



The Legal Ethics Year in Review: News You Can Use

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Today's Program

The Top 10 Developments of the Last Year (or so...)
in Ethics and Lawyering

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Today's Program

Materials available at:

<https://arwebserver.arlaw.com/pdf/ARHK.zip>

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The Top 10 Developments of the Last Year

10. Oh, that stock?
(Judicial recusal and other conduct)

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The Top 10 Developments of the Last Year

10. Oh, that stock? (Judicial recusal and other conduct)

- J. Grimaldi, C. Jones and J. Palazzolo, “131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest,” *Wall Street Journal* (Sept. 28, 2021)
 - C. Jones, J. Palazzolo, and J. Grimaldi, “Federal Judges or Their Brokers Traded Stocks of Litigants During Cases,” *Wall Street Journal* (Oct. 15, 2021)
- ⇒ Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205 (May 13, 2022)

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The Top 10 Developments of the Last Year

10. Oh, that stock? (Extrajudicial statements)

- *Clay County v. Purdue Pharma L.P.*, 2022 WL 1161056 (Tenn. Ct. App., Apr. 20, 2022)
- *In re Young*, Tenn. Bd. of Jud. Cond. (July 26, 2022)

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The Top 10 Developments of the Last Year

10. Oh, that stock? (Extrajudicial statements)

- Feb. 10, 2022: hearing awarding terminating sanctions against Endo Pharma.
- Feb. 14, 2022: *Law360.com* article quoting Judge: "...the worst case of document hiding that I've ever seen. It was like a plot out of a John Grisham movie, except that it was even worse than what he could dream up."
- Feb. 15, 2022: Judge's Facebook postings begin ...
 - Judge "liked" this comment: "I don't know if you're going to get the help or platform you need from those with power/deep pockets. Many of Tennessee's powerful have ties to pharmaceuticals."

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The Top 10 Developments of the Last Year

10. Oh, that stock? (Extrajudicial statements)

- Responding to Facebook question why the case was newsworthy, Judge responded, "Is a \$1.2 Billion opioid case. Our area has been rocked with that drug for decades. Lots of interesting and new developments about the manufacturers in this case."
- Another Facebook user commented: "We do not have a serious local news reporting outfit around here. ... *The Tennessean* is a left leaning rag so that leaves the internet to provide people the local 'news.'"
 - Judge "liked" this post and responded that "[t]his is an earth shattering case, especially for our community. Fake news is not always what they publish, but what they choose not too also."

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The Top 10 Developments of the Last Year

9. They said *what* about me?!?
(Responding to negative online reviews)

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- *Law Offices of David Freydin, P.C. v. Chamara*, 24 F.4th 1122 (7th Cir. Jan 28, 2022) (dismissal of lawyer's libel lawsuit against online commenters upheld)

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The Top 10 Developments of the Last Year

- *Freydin's* Sept. 2017 posting on Facebook:
- “Did Trump put Ukraine on the travel ban list?! We just cannot find a cleaning lady!”
- Then in comments:
 - “My business with Ukrainians will be done when they stop declaring bankruptcies. If this offends your national pride, I suggest you look for underlying causes of why 9 out of 10 cleaning ladies we’ve had were Ukrainian and 9 out of 10 of my law school professors were not. Until then, if you don’t have a recommendation for a cleaning lady, feel free to take your comments somewhere else.”

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The Top 10 Developments of the Last Year

9. They said *what* about me?!? (Responding to negative online reviews)

- N.C. St. Bar 2020 Formal Eth. Op. 1, *Responding to Negative Online Reviews* (July 16, 2021)

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The Top 10 Developments of the Last Year

8. Crowdfunding (New Hampshire Op. 2021-22/02)

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The Top 10 Developments of the Last Year

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- N.H. Bar Ass'n Eth. Cte. Op. 2021-22/02, *Crowdfunding Legal Fees* (June 7, 2022)

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The Top 10 Developments of the Last Year

7. “Nice little reputation you have there...”
(Tough settlement talk v. extortion)

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The Top 10 Developments of the Last Year

7. “Nice little reputation you have there...” (Tough settlement talk v. extortion)

- *Falcon Brands, Inc., v. Mousavi & Lee, LLP*, 74 Cal. App. 5th 506, 289 Cal. Rptr. 3d 521 (Cal. Ct. App. Jan. 27, 2022), *reh'g denied* (Feb. 17, 2022), *review denied* (Cal. May 11, 2022) (lawyer may be civilly liable for extortion based on settlement proposals threatening revelation of illegal conduct not closely related to claims)

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The Top 10 Developments of the Last Year

6. You're a lawyer even when you're representing yourself
(ABA Formal Op. 502)
and
You copied her; so I can, too
(ABA Formal Op. 503)

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The Top 10 Developments of the Last Year

6. Two fresh ABA opinions on Rule 4.2 and contact with a represented person
- ABA Formal Op. 502, *Communication with a Represented Person by a Pro Se Lawyer* (Sept. 28, 2022)

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The Top 10 Developments of the Last Year

6. Two fresh ABA opinions on Rule 4.2 and contact with a represented person

- ABA Formal Op. 503, *“Reply All” in Electronic Communications* (Nov. 2, 2022)

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The Top 10 Developments of the Last Year

5. Unworthy clients
(Bad conduct by clients)

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The Top 10 Developments of the Last Year

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“[S]ome men are born great, some achieve greatness and some have greatness thrust upon them.”

