enter: Emojis and Emoticons

 = `<3`
 = `</3`
 = `8)`
 = `D:`
 = `:|`
 = `:o)`

 := `=)` `=-)`
 = `:D` `:-D`
 = `;)` `;-)`
 = `::>` `::->`
 = `:o` `:-o`
 = `>:(` `>:-(`

 := `:)` `(:` `:-)`
 = `:(` `):` `:-(
 = :/ :-/ :\ :-\
 = :p :-p :b: :-b
 = ;p ;-p ;b ;-b
 = :* :-*`


A few fast facts

- December 2016 - iOS 10.2 added new emoji including judges.





A few fast facts

- As of June 2018, according to Unicode, the database which records and classifies all emojis, there are a total of 2,823 emojis officially recognized.
 - As of September 2019, just over one year later, Unicode recognizes 3,019 emojis.
- 

Social Media: Getting Emojis/Emoticons into Evidence

- New Jersey

- Standard for authenticating screenshots of emojis/emoticons is the same as social media evidence.

- New Jersey follows the general practice for authentication of a “writing”
- Must set forth evidence sufficient to support a finding that the matter is what its proponent claims (N.J.R.E. 901)
- N.J.R.E. 901 (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.”)

- New Jersey follows the Third Circuit approach set forth in *U.S. v. Browne*, 834 F.3d 403 (3d Cir. 2016) (holding that Facebook logs of chats were sufficiently authenticated by extrinsic evidence to be admissible and ruling that social media evidence may be authenticated using the same types of evidence traditionally used to authenticate documents).

Social Media: Getting Emojis/Emoticons into Evidence

- New York

- Standard for authentication is a liberal one and similar to New Jersey.


- New York follows the general practice for authentication of a “writing”
- Must set forth evidence sufficient to support a finding that the matter is what its proponent claims.
- *People v. Clevestine*, 891 N.Y.S.2d 511, 514 (N.Y. App. Div. 2009) (admitting MySpace messages into evidence through traditional authentication procedures), *appeal denied*, 925 N.E.2d 937 (N.Y. 2010).



Recent Highlights: Emojis

Russo v. New Jersey et al.

2018 U.S. Dist. LEXIS 125646 (D.N.J. July 27, 2018)

- New Jersey Superior Court Judge John F. Russo, Jr. filed a federal discrimination and retaliation lawsuit against the state and three judges.
 - Judge Russo was previously placed on administrative leave amid an ongoing ACJC investigation for judicial misconduct.
 - The misconduct probe involved allegations that Judge Russo engaged in “explosive fits of rage,” “extreme emotional immaturity,” “bizarre and uncomfortable conduct” towards law clerks, and indecent behavior.
- 

Recent Highlights: Emojis

- One of the named defendants in the federal lawsuit, Superior Court Judge Marlene Lynch Ford, filed a certification in opposition to Judge Russo's request for a preliminary injunction allowing him to attend a judiciary training program.
- Therein, Judge Ford certified that Russo engaged in a pattern of conduct unbecoming for a judge, including the display of a "poop emoji" in his office.
 - The defendants filed a motion to stay the federal action pending disposition of the ACJC proceedings regarding allegations of judicial misconduct. This motion was granted on July 27, 2018.



Recent Highlights: Attorneys and Social Media

- *In re Ashley Ann Krapacs*, Case No. 19mc20857, FL Bar Adm. 2019-30 (S.D.Fla. Apr. 17, 2019)(Order of suspension)

– Emergency suspension of lawyer for online tirade and waging personal and “public war on social media against attorneys representing clients [and] resorting to terrorist legal tactics.”

Krapacs sought a domestic violence injunction against a former boyfriend and his lawyer, but soon “launched an attached of massive and continuous proportions [on social media].”

– Posted on social media – Facebook, Instagram, LinkedIn, YouTube – that her former boyfriend’s attorney was an “old white male attorney” who was a “bully.”

