

## ACC Tennessee

# 6th Annual Legal Ethics Year in Review: News Corporate Counsel Can Use

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## Today's Program

The Legal Ethics Year in Review:

*The Top 10 Developments of the Last Year in  
Ethics and Lawyering for Corporate Counsel*

## Today's Program

Materials available at:

<https://arwebserver.arlaw.com/acc.zip>

## The Top 10 Developments of the Last Year

10. A few small Tennessee repairs

(Tennessee lawyer regulation tweaks)

## 10. A few small Tennessee repairs

Tennessee Supreme Court lawyer regulation tweaks

- New rule allows “permanent disbarment” (Order, No. ADM2019-01685 (Tenn. Jan. 23, 2020))
- Lawyer updates with BPR and payments go electronic (Order, No. ADM2018-02186 (April 20, 2020))
- IOLTA trust account notices go electronic (Order, No. ADM2018-0218 (April 20, 2020))

## The Top 10 Developments of the Last Year

9. Is there a “butt-in-seat” issue problem?

(The UPL issues of lawyers working remotely)

## 9. Is there a “butt-in-seat” issue problem?

The UPL issues of lawyers working remotely

- ***Possible Issue***: LAWYER licensed only in STATE A. LAWYER has a home in STATE B. Would it constitute UPL for LAWYER A to carry on with her practice, as authorized in STATE A, while working from her home in STATE B?

## 9. Is there a “butt-in-seat” issue problem?

The UPL issues of lawyers working remotely

- Florida Bar UPL Cte. Op. 2019-4 (issued Aug. 17, 2020; pending before Florida Supreme for approval)
- D.C. Bar UPL Cte. Op. 24-20 (March 23, 2020)
- Utah Ethics Op. 19-03 (May 14, 2019)



## The Top 10 Developments of the Last Year

8. But I'm a lawyer!!

(Lawyer UPL questions from all over)

## 8. But I'm a lawyer!!

Lawyer UPL questions from all over

- *State ex rel. Stephen B. Diamond, P.C., v. My Pillow, Inc.*, 180 A.D.3d 419 (N.Y. Super. Ct. App. Div. Feb. 4, 2020)
  - Illinois-licensed lawyer had brought action against defendant; prepared and had NY lawyer file similar claim in NY against defendant; parties reached settlement
  - Illinois lawyer denied fees for his work on NY matter because he was never admitted *pro hac vice*

## 8. But I'm a lawyer!!

Lawyer UPL questions from all over

- Ill. St. Bar Ethics Op. 20-08 (Oct. 2020)
  - Lawyer not licensed in Illinois *can* work there, in Illinois firm, under supervision of Illinois lawyer

## 8. But I'm a lawyer!!

Lawyer UPL questions from all over

- *In re Harris*, 366 Or. 475 (2020)
  - Lawyer licensed in another state moves to Oregon to become public school system GC
  - His practice for client while awaiting admission on motion was “temporary” under Rule 5.5 and thus not UPL

## The Top 10 Developments of the Last Year

### 7. The ethics of old tech

(The perils of hitting “reply to all” when the other lawyer copied her client)

## 7. The ethics of old tech

The perils of hitting “reply to all” when the other lawyer copied her client)

- Illinois St. Bar Op. 19-05 (Oct. 2019)
- Without consent of client’s lawyer, it violates Rule 4.2 to “reply to all” on email from client’s lawyer, where lawyer copied client on email

## The Top 10 Developments of the Last Year

6. Annals of lawyer marketing

(Lawyer ads)

## 6. Annals of lawyer marketing

- *Recht v. Justice*, No. 5:20-CV-90, 2020 WL 6109430 (N.D.W. Va. June 26, 2020)
  - U.S. Chamber-inspired statute on “bad drug” ads held unconstitutional
  - Highly similar statutes passed in Texas and Tennessee



## 6. Annals of lawyer marketing

- *Dwyer v. Cappell*, 762 F.3d 275 (3d Cir. 2014)
  - New Jersey cannot constitutionally bar lawyer from quoting excerpts of judicial opinions on fee motions praising work of lawyer

