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Ethical Considerations for Tennessee Employment Lawyers

May 6, 2016 ▪ Nashville, Tennessee

Presented by:

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Ogletree Deakins

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Meet . . .

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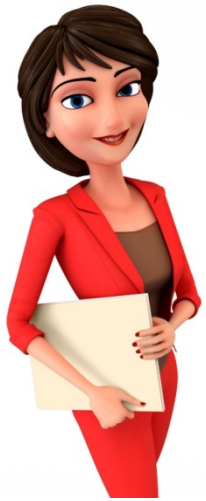
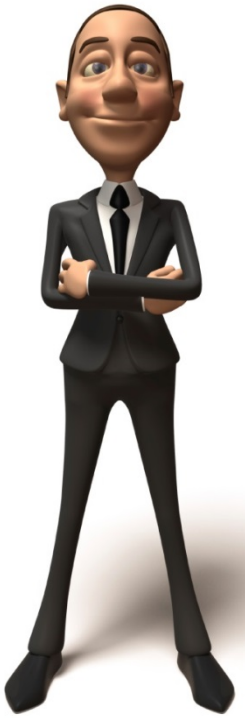
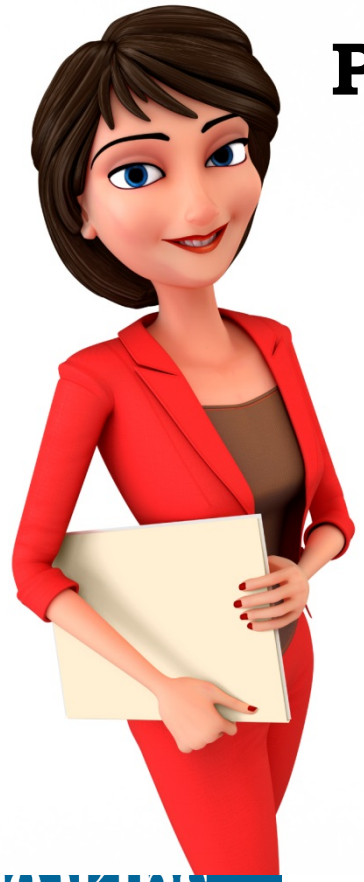




Reasonablefee & Deakins—Olga



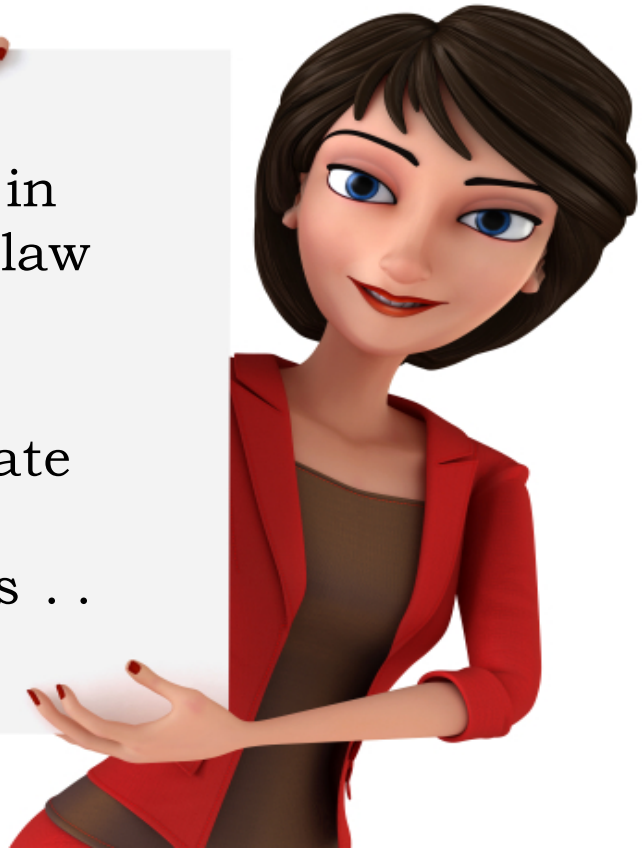
Per Olga's bio she:

- Is a shareholder at Reasonablefee & Deakins, a national employment law firm
- Did well in law school, received some awards, etc.

Defense Counsel – Olga

"Devotes her practice to representing management in all aspects of employment law . . ."

"Has successfully defended employers in numerous state and federal courts and in various agency proceedings . . ."



