Richland County Bar Association Annual Ethics CLE Seminar

Friday, October 22, 2021
Zoom Pro Webinar

Course #910733 (in-person) or
Course #910700ADO (virtual)
Approved for 3.0 Ethics Credits



The Supreme Court of South Carolina

COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION

October 26, 2021

RCBA

Richland County Bar Association

COURSE #	<u>DATE</u>	COURSE NAME	CREDITS	<u>ETHICS</u>	SA/MH 1	rial ad	SPECIALTY CREDIT
910700ADO	10/22/21	Annual Ethics CLE Online	3.00	3.00	0.00	0.00	

Your application(s) for accreditation has been approved.

In extending accreditation for CLE activities, the Commission reserves the right to have a representative attend all programs without charge to the Commission and/or its representatives and requires adherence to its accreditation standards found on page two of the Application for Accreditation.

Click this link to review the **Application for Accreditation**.

Within 30 days of the CLE, attendance is required to be furnished to the Commission with a list of the South Carolina attendees, with South Carolina Bar numbers and attendance totals indicated for each attendee. When submitting a list of attendees, or other correspondence, please refer to the course number(s) indicated above.

All programming is approved on a calendar year basis and expires annually on December 31 of the year in which the program was presented. Programming must be resubmitted (via a comprehensive application packet) in subsequent years to retain accreditation approval. Please note that an application for online, on-demand, teleconference, and in-house programming must be received and approved by the Commission prior to the presentation of the program.

Sincerely,

DeAnne Bullock
Accreditation Coordinator



The Supreme Court of South Carolina

COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION

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DeAnne Bullock
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2021 Richland County Bar Association Annual Ethics CLE

Table of Contents:

- Agenda/Time Schedule, page 1
- Combined Faculty Descriptions, pages 2 5
- Virtual Court and Ethical Dilemmas, pages 6 30
- Understanding Microaggressions in the Workplace, pages 31 49
- Ethics in Real Estate Transactions, page 50
- Updates on Ethics Cases, pages 51 57

2021 Richland County Bar Association Annual Ethics CLE

Friday, October 22, 2021

Course #910733 (in-person) or #910700ADO (virtual)

AGENDA

8:30 – 8:45 am	Introduction Puran E. Ginson, Solicitor, Eifth Judicial Circuit
	Byron E. Gipson, Solicitor, Fifth Judicial Circuit
8:45 – 9:30 am	Virtual Court and Ethical Dilemmas
	Daniel M. Coble and Costa M. Pleicones
9:30 – 10:15 am	Understanding Microaggressions in the Workplace
	Discussion moderated by Leslie Harvel, with panelists Tyler
	Bailey, Kayla Capps, and April Sampson
10:15 – 10:20 am	South Carolina Bar Foundation
	Venus Poe, President
	SC Supreme Court Historical Society
	Robert M. Wilcox, President
10:20 – 10:30 am	Break
10:30 – 11:15 am	Ethics in Real Estate Transactions
	Cynthia D. Blair
11:15 – 12:00 pm	Updates on Ethics Cases
	Michael J. Virzi, Esq.

Combined Biographical Information

Byron E. Gipson became Solicitor on January 9, 2019. Prior to that time, he practiced with the law firm of Johnson, Toal & Battiste, P.A. for 21 years in the areas of criminal defense and personal injury becoming a partner in 2005. He tried numerous cases including high-profile murder and violent crimes. Mr. Gipson graduated from the College of Charleston with degrees in English and Political Science. He later attended the University of South Carolina School of Law. After graduation, Mr. Gipson became law clerk to the Honorable L. Casey Manning, Chief Administrative Judge for the Fifth Judicial Circuit. In 2000, Mr. Gipson was appointed to the South Carolina Humanities Council Board of Directors by Governor Jim Hodges. He was later elected as the Chairman of the Humanities Council in September 2004. In 2010, he was appointed by the South Carolina Supreme Court to serve on The Committee on Character and Fitness. Mr. Gipson is also a board member of the South Carolina Bar Foundation and is past Chair of the Municipal Election Commission. He is currently a member of the Richland County, South Carolina, National and American Bar Associations. Mr. Gipson has previously lectured at numerous legal seminars regarding criminal trials, evidence, and ethics.

