



I WOULD LIKE TO PUT 2020 IN MY REARVIEW MIRROR!

Agree

Neutral: 2020 is a mixed bag of good and bad

Disagree because I don't want to wish any of my years away

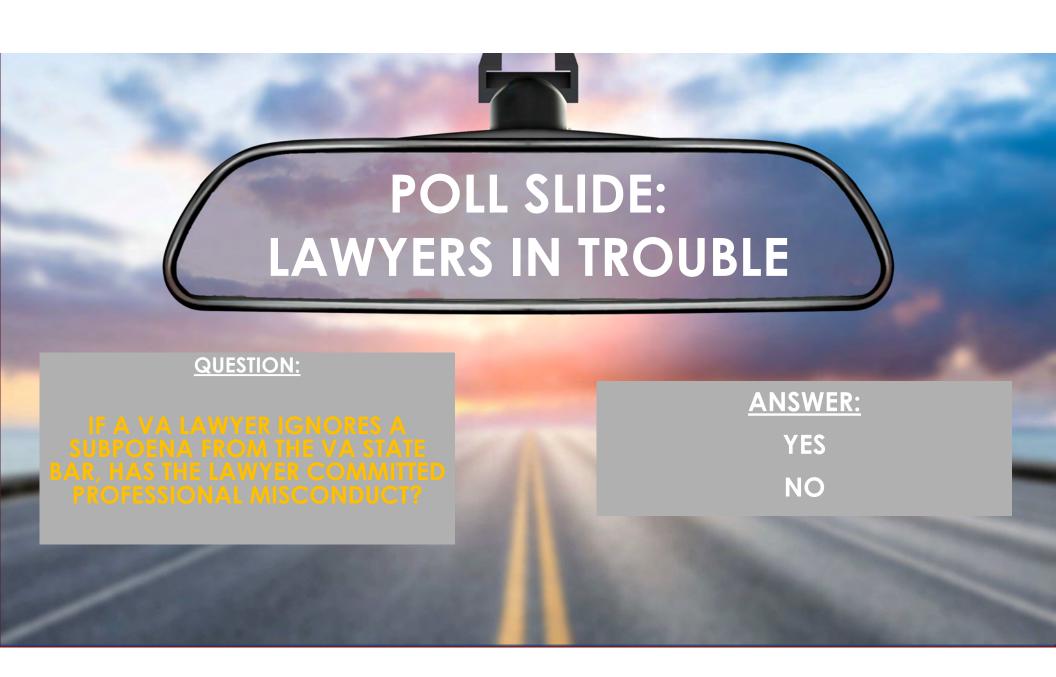
Disagree because I am afraid that 2021 might be worse

Disagree









## Lawyers in Trouble: Ignoring Bar Subpoena

- Lawyer sanctioned by judge who files bar complaints
- Lawyer does not respond to complaints
- Disciplinary Board issues subpoena
- Lawyer fails to respond
- Disciplinary Board suspends license pending compliance with subpoena
- Lawyer continues practice
- Disciplinary Board issues show cause





- Disciplinary Board says not a "misconduct" case
- Notes that lawyer had no prior disciplinary action







WHAT DO YOU THINK IS THE APPROPRIATE SANCTION?

#### **ANSWER:**

PRIVATE REPRIMAND
PUBLIC REPRIMAND
SUSPENSION – UP TO 1 YEAR
SUSPENSION – UP TO 3 YEARS
SUSPENSION – UP TO 5 YEARS
REVOCATION



Rule 8.4, ABA Rules of Professional Conduct	Rule 8.4, Virginia Rules of Professional Conduct
It is professional misconduct for a lawyer to:	
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly as another;	sist or induce another to do so, or do so through the acts of
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;	<ul> <li>(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;</li> </ul>
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;	(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;
<ul><li>(d) engage in conduct that is prejudicial to the administration of justice;</li></ul>	(Not adopted)
(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.	(Not adopted)



## Lawyers in Trouble: Ignoring Bar Subpoena

- ▶ Part Six, § IV, Paragraph 13-6(G)(3) Rules of the Supreme Court of Virginia
  - ▶ Power to "impose an interim Suspension if an Attorney fails to comply with a summons or subpoena issued by any member of the Board . . ."