Recent Highlights: Attorneys and Social Media

- *In re Ashley Ann Krapacs*, Case No. 19mc20857, FL Bar Adm. 2019-30 (S.D.Fla. Apr. 17, 2019)(Order of suspension)
 - Posted a Youtube video calling the attorney a “moron”, “sexist”, “backstabbing traitor” for representing “misogynist pigs”.
 - Went on Instagram and referred to the attorney using hashtags: “#sellout” and “#womanhater”.
 - Posted to Facebook attacking the Florida Bar as being corrupt.
 - Attorney sought a TRO against Krapacs after Krapacs posted a “meme” showing a shotgun pointed at a person, captioned “when opposing counsel tries to use the same exact trick you saw in your last case”

Using Technology and Ethical Issues

- Working remotely and using technology outside of the office can create unforeseen problems.
 - Common questions to IT departments/IT professionals involve:

- Remote Access
- Video Conferencing
- E-mail and Storage/E-Doc Retrieval
- Cloud Computing



Credits: <https://www.digitaluppercut.com/2018/03/the-less-is-more-approach-to-computer-security/>

Using Technology and Ethical Issues (Cont.)

- Security Concerns.
- Know where to store data that is created remotely and whether it can be backed up.
- Comply with encryption or security procedures utilized by your firm/software.
- Follow e-mail protocol for remote dissemination to prevent unauthorized disclosure.




Credits: <https://www.digitaluppercut.com/2018/03/the-less-is-more-approach-to-computer-security/>



How to Stay Safe and Avoid Ethical Pitfalls

The practice of law can be extremely stressful.

Add Into the Mix: Managing work, health, and personal life during COVID-19

- ❖ Controlling stress and channeling anger is critical to effective representation.
 - ❖ While most lawyers will not cross these lines of acceptable behavior, some lawyers succumb to broaching the line of acceptable/unacceptable conduct by engaging in acts of “minor” disrespect
 - ❖ Lawyers must be mindful that their obligation to respect the judicial process is not exclusive to the judiciary.
 - ❖ Lawyers have a continuing obligations to show courtesy and respect to the tribunal, court staff, the parties, and opposing counsel.
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Be Mindful of Changes to Your Routine

- Working remotely

- Change in work hours; working late into the night.

- Sending work/correspondence off late at night.

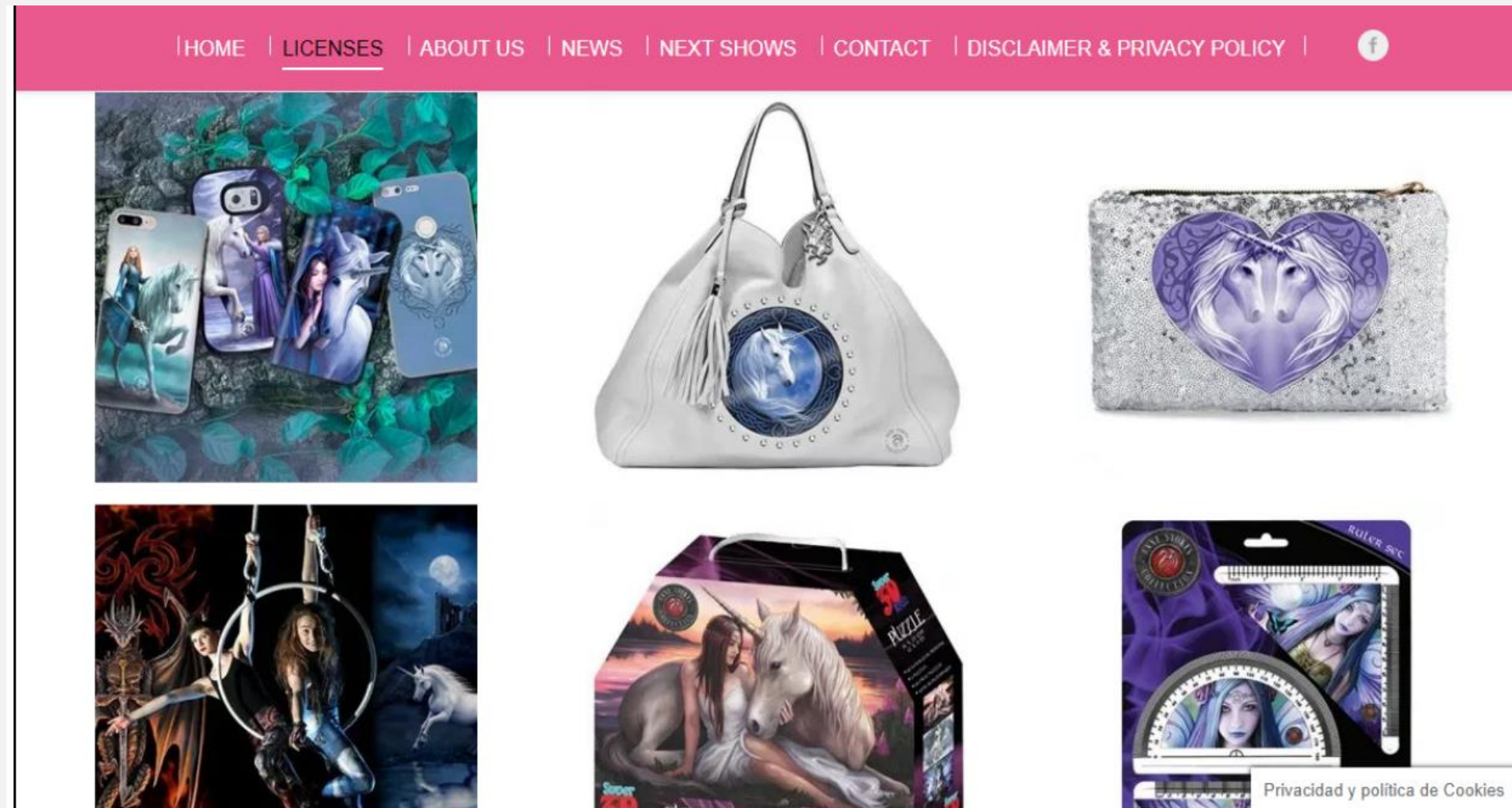
- Should you send that 2p.m. e-mail or correspondence?