## 6. Annals of lawyer marketing

- Fine distinctions in Florida lawyer advertising

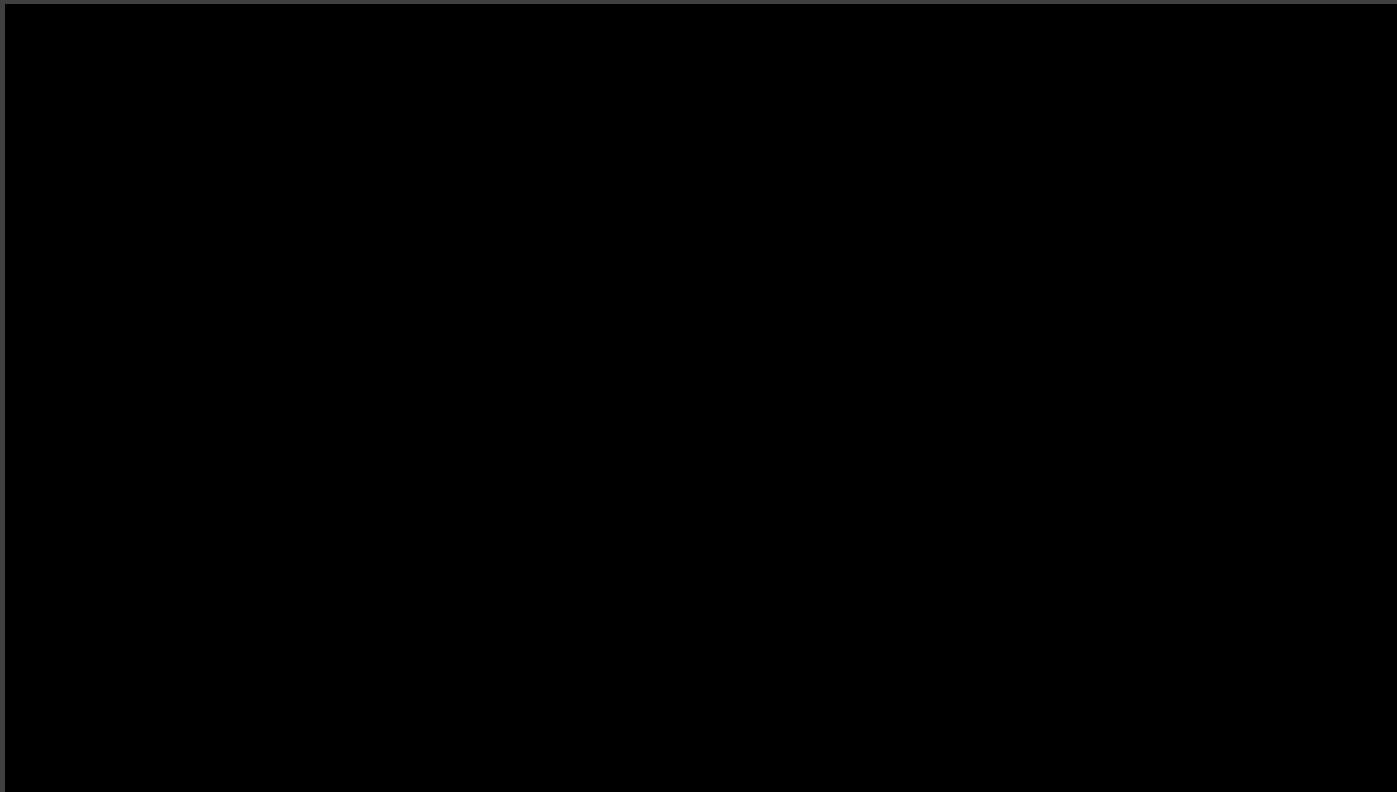


## 6. Annals of lawyer marketing

*Intermission:*

The 2020 Lawyer Marketing Film Festival

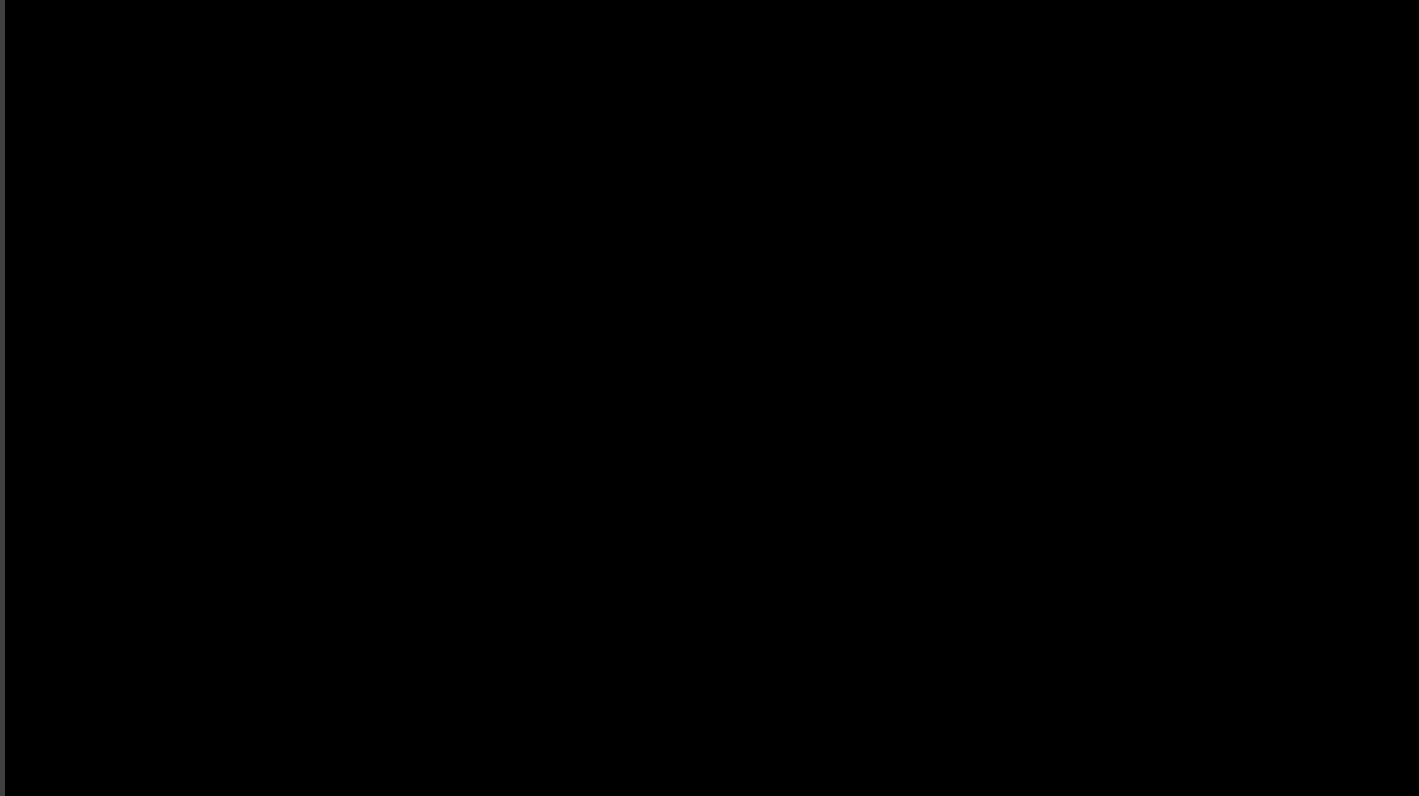
## 6. Annals of lawyer marketing



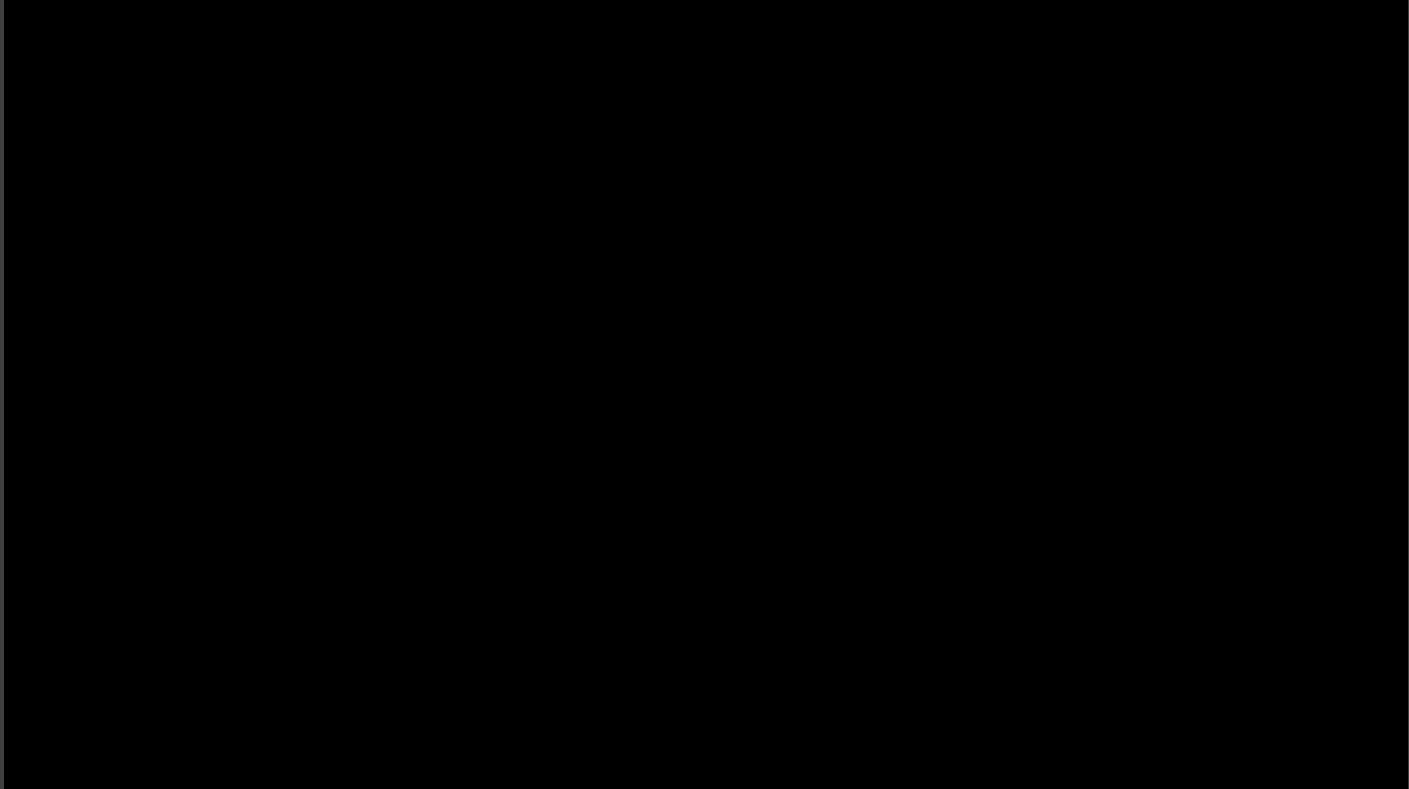
## 6. Annals of lawyer marketing



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## The Top 10 Developments of the Last Year

5. “Everybody with the company signs them....”

(In-house counsel noncompetes)



## 5. “Everybody with the company signs them...”

- **Question:** May in-house counsel ethically sign, or be asked to sign, noncompete agreements?
  - Two recent answers “No”
    - Ohio Bd. of Prof’l Cond. Ethics Op. 2020-01 (Feb. 7, 2020)
    - Nevada St. Bar Ethics Op. 56 (Dec. 10, 2019)
  - *See also* New York State Bar Ethics Op. 1151 (May 1, 2018)

## The Top 10 Developments of the Last Year

4. “Wait ... should we have that document?”