AFTER CONCLUDING LITIGATION
OF PLAINTIFF CLAIMS AGAINST A
DEFENDANT, IS PLAINTIFFS'
LAWYER THEN FREE TO SERVE AS A
CONSULTANT TO THAT DEFENDANT

### **ANSWER:**

YES

NO





- Attorney part of trial team on weed killer injury claims against manufacturer
- ▶ Then targeted supplier of chemical used in weed killer
- Sent draft complaint and offered to hold it pending meeting
- Sought \$200 million consulting agreement from the supplier/potential defendant





Part Six, § IV, Paragraph 13-22 - Rules of the Supreme Court of Virginia

- Attorney Crime reported to Clerk
- Disciplinary Board enters suspension order
- Show cause why licenses should not be further suspended or revoked
- ▶ Lawyer has burden of proof on why no further suspension or revocation
- Nothing precludes further proceedings on allegations of misconduct arising from facts leading to conviction



- ▶ Rule 1.2
- ▶ Rule 1.3
- ▶ Rule 1.4
- ▶ Rule 1.7
- ► Rule 1.8
- ▶ Rule 1.16
- ▶ Rule 3.4
- ▶ Rule 4.4





### Lawyers in Trouble: Extortion

### Rule 5.6: Prohibits restrictions on right to practice

- Agreements not to sue defendants either at all or on the same claims again;
- Agreements not to use information acquired during the litigation in connection with a future matter;
- Agreement not to advertise the lawyer's practice in that area or type of case;
- Agreement not to solicit others;
- Agreement to withdraw from representing non-settling defendants;
- Agreement restricting rights to "use" information; and



CAN SETTLEMENT AGREEMENT INCLUDE ADDITIONAL FUTURE PAYMENTS TO PLAINTIFF'S COUNSEL FOR EACH YEAR THAT PASSES WITHOUT ADDITIONAL CASE FILINGS OR WITHIN A CERTAIN NUMBER OF CASE FILINGS?

### **ANSWER:**

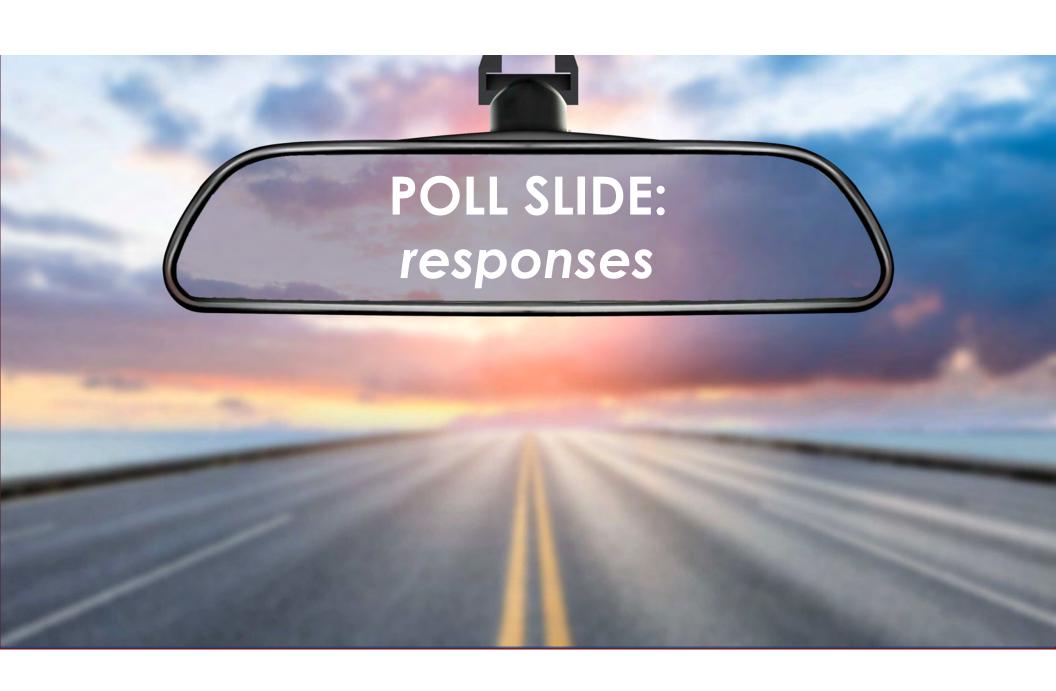
YES

NO

# Lawyers in Trouble: Extortion

### These have been found not to violate Rule 5.6:

- Agreement not to criticize a defendant in a non-litigation context;
- Representation of "no present intention" to represent others against defendant; and
- Agreement restricting rights to "reveal" information.