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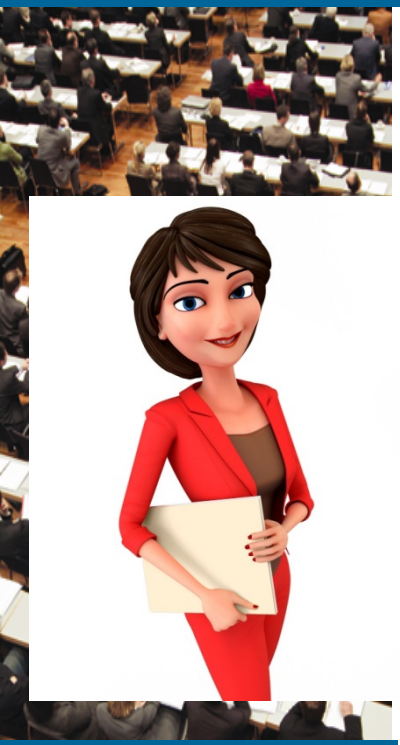
Corporate Counsel—Chris

Per Chris's bio he:

- Is Associate General Counsel-Employment Law at *Widget World, Inc.*
- Did well in law school
- Prior to going in-house, practiced with a couple big law firms, etc.

Meet . . .



Olga and Chris try to defend *Widget World, Inc.* without getting sanctioned, disbarred, or disqualified

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Peter Prominent

Prominent Plaintiff's Employment Attorney

Per Peter's website (theydidyouwrong.com):

- Truly believes in protecting your rights and righting the many wrongs committed by your employer
- Will meet with you for a free consultation
- (with appropriate disclaimers) . . . Has obtained many high dollar settlement and jury verdicts for his clients

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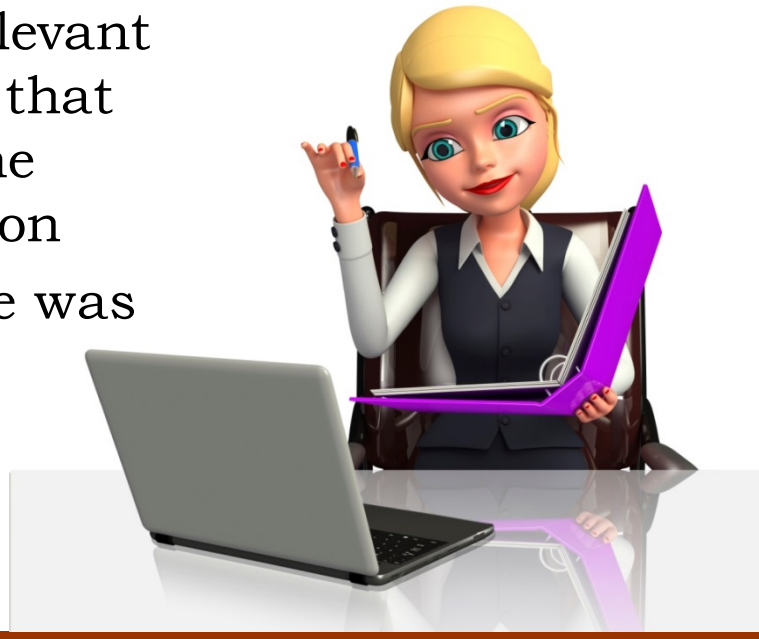
Paula Plaintiff

Formerly worked at *Widget World*

- Does not remember being presented with employee handbook or other relevant policies, but "thinks" that is her signature on the relevant documentation
- Just "knows" that she was retaliated against