- There are ways to be efficient, but there is no need to be trigger happy.

- Just because you can, does not mean that you should:

Unicorn Case

Art Ask Agency v. Individuals, No. 20-cv-1666, 2020 U.S. Dist. LEXIS 49954 (E.D. Ill. Mar. 18, 2020)



Credits: <https://www.abajournal.com/news/article/judge-slams-emergency-motion-to-halt-knockoff-unicorn-art-amid-pandemic>

- ❖ Plaintiff-company sought a TRO one week before federal courts announced a stay of civil litigation.
- ❖ Federal judge delayed the hearing, so plaintiff filed a motion for reconsideration, which was denied. Plaintiff filed an emergency appeal.
- ❖ In his opinion, the District Judge wrote: "The [plaintiff's] filing calls to mind the sage words of Elihu Root: 'About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.'"

Technology, COVID-19, and Ethical Obligations

Model Rule 1.1 (Competence)

Model Rule 1.3 (Diligence)

Model Rule 1.4 (Communications)



Model Rule 1.1: Competence

- The Client-Lawyer Relationship

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

Model Rule 1.3: Diligence

- The Client-Lawyer Relationship

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

Model Rule 1.4: Communications

- The Client-Lawyer Relationship

- “(a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Ethics and Professionalism

C.W. v. Ncl (Bahamas) Ltd., 2020 U.S. Dist. LEXIS 56573 (S.D. Fla. Mar. 21, 2020)

Two parties engaged in a bitter war of words over a deposition dispute.

The Cruise Line-Defendant filed an unnecessary motion over the date of a deposition.

- Florida federal Judge Jon Goodman lambasted the attorneys for their petty behavior over "a routine snafu" [while the] "entire world is in the midst of a pandemic" There are "far-more-important issues this court (and the entire world) is facing."



Treat Video Conferences with the Court as if you were appearing in-person



Credits: <https://snopes.com>

Broward Florida Circuit Judge Dennis Bailey conducted motion hearings via Zoom with some attorneys appearing from their beds and others without a shirt on.

Judge Bailey then posted a letter to the Weston Bar Association website advising attorneys to wear proper attire when appearing before the Court via Zoom during the pandemic.

“One comment that needs sharing and that is the judges would appreciate it if the lawyers and their clients keep in mind these Zoom hearings are just that: hearings. They are not casual phone conversations. It is remarkable how many ATTORNEYS appear inappropriately on camera. We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up won't cover up you're poolside in a bathing suit. So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or not.”

Model Rule 3.2 (Expediting Litigation) and New Jersey Rule 3.2

Model Rule: Advocate

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

New Jersey RPC 3.2: Advocate


“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.”

- ❖ The **Model Rules of Professional Conduct (“MRPCs”)** and case law establish that attorneys must conduct themselves in a courteous and dignified manner in their professional activities.
- ❖ Model Rule 3.2, cmt. 1: “... Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar.”
- ❖ New Jersey Rule 3.2 mandates that an attorney treat all persons involved in the legal process with courtesy and consideration.