# Lawyers in Trouble: Disqualification

### **Third Party Payor Circumstances Considered**

- Defendant charged with drug conspiracy (cocaine, heroin); distribution; obstruction of justice; money laundering
- Lawyer for criminal defendant receives \$55,000 (73%) of fee from potential co-conspirator (+ employer + long-time friend)
- Co-conspirator says money raised from friends and family
- Defendant are of potential conflicts; willing to provide a waiver





## Lawyers in Trouble: Disqualification

### Third Party Payor: Rule 1.8(f)

- ▶ A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client gives informed consent [VA: consents after consultation];
  - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - (3) information relating to representation of a client is protected as required by Rule 1.6.



## Lawyers in Trouble: Disqualification

### Third Party Payor: Disqualification Motion

- Government "Motion to Inquire" into potential conflicts of interest
- Court considers:
  - Sixth Amendment Right to Counsel
  - ▶ Defense Counsel's "actual or serious potential conflict of interest?"
    - ▶ Lawyer as witness (Rule 3.7)
    - ▶ Professional Independence (Rule 1.8(f))
    - ▶ Conflict (Rule 1.7? Not specifically cited by Court)
      - "Dubious circumstances"



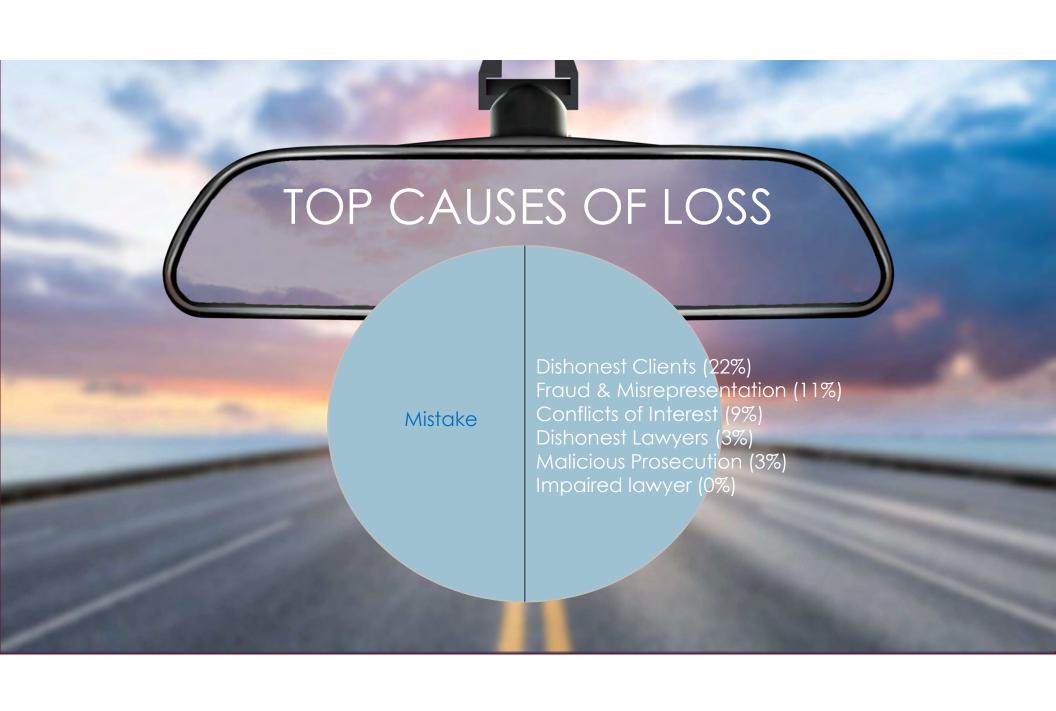




WHICH OF THE FOLLOWING IS THE #1 TOP CAUSE OF "LOSS" FOR LAWYERS?