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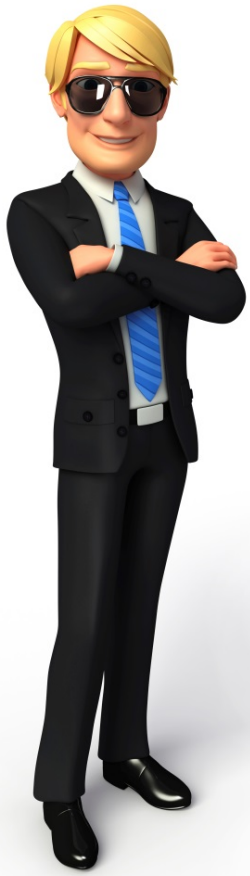
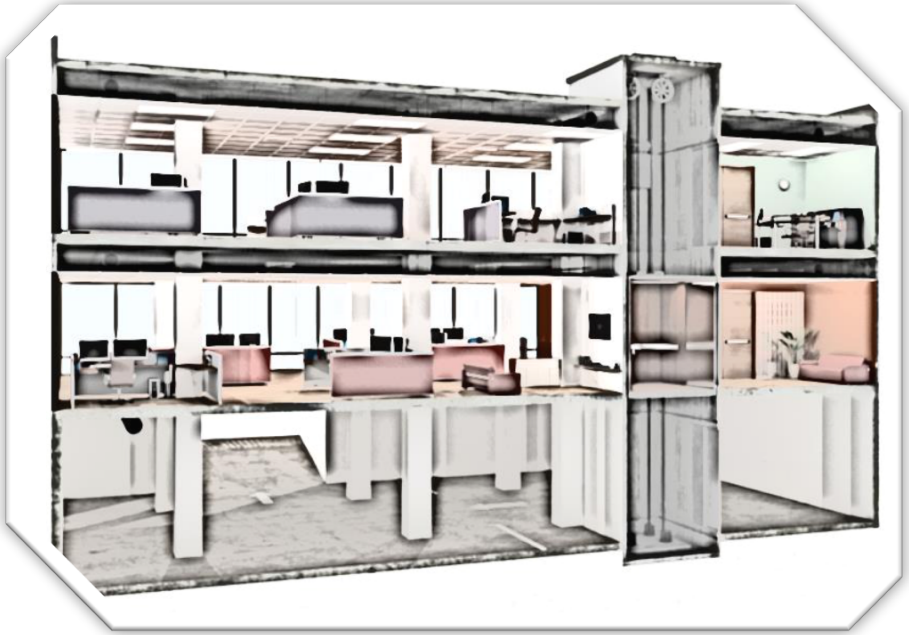
Harry "It wasn't me!" Harasser



Formerly worked at *Widget World* in the same unit as co-employee Paula Plaintiff



Individual Defendant—Ivan Davis

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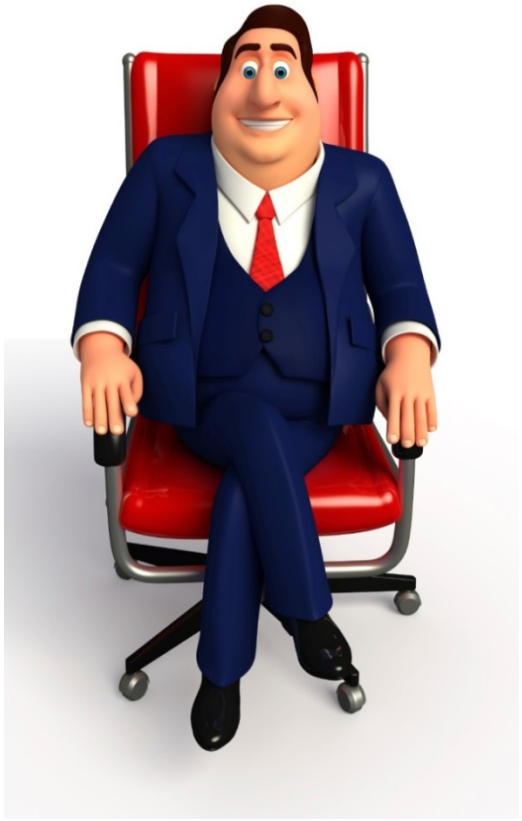
Widget World Founder



Bad News & Good News For Chris

Amendment to Tenn. R. Sup. Ct. 7:

- Dec. 21, 2015 – Rule 7 repealed & replaced
- Among changes:
  - RPC 5.5 clarified – **In House Counsel** must register with Board of Law Examiners
    - Within 180 days of commencement of employment
      - Discipline, ineligible for admission without examination
  - Safe Harbor: Register before July 1, 2016

Client files and data – Recent Formal Ethics Opinions

- Lawyer's responsibility regarding client files
  - 2015-F-160 (Dec. 11, 2015)
  - Amended 2015-F-160(a) (March 11, 2016)
- Use of cloud-based services for confidential client information
  - 2015-F-159

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Client Files
2015-F-160 & Amended 2015-F-160(a)