Costa Pleicones, former Chief Justice of the South Carolina Supreme Court, advises Haynsworth Sinkler Boyd clients on complex litigation and appellate matters. He is a Certified Circuit Court Arbitrator and Mediator and his experiences as a successful practitioner, trial judge and appellate jurist allow him to provide skillful and effective dispute resolution services. Upon graduation from the University of South Carolina School of Law in 1968, Costa began a 30-year active duty and reserve service military career in the United States Army, serving as a Captain in the United States Army Judge Advocate General's Corp for four years and as Colonel in the United States Army Reserve for 26 years. He also served as Commander of the 12th Legal Services Organization and was the Emergency Preparedness Liaison Officer for South Carolina, First United States Army. Following his active-duty service, Costa began practicing law as a public defender for Richland County. He entered private practice in 1975 and served as a part-time municipal judge for the City of Columbia and as County Attorney for Richland County. In 1991, Costa was elected Resident Circuit Court Judge for the Fifth Judicial Circuit and was then elected as an Associate Justice of the South Carolina Supreme Court in 2000. He was elected Chief Justice of the South Carolina Supreme Court on May 27, 2015 and served until December 2016. A graduate of Wofford College, he received an Honorary Doctor of Laws from Wofford in 2002 and currently serves on the Wofford College Board of Trustees. He is a member of the South Carolina Bar and Richland County Bar, receiving the prestigious Matthew J. Perry, Jr. Civility Award in 2011 and the John W. Williams Distinguished Service Award in 2017.

Daniel Coble is the owner of the Coble Law Group, LLC. Daniel was born and raised in Columbia, South Carolina. He attended public schools growing up in Columbia. He received his undergraduate degree from Clemson University in Economics. After college, Daniel attended University of South Carolina School of Law where he received his law degree. After graduation, Daniel worked as a prosecutor for the Fifth Circuit Solicitor's Office. He was appointed as a Richland County Magistrate Judge in 2017 where he served full time at Central Court on Decker Boulevard until 2021. Daniel is married and has a young daughter and a Yellow Lab, Jack. In his spare time, Daniel enjoys spending time with his family, deer hunting, and reading historical fiction novels and autobiographies. He is the founder and editor of the legal resource Everyday/Evidence.

Leslie Harvel is a retired member of the Richland County Bar who, almost two decades ago, decided the classroom was a better fit than the courtroom. Within a few years, she felt the need for another change and accepted a position teaching International Law at SIAS International University in Zhengzhou, China. Over the years she has taught at several Chinese law schools, including East China University of Politics and Law in Shanghai. After Shanghai, she moved to Ethiopia to take a teaching and development position at Haramaya University in conjunction with the University of Alabama. There, she taught trial and appellate advocacy, and international and domestic employment law. She also laid the groundwork for the regions first LLM in International Law and created partnerships with international and domestic universities. In 2013, she made another change of career and spent six years with a Sino-British organization training Chinese teachers in modern educational theories and practices. She also spent most of one school year teaching Mandarin Chinese for Hartsville High School after they abruptly lost their Chinese teacher. Leslie is currently both an International Adjunct Professor and an Adjunct Professor with Concordia University. She teaches Business Law and Business Ethics in their international program at Hebei University of Economics and Business in Shijiazhuang, China. She also teaches Advanced Business Law for Concordia's domestic students. A significant portion of her Ethics course addresses the issue of microaggressions plus appropriate microinterventions individuals and their allies may use to counteract these microaggressions. Leslie graduated from Florida State University with a BA in Communications and minors in Education and Psychology. She received her Juris Doctorate from the University of South Carolina in 1990 and has 2 daughters and six grandchildren ranging in age from 3 to 21.