#### **ANSWER:**

- 1. CONFLICTS OF INTEREST
  - 2. DISHONEST CLIENTS
  - 3. DISHONEST LAWYERS
- 4. FRAUD AND MISREPRESENTATION
  - 5. IMPAIRED LAWYER
  - 6. MALICIOUS PROSECUTION
    - 7. MISTAKE









AS A MATTER OF PROFESSIONAL ETHICS, MUST I TELL A CURRENT CLIENT ABOUT A MISTAKE IF NO HARM OR PREJUDICE TO CLIENT?

### **ANSWER:**

- YES
- ONLY IF IT WOULD CAUSE CLIENT TO CONSIDER FIRING YOU
  - NO



- Formal Opinion 481 April 17, 2018 A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error
- ► ABA Rule 1.4

- → PROMPTLY
- ► Current client: Duty to inform of material error
  - (a) reasonably likely to harm or prejudice a client; or
  - (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice







AS A MATTER OF PROFESSIONAL ETHICS, MUST I TELL A <u>PAST</u> CLIENT ABOUT A MISTAKE THAT COULD CAUSE HARM OR PREJUDICE?

#### **ANSWER:**

- YES
- ONLY IF IT WOULD CAUSE CLIENT TO CONSIDER SUING YOU
  - NO

# Top Causes of Loss: Mistake

- Formal Opinion 481 April 17, 2018 A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error
- ► ABA Rule 1.4
  - ▶ Past client: No duty to inform







#### Rule 1.2(d) Client-Lawyer Relationship

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.



A LAWYER ASSISTING WITH FORMATION OF NEW ENTITY TO PURCHASE REAL PROPERTY HAS DUTY TO INQUIRE AS TO SOURCE OF FUNDS

#### **ANSWER:**

ALWAYS SOMETIMES NEVER

# Fraud/Dishonesty

"depends on the circumstances"

knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d)



ABA Opinion 491: Duty to Inquire

- competence [Rule 1.1]
- diligence [Rule 1.3]
- communication [Rule 1.4]
- honesty [Rule 8.4(b and c)
- withdrawal [Rule 1.16(a)]





**Advance Consent** 





A LAWYER HAS A <u>PROFESSIONAL OBLIGATION</u>
TO SEEK IMPROVEMENT OF (1) THE LAW, (2)
ACCESS TO THE LEGAL SYSTEM, AND (3) THE
ADMINISTRATION OF JUSTICE