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- How long must Olga and Peter retain client files?
  - 5 years recommended but not required
    - May be altered by client agreement, type of representation, and contents of file
    - Best practices: address file retention initially or contact clients to determine their wishes
    - "Should individually review" for original documents with economic, legal or evidentiary value
  - 5 years required for client accounts (RPC 1.15(b))

Client Files
2015-F-160 & Amended 2015-F-160(a)

- When is a matter concluded?
  - Contract actions: “satisfaction of judgment or dismissal of action”
  - Tort claims:
    - “final judgment or dismissal of action”
    - Minors: majority and expiration of the statute of limitations
  - Protection from malpractice claims – Do not destroy a closed file until the expiration of the statute of limitations

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Client Files
2015-F-160 & Amended 2015-F-160(a)

- Who owns client files?
  - In Tennessee – the client
  - Prompt surrender per RPC 1.16
    - Copies at lawyer's expense
    - Lien rights in work product where client has not paid (absent "materially adverse effect")
- What constitutes the file?
  - In Tennessee: "entire file" approach
    - "expansive general right to materials related to the reputation"

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Client information in “the cloud” 2015-F-159

- May an attorney ethically store confidential client information in “the cloud”?
- **YES**
  - Use reasonable care to assure confidentiality is protected
  - Use reasonable efforts to ensure conduct of providers of cloud-based services is compatible with ethical obligations
    - How will the provider handle storage and security?
    - Confidentiality agreement
    - Method to retrieve data when services end
    - Stay up-to-date on safeguards that should be used
    - Adopt internal policies and procedures (back-up, passwords)

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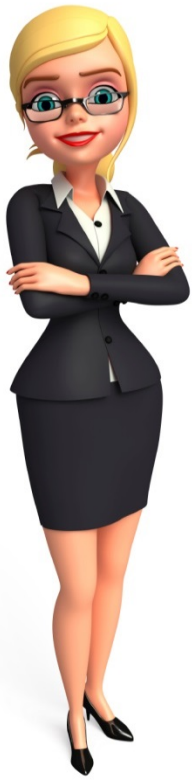
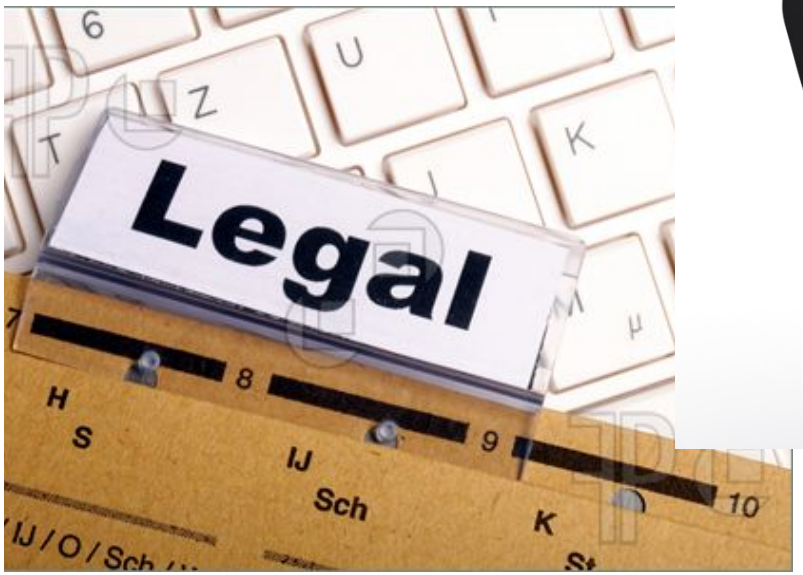
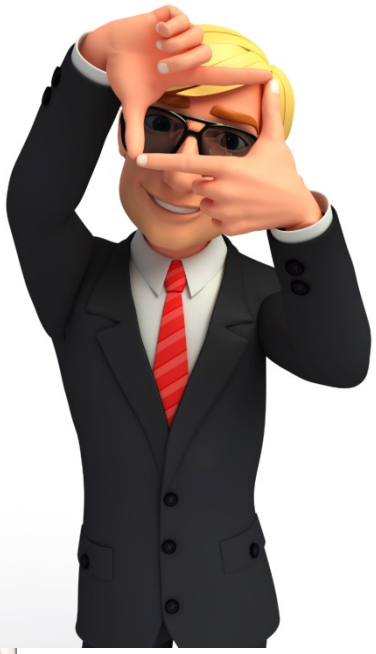
Paula Plaintiff, et al.
vs.
Widget World, Inc., et al. (Ivan and Harry)







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Key Allegations

1. Paula “harassed” by Harry.
2. Paula and her co-workers worked off the clock
2. Paula complained to HR “but nothing was done.”
3. Her complaints were a “contributing factor” in her later being fired by Ivan.