Civility

Inflammatory, disrespectful, and discourteous speech directed at judges, opposing counsel and others happens all too frequently through communications by attorneys and may be **ethical violations.**

- ❖ Former U.S. Supreme Court Justice Sandra Day O'Connor on civility:
 - ❖ "Unfortunately civility is hard to codify or legislate, but you know it when you see it. It's possible to disagree without being disagreeable."
- 



E-Mails

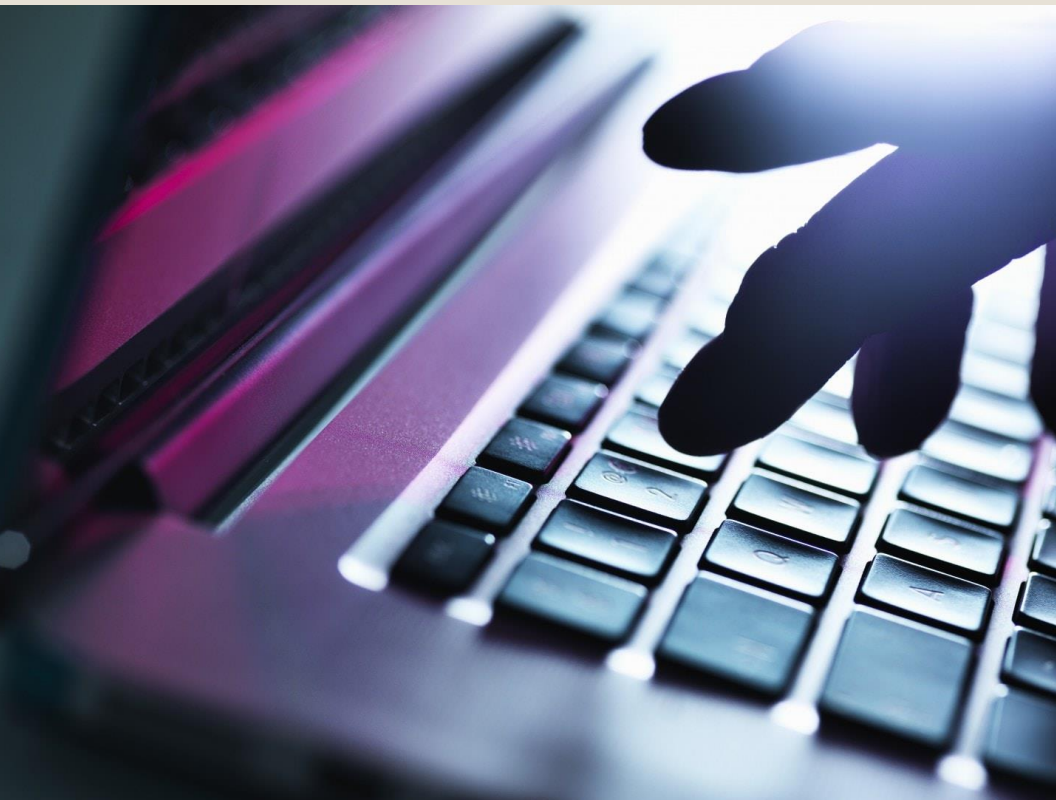
"When is your unprofessional, ludicrous, downright unintelligent conduct going to stop? Before or after you are directed to pay my bills?"

- Examples are innumerable pre-pandemic.

Florida Bar v. Norkin, 183 So. 3d 1018 (Fla. 2015)



Credits: <https://www.youtube.com/watch?v=rscvOFekUV4>



Credits: Andrew Brookes/Getty Images/Cultura RF

The Allstate Case

- “Fu** you crooks. Eat a bowl of di***.”
- “I’m going to let the long di** of the law fu** Allstate for all of us.”
- Hey Klee you Cu*stain the demand is now 302 million. Pay up fu**face.”
- “Peter when you are done fel**ing your copy boy tell Allstate the demand is now 305 million.”
- “[Other Sheppard Mullin attorneys] may not be too smart but at least they have some fu**ing dignity and honor unlike you two limp di** mother fu**ers.”

Baker et al. v. Allstate Ins. Co. et al., 2:19-cv-08024 (C.D. Cal. Aug. 13, 2019) cont.

❖ U.S. District Court Judge Otis D. Wright II referred California attorney Christopher G. Hook to state disciplinary authorities for sending more than 100 profanity-laced and threatening e-mails to opposing counsel for Allstate.

❖ Hook blamed anger management issues, emotional problems, and a recent death in the family for his behavior.