#### **ANSWER:**

- TRUE
- FALSE

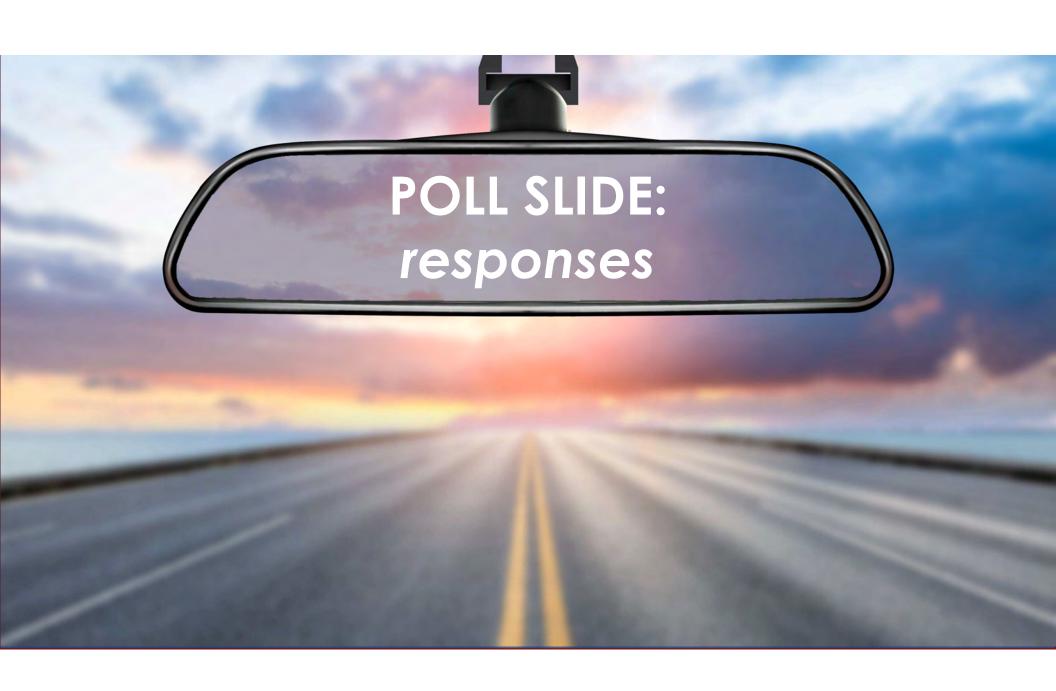


# Backdrop to galvanized social justice movements:

- 3/13/20: Pres. Trump declares COVID-19 a National Emergency
- Widespread school closures and business shutdowns
- ▶ Joblessness spikes
- ► 5/25/20: Social protests erupt after death of George Floyd

#### Overview of Ethical Obligations:

- Improve the law and legal system
- Provide pro bono representation to improve access to justice system
- Abstain from professional misconduct (including harassment or discrimination on the basis of race, etc.)





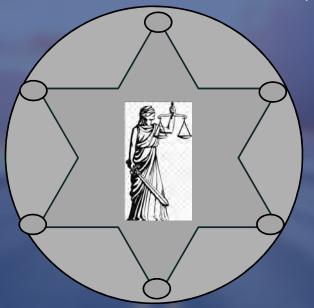


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# Ethical Obligations – Social Justice Movements

▶ The Vision for the Legal Profession

Improve the law and legal system

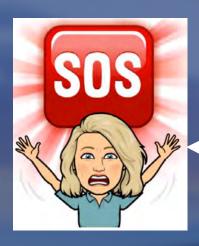


Legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority





- Law
- Professional Rules and Principles
- Moral, economic, social, and political factors



Client





Court





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# Ethical Obligations – Social Justice Movements

#### ABA Rule 6.1

- Provide legal services to those unable to pay (50 hours) (VA 6.1 = 2%)
- ▶ Focus
  - ▶ Limited means
  - Charitable, religious, civic, community, governmental, educational (limited means focus)
- ► Civil rights, civil liberties, public rights
- Substantially reduced fees (limited means)
- Improving the law, legal system, profession



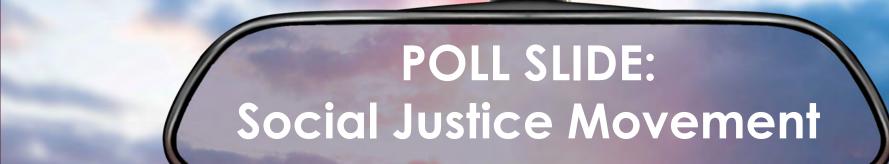
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- ► Managing conflict issues vs. professional probono obligations (Rules 6.3, 6.4, (ABA only) 6.5 (VA))
  - ▶ Director/officer/member of legal services organization OK
    - ▶ BUT: Abstain from decision/action if conflict under Rule 1.7 (including material adverse effect on clients)
- Serving persons with interests adverse to clients
- Reform of law



- ▶ Disclose if client will benefit
- ▶ VA Rule 6.5 cuts off conflicts "imputation" in limited circumstances





LAWYERS SHOULD BE SUBJECT TO
PROFESSIONAL DISCIPLINE FOR ENGAGING IN
HARASSMENT OR DISCRIMINATION AS
ADJUDGED BY THE DISCIPLINARY BOARD

#### **ANSWER:**

- AGREE
- DISAGREE



► Harassment & Discrimination as Professional Misconduct: ABA Rule 8.4

"Maintaining the Integrity of the Profession"

Defining "Professional Misconduct"



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# Ethical Obligations – Social Justice Movements

- Comment 3 (before)
- "Bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph (d) when such actions are prejudicial to the administration of justice."
- ► ABA Rule 8.4(g) (Aug. 2016)
- Professional Misconduct =
  "conduct that the lawyer
  knows or reasonably should
  know is harassment or
  discrimination on the basis of
  race, sex, religion, national
  origin, ethnicity, disability, age,
  sexual orientation, gender
  identity, marital status or
  socioeconomic status in
  conduct related to the
  practice of law."