WHEREFORE, wants a ton of money, but only has “garden variety” emotional distress.

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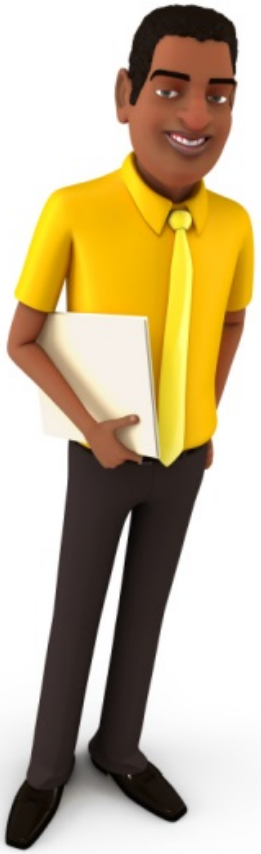
Chris's Story



Chris Tells Olga The Real Story

- Paula complained (but "was not a big deal")
- Harry denied allegations
- Harry was given a write-up and quit
- Paula had recurring performance problems and was discharged many months later
- Chris sat in during discharge decision meeting

JOINT REPRESENTATION

In addition to representing Widget World, can Olga and Reasonablefee also represent Ivan and/or Harry?

A. Probably just Ivan

B. Probably just Harry

C. Probably both Ivan and Harry

D. Probably neither Ivan nor Harry

Can Peter also represent Paula's former colleague, who says she also worked off-the-clock?

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JOINT REPRESENTATION

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Relevant Rules/Authorities

- Rule 1.6
- Rule 1.7
- D.C. Ethics Op. No. 140 (1984)

JOINT REPRESENTATION

Rule 1.6

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…

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JOINT REPRESENTATION

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Rule 1.7

- (a) …a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. …
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - (4) each affected client gives informed consent, confirmed in writing.

JOINT REPRESENTATION

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D.C. Ethics Op. No. 140 (1984) provides guidelines for determining if there is a conflict of interest in joint representation:

Whether co-parties agree to a single comprehensive statement of facts;

Whether the facts support a claim by one against the other;

Whether either party may know additional facts that would give rise to an independent claim of liability between the co-parties;

Whether co-parties understand the possible defense theories each may have to relinquish due to joint liability;

JOINT REPRESENTATION

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D.C. Ethics Op. No. 140 (1984) (cont.)

Whether co-parties will agree to forgo any claim or defense against;

Whether co-parties agree to disclose to each other all facts known to each other;

Whether co-parties understand the potential down falls of joint representation, whether co-parties have been advised to seek independent counsel about the joint representation, whether co-parties consulted independent counsel or did not chose to do so;

Whether co-parties acknowledge that later discovered facts may reveal different interests, and that this may require the attorney to withdraw representation;

Whether co-parties agree to joint representation in the litigation.

JOINT REPRESENTATION cont.

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Examples

- The disciplined accused harasser
- Scope of employment issues
- Joint employers

JOINT REPRESENTATION cont.

Indemnification

- Conflicts can also arise where a co-party seeks indemnification from the other party.
- *Wasserman v. Black*, 910 S.W.2d 564(Tex. Ct. App. 1995) (attorney could not represent both the city and a city official, where the official brought a cross claim for indemnification)

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JOINT REPRESENTATION cont.

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Informed Consent

- Lawyer may proceed in joint representation if each client gives informed written consent
- *Doe v. Fulton-DeKalb Hospital Authority*, 2006 WL 2990442 (holding law firm could represent both employer and employees in sexual harassment case where law firm advised each client of the potential conflict of interest and their right to seek independent counsel and each co-defendant signed a conflict waiver).

JOINT REPRESENTATION cont.

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Practice Tips

- Pre-representation investigation
- Written joint-representation agreements

A waiver from each party regarding particular defenses that each party could bring that would impose liability on a co-party.

A waiver of privilege relative to other co-parties;

The right to remain as counsel for one party.

JOINT REPRESENTATION cont.

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Practice Tips (cont.)

