

# The Legal Ethics Year in Review: News You Can Use

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**Chicago/New York**

**Holland & Knight LLP**

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## Today's Program

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

# **The Top 10 Developments of the Last Year**

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

# 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)**

# 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)

# 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."

# 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.”

# The Top 10 Developments of the Last Year

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



# The Top 10 Developments of the Last Year

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

- *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)

# 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.”

# 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)

# **The Top 10 Developments of the Last Year**

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

# The Top 10 Developments of the Last Year

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

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

# The Top 10 Developments of the Last Year

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

# 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)

# 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)**



# 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)

# 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)

# The Top 10 Developments of the Last Year

## **5. Unworthy clients (Bad conduct by clients)**

# The Top 10 Developments of the Last Year

## 5. Unworthy clients (Bad conduct by clients)

“[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

# 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)

# 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 (3<sup>rd</sup> Cir. 2021))**

# 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 (3<sup>rd</sup> Cir. 2021) (appellate lawyer ordered to pay damages where brief was cut-and-pasted from trial court summary judgment brief)

# **The Top 10 Developments of the Last Year**

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



# The Top 10 Developments of the Last Year

## 3. Conflicts, conflicts everywhere (A generous potpourri)

- *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)

# 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 (11<sup>th</sup> Cir. July 22, 2022) (arbitration award upheld despite lawyers switching sides based on failure to object before tribunal)

# The Top 10 Developments of the Last Year

## 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)

# The Top 10 Developments of the Last Year

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

# 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 (5<sup>th</sup> 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 (7<sup>th</sup> Cir. Feb. 28, 2022) (dismissal affirmed where attorney missed deadline because email filtering rules meant he didn't receive notice)

# The Top 10 Developments of the Last Year

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

# 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)

# 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



## Trisha M. Rich



**Trisha Rich** is the national co-chair of Holland & Knight's Legal Profession Team. Ms. Rich focuses her practice on complex commercial litigation, as well as legal ethics and professional responsibility matters. In her professional responsibility practice, Ms. Rich advises lawyers, law firms, and in-house counsel on a variety of issues related to professional responsibility and legal ethics, including professional responsibility, malpractice, partnership and corporate structuring.

Trisha founded and coordinates the [Attorney Defense Initiative](#), the first privately sponsored pro bono initiative in the nation that focuses on assisting impaired lawyers facing disciplinary charges.

[Read more here.](#)

### Trisha M. Rich

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#### Practice

- Litigation and Dispute Resolution
- Lawyer Ethics, Risk Management and Regulation

#### Education

- University of Michigan Law School, J.D.
- Western Michigan University, M.A., Philosophy, *magna cum laude*
- Western Michigan University, BBA, Business and Economics, *magna cum laude*

#### Bar Admission

- Illinois
- New York
- Michigan