Harassment & Discrimination as Professional Misconduct

#### **CONCEPTS TO GRAPPLE WITH:**

- Harassment / discrimination
- Know/reasonably should know
- Conduct related to the practice of law
  - Legitimate advice or advocacy
  - Non-engagement/withdrawal





#### **OBJECTIONS ADDRESSED IN REPORT:**

- Vagueness
- Want "prior adjudication"
- Chilling effect on thought, speech, debate
- Not needed / ((Over)reaction to #metoo)



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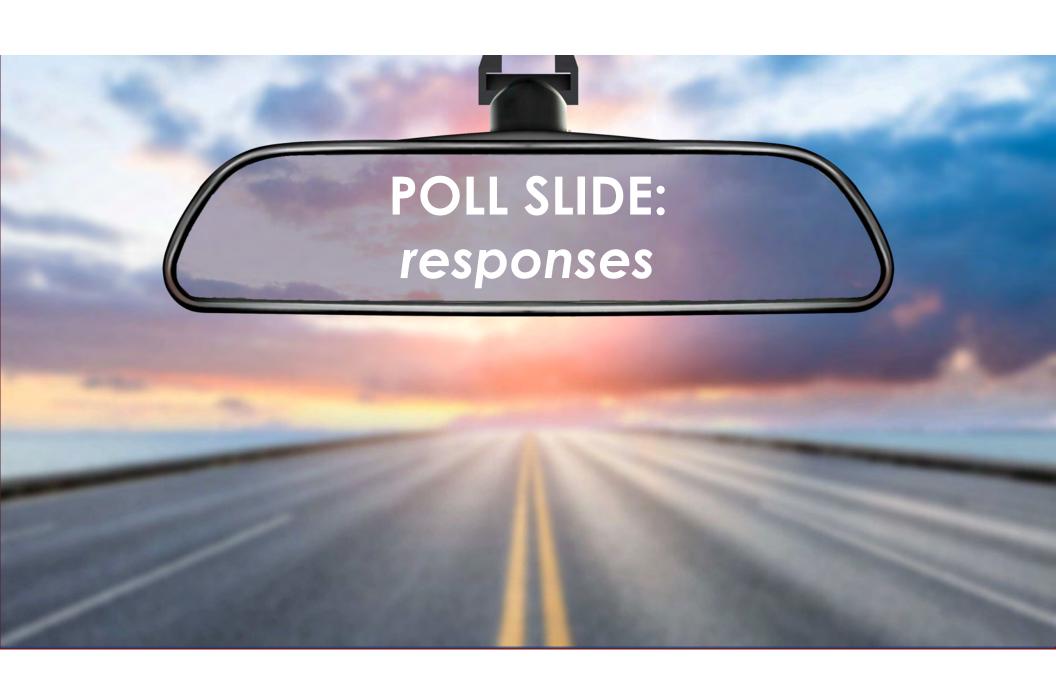
#### **ADOPTION STATUS**

- California (pre-existing, analogous rule)
- DC ("studying")
- Florida (pre-existing, analogous rule)
- Georgia (no language addressing)
- Massachusetts (pre-existing, analogous rule)
- New York (pre-existing, analogous rule)
- North Carolina (no language)
- Texas (no language)
- Virginia (no language)





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- Police reform
- Harassment & Discrimination
- Diversity & Inclusion

- Criminal Defense
- Civil Rights Litigation
- Pro Bono
- Legal Reform
- Legal Education





WHICH OF THE
FOLLOWING
STATEMENTS DO YOU
AGREE WITH THE MOST
OR DISAGREE WITH THE
LEAST?