– William Shakespeare, *Twelfth Night*, Act II, scene 5, line 157

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The Top 10 Developments of the Last Year

5. Unworthy clients (Bad conduct by clients)

- Colo. Bar Ass’n Ethics Cte. Formal Op. 142 (July 10, 2021) (when you *suspect* that your client is engaged in criminal or fraudulent conduct)
- Wis. Formal Eth. Op. EF-21-03 (Oct. 21, 2021) (when your client is a fugitive)
- *In the Matter of Gerald R. Curran*, Case No. CL2021-13469 (Fairfax Cnty., Va., March 7, 2022) (divorce lawyer reprimanded for awareness and failure to counsel clients not to cease illegal recordings)

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The Top 10 Developments of the Last Year

4. Wait. I can't plagiarize ... myself?
(*Conboy v. U.S. Small Bus. Admin.*,
992 F.3d 153 (3rd Cir. 2021))

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The Top 10 Developments of the Last Year

4. Wait. I can't plagiarize ... myself? (*Conboy v. SBA*)

- *Conboy v. U.S. Small Bus. Admin.*, 992 F.3d 153 (3rd Cir. 2021)
(appellate lawyer ordered to pay damages where brief was cut-and-pasted from trial court summary judgment brief)

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The Top 10 Developments of the Last Year

3. Conflicts, conflicts everywhere (A generous potpourri of conflicts of interest)

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- *Avco Corp. v. Turner*, No. 21-02750, 2022 WL 2901015 (3rd Cir. July 22, 2022) (upholding claim for disgorgement of fees by lawyer based on breach of fiduciary duty for former-client conflict), *on remand*, 2022 WL 17251250 (E.D. Pa. Nov. 28, 2022) (summary judgment granted to lawyer; no substantial relationship shown)

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The Top 10 Developments of the Last Year

3. Conflicts, conflicts everywhere (A generous potpourri)

- *Tecnicas Reunidas De Talara SSAC v. SSK Ingenieria Y Construccion SAC*, 40 F.4th 1339 (11th Cir. July 22, 2022) (arbitration award upheld despite lawyers switching sides based on failure to object before tribunal)

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3. Conflicts, conflicts everywhere (A generous potpourri)

- *Cantu Services, Inc. v. Worley*, No. CIV-12-129-R, 2021 U.S. Dist. LEXIS 106266, 2021 WL 2323721 (W.D. Okla. June 7, 2021) (privilege not waived where lawyer represented joint clients where interests were so adverse representation was prohibited)

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The Top 10 Developments of the Last Year

2. Time to learn to use 1990s tech (Technological competence)

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The Top 10 Developments of the Last Year

2. Time to learn to use 1990s tech (Tech competence)

- *Rollins v. Home Depot USA*, 8 F.4th 393 (5th Cir. Aug. 9, 2021)
(appellate court refuses to reinstate lawsuit after plaintiff's lawyer did not see filtered email notice and didn't respond to summary judgment motion)
- *In re: Cook Med., Inc.*, 27 F.4th 539 (7th Cir. Feb. 28, 2022)
(dismissal affirmed where attorney missed deadline because email filtering rules meant he didn't receive notice)

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The Top 10 Developments of the Last Year

1. The many faces of cybersecurity
(Another generous potpourri)

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The Top 10 Developments of the Last Year

1. The many faces of cybersecurity (Another potpourri)

- More opinions
 - N.C. St. Bar 2021 Op. 2, *A Lawyer's Professional Responsibility in Identifying and Avoiding Counterfeit Checks* (July 16, 2021)
 - NYSBA Cte. on Prof'l Eth. Op. 1240, *Duty to Protect Client Information Stored on a Lawyer's Smartphone* (Apr. 8, 2022)

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The Top 10 Developments of the Last Year

1. The many faces of cybersecurity (Another potpourri)

- A growing number of lawsuits and claims against lawyers
- Phishing, ransomware, and other attacks
- Lousy passwords ... but password managers!
- Outside counsel guidelines, questionnaires, audits

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Questions?



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