- a lawyer should advise each client:
- To seek independent counsel regarding whether joint representation is appropriate in the given context;
- The full risks of joint representation, including possible conflicts that may arise, and the implications of giving any of the waivers suggested above.

EX PARTE CONTACTS

- Relevant Rules
  - 3.4 (f) (fairness to third-parties)
  - 4.2 (communications with represented parties)
- Current Employees
- Former Employees
- Class/Collective Actions
- Practice Tips
  - Requests to employees regarding contact from opposing counsel

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EX PARTE CONTACTS

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Relevant Rules

- 3.4 (f) (fairness to third-parties)
  - lawyers shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party unless the person is a relative ***or an employee***…of a client."
  - Employer's counsel cannot make a blanket relationship with all employees to bar ex parte contacts. *Patriarca v. Ctr. For Living & Working, Inc.*, 778 N.E.2d 877, 880 (Mass. 2002

EX PARTE CONTACTS

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Relevant Rules

- 4.2 (communications with represented parties)

  "**In representing a client**, a lawyer shall not communicate about the subject of the representation with a person the lawyer **knows to be represented** by another lawyer **in the matter**, unless the lawyer has the **consent of the other lawyer** or is authorized by law to do so."

  Rule requires actual knowledge that the other party has representation

EX PARTE CONTACTS

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Relevant Rules (4.2 cont.)

- Parties can still speak with each other, so long as it is not at the behest of their lawyers
- Lawyers may contact a *pro se* party, so long as they are the attorney of record
- Rule likely applies when there is a "ripening adverse" relationship
- It only attaches for a specific matter—attorneys may contact represented party for other matters.
- If a party has multiple lawyers, consent is only need from one to allow ex parte contact with client

EX PARTE CONTACTS cont.

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Current Employees

- Cmt. 7 to Rule provides insight as to which employees are "represented" by an organization's counsel for the purposes of Rule 4.2
- "…constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or who act or omission in connection with the matter may be imputed to the organization …."

EX PARTE CONTACTS cont.

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Current Employees (cont.)

- This creates three categories of employees that are covered under Rule 4.2
- Those with a (1) supervisory role/consults with the lawyer concerning the matter or (2) the ability to impute liability on the company or (3) access to confidential information.

EX PARTE CONTACTS cont.

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Current Employees (cont.)

- Examples of when a current employee is "off limits" for communication include:
- *Hammond v. City of Junction City*, 126 Fed.Appx. 886 (10th Cir. 2005) (finding target of contact had "managerial status" because his job title was Director of Human Resources, the role he played in document production and shredding in connection with the litigation and authority over hiring and investigations of discrimination complaints)

EX PARTE CONTACTS cont.

Current Employees (cont.)

- Examples of when a current employee is "off limits" for communication include:
- *Hobart Corp. v. Waste Management of Ohio, Inc.*, 2012 WL 996525 (a truck driver employee who did not have managerial or supervisory duties, but whose testimony of where he delivered waste could impute liability to the employer)
- *Snider v. Superior Court*, 113 Cal. App. 4th 1187 (2003) (it was a violation of the rules to speak with the named party's administrative assistant because while not a manager, she played a central role in the employer's administration and had access to confidential information).

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EX PARTE CONTACTS cont.

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Current Employees (cont.)

- Examples of when a current employee is "fair game" for include:
- *E.E.O.C. v. Hora, Inc.*, 239 Fed. Appx. 728 (3d Cir. 2007) (in sexually hostile workplace case, administrative assistant of employer was not covered under Rule 4.2 where she did not regularly consult with employer's lawyer).
- *Smith v. Unite Salt Corp.*,2009 WL 2929343 at*4 (plaintiff's lawyer could speak with plaintiff's co-workers whose statements could not be used to impute liability onto the employee to gain information, but prohibiting contact with supervisory or managerial employees).

EX PARTE CONTACTS cont.

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Former Employees

- Comment 7 to Rule 4.2 specifically states that "[c]onsent of the organization's lawyer is not required for communication with a former constituent." This is the rule in both Kansas and Missouri, as both states have adopted essentially the same language as Model Rule 4.2.
- Example: *Smith v. Kansas City Southern Ry. Co.*, 87 S.W.3d 266, 279 (Mo. 2002) (plaintiff's attorney could speak with a former field supervisor of defendant railroad)

EX PARTE CONTACTS cont.