#### **ANSWER:**

- I AM OPTIMISTIC THAT THE PANDEMIC WILL FINALLY CATALYZE CHANGE IN UPL RULES
- THE NEXT WAVE OF CLASS LITIGATION WILL RELATE TO THE LONG TERM HARMFUL EFFECTS OF HAND SANITIZER
- ELECTION RESULT DISPUTES WILL REPLACE THE PANDEMIC AS THE TOP NEWS STORY AFTER ELECTION DAY
- I HOPE THAT MASK WEARING STICKS AROUND AS A REGULAR WAY OF COMBATING SPREAD OF CONTAGIOUS ILLNESSES
- IF I NEVER HEAR THE WORD "COVID-19" AGAIN, I WILL BE HAPPY

#### PRACTICAL PROBLEMS

Ethical Obligations - Pandemic

- Working remotely
- Rapidly evolving orders that change access to government services and agencies, including courts
- New and rapidly evolving laws and regulations in time sensitive circumstances
- Advising a broad spectrum of clients facing unprecedented challenges and changes in how they do business, generating many legal questions about the implications of those challenges and changes
- Widespread financial disruption and distress
  - Causes more conflicts
  - Emphasis on controlling expenses (including legal expenses)
  - Clients in bankruptcy processes
  - > Temptation to practice outside usual areas of practice
- Physical isolation + stressful circumstances = increased risk of mental health and substance abuse issues





- Communicate (Rule 1.4)
- Be competent (Rule 1.1) and diligent (Rule 1.3)
- Keep client information confidential (Rule 1.6)
- Safeguard property (Rule 1.15)
- Supervise (Rules 5.1, 5.3)
- Manage conflicts (Rules 1.7, 1.8, 1.9)
- Avoid the unauthorized practice of law (Rule 5.5)

Rules, duties implicated



# **ABA Formal Opinion 482**

- ► PLAN AHEAD DISASTERS
  - Communicate
- Client's Legal Position
  - Client's Property
- Client's Confidentiality





# ► ABA Formal Opinion 482

- ▶ 1.1: Duty of Competence
- ▶ 1.4: Communicate
- ▶ 5.5: UPL
- ► Notify





Navigating <u>Cyber</u> Disasters: Don't let the pandemic disaster lead to a cyber disaster!

Before: Opinion 477 After: Opinion 483



#### Cybersecurity Handbook: Reasonable Efforts

- Sensitivity of information
- Likelihood of disclosure without additional safeguards
- Cost of additional safeguards
- Difficulty of implementing safeguards
- Adverse impact of safeguards on representation of clients

Before: Opinion 477



#### "Data Breach"\*

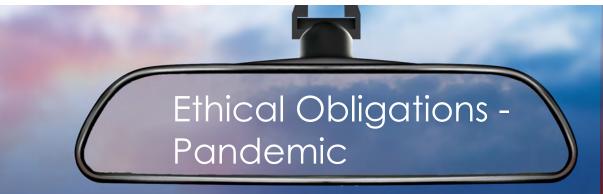
After: Opinion 483 material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode



# "Data Breach"\*

- ▶ 1.1: Competence
- ▶ 1.6: Confidentiality
- ▶ 5.1 + 5.3: Supervise Others
- ▶ 1.4: Communicate
- ▶ 1.15: Safeguard property



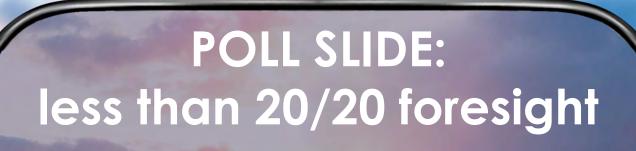


# "Data Breach"\* - NOTICE

- Sufficient to inform client on what next
  - ► <u>Minimum</u>:
  - ▶ Fact of/suspicion of breach
    - What info affected
    - ► Efforts to investigate
      - ► Planned response







THE ELECTION RESULTS WILL BE CONTESTED AND LITIGATED.

#### **ANSWER:**

YES, NO MATTER WHO WINS
YES, BUT ONLY IF TRUMP WINS
YES, BUY ONLY IF BIDEN WINS
NO, NO MATTER WHO WINS