- “Tell Allstate I am going to water board each one of their trolls that show up for depo without any mercy whatsoever.”
- “Don’t make me come down there and beat the sh** out of you you fu**ing thief.”
- “You are going to get fu**ing tattooed across the face Klee.”
- “I’m going bat sh** crazy on you mother fu**ing co** suckers.”

In the Matter of Michael E. Rychel, Dkt. No. DRB 16-250 (Apr. 10, 2017)

Respondent emailed the OAE investigator and said:

*"Tell Charles Centinaro that I said to go F**k himself! Quote me in your report!"*

Respondent then emailed Charles Centinaro, the Chief Disciplinary Counsel himself:

*"Hey Charlie, here's an example of what you're [sic] f*****g AMBULANCE CHASING attorneys and their minions do to honest hardworking attorneys who comport their conduct to the RPC's, 2C and the IRS code. Thanks so much for the back up [sic]. Look personally between me and you GO F**K YOURSELF!!!!!!!!!!!!!!!!!!!!!! Mike Rychel"*

Amy Totenberg, U.S.D.J. Weighs In:

Judge Totenberg, a United States District Court Judge in Georgia, issued an order related to civility and court operations during this pandemic.

“Be kind to one another in this most stressful of times. Remember to maintain your perspective about legal disputes, given the larger life challenges now besetting our communities and world. Good luck to one and all.”



Credits: www.Law.com



Be Patient and Exercise Restraint

“In light of the unprecedented risks associated with the novel Coronavirus, we urge all lawyers to liberally exercise every professional courtesy and/or discretionary authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk . . . Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations.”

- Los Angeles County Bar Association’s Professional Responsibility & Ethics Committee.
- 

Stay Apprised of Resources and Court Notices:

- **National and local bar associations provide helpful resources for legal professionals during the COVID-19 crisis.**
- The ABA Coronavirus (COVID-19) Task Force
- The New Jersey State Bar Association Pandemic Task Force
- Florida Bar Association COVID-19 Pandemic Recovery Task Force

Example:

The New Jersey State Bar Association Pandemic Task Force Committee on Law Firm Opening and Operations

- **Health Screening and Monitoring**
- **Law Office Workplace Logistics**
- **Best Practices Regarding EEO Issues**
- **Multi-Tenanted Facilities**
- **Considerations for Insurance Policyholders**
- **Whistleblower Complaints**
- **Communications Strategies**
- **Legal Liability Considerations**
- **Changes to Handbooks, Policies and Procedures**

COVID-19- Fifth Omnibus Order On Court Operations and Legal Practice

SUPREME COURT OF NEW JERSEY

“In response to the ongoing COVID-19 public health emergency, the Supreme Court has authorized various interim adjustments to court operations, including as set forth in the March 27, 2020 First Omnibus Order, April 24, 2020 Second Omnibus Order, May 28, 2020 Third Omnibus Order, and June 11, 2020 Fourth Omnibus Order.

Court operations are continuing in a virtual format to the greatest extent practicable, subject to constitutional considerations and resource limitations. To date, the New Jersey courts have conducted more than 43,000 court events involving more than 390,000 participants.”

COVID-19- Sixth Omnibus Order On Court Operations and Legal Practice

SUPREME COURT OF NEW JERSEY

“It is ORDERED that effective immediately, the provisions of the June 25, 2020 Fifth Omnibus Order are continued as follows:

1. The provisions of paragraphs 1 and 3 are extended for the additional period from July 13 through July 26, 2020.
2. All other provisions (paragraphs 2 and 4-7) remain in full force and effect.”

COVID-19- Resuming Civil and Criminal Jury Trials – July 22, 2020 Notice and Order

SUPREME COURT OF NEW JERSEY

“Atlantic/Cape May, Bergen, and Cumberland/Gloucester/Salem will be the first Vicinages to resume certain jury trials, beginning with Criminal trials involving a single detained defendant. Over the coming months, trials will gradually resume in all counties and will expand to include Civil as well as Criminal cases.”

“For more than four months, the courts have been operating almost exclusively via remote (video and phone) technologies for matters not including jury trials.”

“With the transition to Phase 2 of the Judiciary's Post-Pandemic Plan, the New Jersey courts are gradually resuming limited on-site presence and in-person proceedings, including for matters that cannot be conducted in a remote format.”

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Calendaring

Remain Vigilant About Deadlines

- Check your calendar and be mindful of filing dates.
- Professional liability concern of missing a filing deadline – legal malpractice claim.
- The current climate of COVID-19 is ripe with distractions, additional responsibilities, and changing rules governing court operations/tolling of filing dates.



Questions?

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