(Hot documents)

## 4. “Wait ... should we have that document?”

- What to do when you have a document or information someone will say you shouldn't have?
- Los Angeles Bar Ass'n Ethics Op. 531 (July 24, 2019)
- *Question:*

What does a lawyer do when she is offered access, by a witness who is an unrepresented former employee of the opposing party, to potential documentary evidence and is informed that it will show the adverse party's failure to comply with discovery obligations?

## 4. “Wait ... should we have that document?”

- See “Hot Documents: Handling Stuff You Arguably Shouldn’t Have” (Sept./Oct. 2018), available on Westlaw at 44 No. 5 Law Prac. 18
- Five Questions and four Rules of the Road

## 4. “Wait ... should we have that document?”

- Five Questions:
  1. What is the argument that you or your client shouldn't have it?
  2. Is actual possession unlawful for you or client?
  3. Was there misconduct or illegality by you or client in obtaining or receiving the document or data? Did you your client engage in any misconduct or illegality in getting it?
  4. Is there any law that precludes or permits you or client from using it?
  5. Is there any law (including ethics rules) that requires you or the client to do anything because they have it?

## 4. “Wait ... should we have that document?”

- *Four Rules of the Road:*
  1. Get help.
  2. Move very carefully.
  3. Fully document your steps.
  4. Think creatively.

## The Top 10 Developments of the Last Year

3. “Don’t worry, I’ll represent you at the deposition.”

(Joint representation of party and non-party witness  
in deposition)

### 3. “Don’t worry, I’ll represent you at the deposition.”

- Joint representation of party and non-party witness in deposition
- Alaska Bar Ethics Op. 2020-01

*Question:* Lawyer represents party at deposition of third-party witness. During deposition break, lawyer and witness confer. When deposition resumes, lawyer announces lawyer is now representing witness. As deposition proceeds, lawyer instructs witness not to answer certain questions and occasionally recesses deposition to consult with witness.



### 3. “Don’t worry, I’ll represent you at the deposition.”

- See also Douglas R. Richmond, *Touring Deposition Conflicts by Rail*, 57 S. Tex. L. Rev. 81 (2015)
- And a related issue ... *Wellons v. PNS Stores, Inc.*, No. 18-CV-2913-DMS (S.D. Calif. May 11, 2020)
- Does lawyer for employer offering to represent employee in same litigation at no costs to employee = prohibited lawyer solicitation?

## The Top 10 Developments of the Last Year

2. “Sure, I can go with you to the grand jury.”

*(Office of Disciplinary Counsel v. Baldwin,*  
225 A.3d 817 (Penn. 2019))

## 2. “Sure, I can go with you to the grand jury.”

- *Office of Disciplinary Counsel v. Baldwin*, 225 A.3d 817 (Penn. 2019)
- In-house counsel representation of organization employees
- GC of Penn State censured for representation of three college administrators in Sandusky grand jury investigation

## The Top 10 Developments of the Last Year

1. The many faces of cybersecurity

(A generous potpourri)

## 1. The many faces of cybersecurity

- Pandemic cybersecurity
  - Penn. Bar Ass'n Ethics Op. 2020-300 (April 10, 2020)
  - Calif. State Bar Proposed Formal Ethics Op. Interim No. 16-0002 (March 30, 2020)
- Ransomware
- USB drives

## 1. The many faces of cybersecurity

### Cases against law firms

- *Sorenson Impact Found. v. Holland & Knight, LLP* (Utah filed July 21, 2020)
  - Complaint filed July 2020
  - Firm sued over \$3.1M wire transfer sent to scammer's bank account

## 1. The many faces of cybersecurity

### Cases against law firms

- *Guo Wengui v. Clark Hill, PLC* (D. D.C. Feb. 20, 2020)
- District court held that Chinese dissident “successfully pleaded that the alleged mishandling of his information and subsequent cyberattack resulted in damages”

## 1. The many faces of cybersecurity

### Cases against law firms

- *Otto v. Catrow Law PLLC*, No. 19-0361, 2020 WL 7090529 (W. Va. Nov. 2, 2020)
- Divided state supreme court held no liability for law firm for failing to prevent phishing/spoofing scheme that led to loss of more than \$226K



# 1. The many faces of cybersecurity

Passwords, passwords, password.



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