- Former Employees (cont.)
  - Limitations:
    - Lawyers cannot speak to former employees who have retained counsel in the matter
    - Cannot use contact to elicit confidential information

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EX PARTE CONTACTS cont.

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Former Employees (cont.)

- Minority of jurisdictions limit contact with former employees who (1) were managers; (2) had access to confidential information; or (3) were directly involved in the circumstances that gave rise to the law suit

  See Serrano v. Cintas Corp., 2009 WL 5171802 (allowing ex parte interviews only where plaintiffs' counsel identified themselves and the purpose of their contact, advised former employees they didn't have to participate in the communications and could not share any privileged information and immediately terminated the conversations if it appeared the employees were going to reveal privileged information).

EX PARTE CONTACTS cont.

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Class/Collective Actions

- Defendant's communication:
  - Before a class has been certified as either a class or collective action, putative members are not represented
  - This means they can be contacted without violating Rule 4.2
  - Limitation: Communication cannot be deceptive or coercive.

EX PARTE CONTACTS cont.

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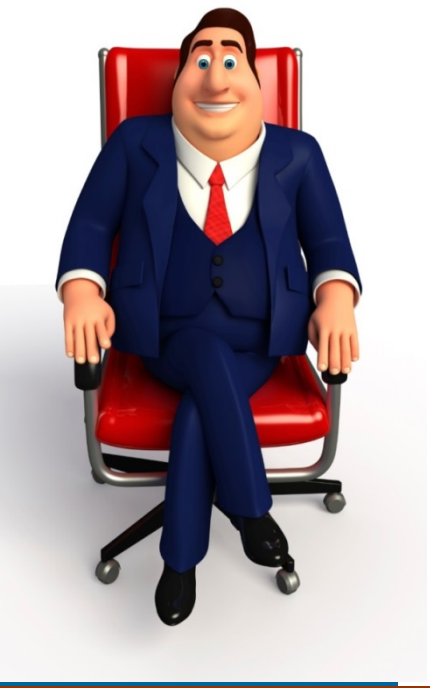
Class/Collective Actions

- Plaintiff's communication:
  - In the precertification stage, plaintiffs' counsel still has a fiduciary relationship with the putative class
  - This means lawyers may communicate with class members to provide notice of the potential suit, respond to inquires and to seek information necessary to their representation of the class.
    - » LIMITATION: communications cannot be deceptive or coercive.
  - *Gulf Oil* is the leading case on class communication

EX PARTE CONTACTS cont.



Class/Collective Actions

- Ivan decides he has a "brilliant idea"
  - Goes to opt-ins and offers cash in exchange for releases (and gets them)
  - Does not tell Olga or Chris in advance
  - Records parts of his encounters
  - Tells opt-ins they can talk to their attorney . . . "but you know how they are"
- Ivan is very proud of himself!
- Peter seeks to invalidate the releases and sanctions

What happens?

EX PARTE CONTACTS cont.

Potts v. Nashville Limo & Transport, LLC, 2016 WL 1622015 (M.D. Tenn. April 19, 2016)

- RPC 4.2: "a *lawyer* shall not communicate about the subject of representation by another lawyer in the matter"
- Comment 4 "parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make."

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EX PARTE CONTACTS cont.

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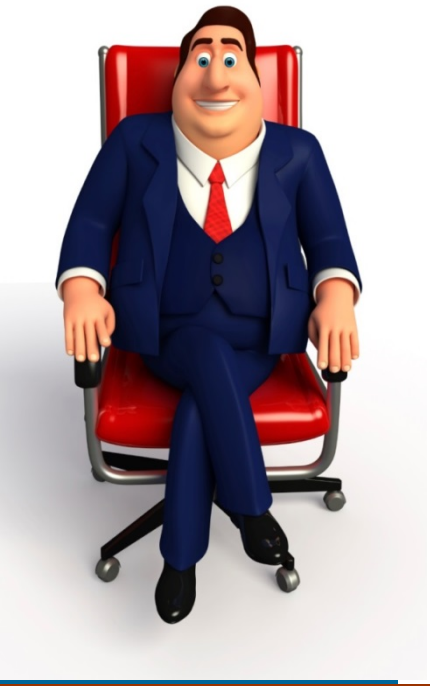
Potts v. Nashville Limo & Transport, LLC, 2016 WL 1622015 (M.D. Tenn. April 19, 2016)

- "Tennessee courts have not addressed how far a lawyer may go . . . before crossing the line into impermissible overreaching"
- ABA Formal Opinion No. 11-461
  - "assists the client in securing . . . an enforceable obligation" without advising the client to encourage the other party to consult with counsel; or
  - drafts a proposed agreement . . . without including conspicuous language encouraging the other party to consult with counsel
- Tennessee law did not prohibit the communications

EX PARTE CONTACTS cont.



The result? (based on *Potts*)

- Since Ivan did not consult with Olga or Chris, Ivan's "brilliant idea" does not result in a violation of RPC
- Releases could still be invalidated and other remedial action taken under *Gulf Oil* analysis

Duty to Report?

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RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's **honesty, trustworthiness, or fitness** as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

Duty to Report?

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Comments to Rule 8.3

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. **A measure of judgment is, therefore, required in complying with the provisions of this Rule.** The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. Similar considerations apply to the reporting of judicial misconduct.

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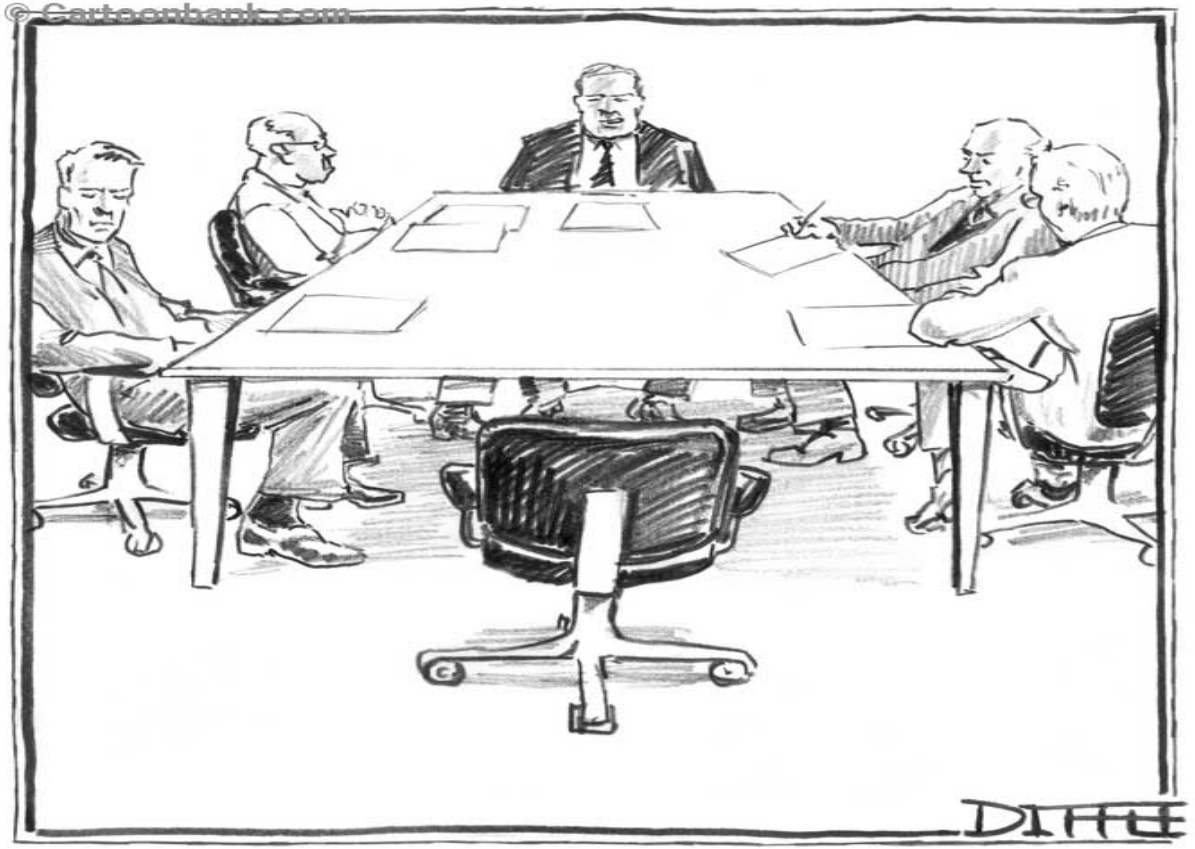
Thank You!



"It's just us today. Campbell called in ethical."

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