Kayla Capps is the Deputy Director of Investigations at the Department of Children's Advocacy (DCA). She has a background in child welfare, law enforcement, and child-care. Kayla attended the University of South Carolina for undergraduate and law school. Currently she stays involved with her community by serving as Vice President on the James F. Byrnes Scholars' Board and Chair of the Community Subcommittee of the Richland County Bar Association's Diversity and Inclusion Committee. Occasionally, Kayla leads kickboxing classes at TNT Martial Arts and Fitness

as a substitute instructor. She shares her home and heart with her talented musician husband, dog, and four cats.

Tyler D. Bailey is the founder and managing attorney at Bailey Law Firm, L.L.C. In this position, Tyler manages the business operations and represents its clients throughout SC primarily in the areas of Civil Rights, Personal Injury, Workers' Compensation, and Civil Litigation with an emphasis on crime victims' rights. Tyler founded Bailey Law Firm, L.L.C., immediately after graduating law school in 2014. He was named one of the Top 40 Under 40 Trial Lawyers in South Carolina by both the National Trial Lawyers Organization, and the National Black Trial Lawyers. Additionally, Tyler was named one of the Best and Brightest 35 and Under by the Columbia Business Monthly Magazine in 2017. Tyler dedicates countless hours serving his community through non-profit board service and various civic endeavors. Tyler serves on the Boards of Sistercare, Vital Connections of the Midlands, The Pretty Powerful Foundation, The Greater Columbia Community Relations Council, The Talented Tenth, Compass Community Development Corporation, and Right Direction Church International. Additionally, Tyler previously served as a Commissioner on the City of Columbia Election Commission and was a Co-Chair of the South Carolina Bar Young Lawyer Division's Diversity Committee. He is currently the Chair of the South Carolina Association for Justice Diversity and Inclusion Committee. Tyler is currently a candidate for Columbia City Council At-Large with and has an upcoming election on November 2nd. Of all of Tyler's roles, he cherishes his role as husband to Allyce Bailey and father to Tyler "Ty" Jr. affectionally known as Sonny.

Cynthia Blair was born and raised in Columbia. She attended Hammond School before going to Florida State University to major in voice and theater, with thoughts of trying her luck on Broadway. However, after much reflection, she decided instead to major in Multinational Business and minor in Spanish. She returned to Columbia for law school and her international MBA. She began her practice as public defender in Richland County where she tried many cases to a jury. Cynthia had always wanted to live in Miami, so she moved there and practiced civil litigation and real estate; however, after a year, she decided to return home and follow her passion of a business-oriented practice in real estate. After growing a very successful real estate practice for 14 years, Cynthia, along with Rex Casterline, Gary Pickren, Kris Cato, and Steve Lenker, all of whom were partners with her in a prior law firm, opened Blair Cato Pickren Casterline, LLC in November of 2014. Cynthia is very active in the real estate industry. She is a past President of the American Land Title Association ("ALTA") and currently serves on numerous committees and taskforces of ALTA all for the improvement of the real estate title and settlement industry. She has also served as an officer and director of both the Palmetto Land Title Association and the Mortgage Lenders Association of Greater Columbia. Cynthia is a past Chair of the Real Estate Section Council of the South Carolina Bar. She is also a licensed instructor for CE for real estate agents in South Carolina.

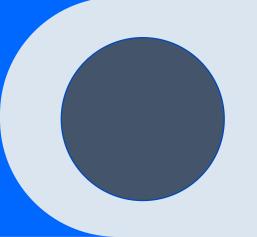
April Sampson is a Circuit Deputy Solicitor in the Fifth Circuit Solicitor's Office. Her responsibilities include prosecuting major felonies, management of offices and staff in Kershaw and Richland Counties, training staff, incoming prosecutors and law clerks, and liaison to the Chief Administrative Judge. April previously served as Senior Assistant Solicitor, Fifth Circuit Solicitor's Office since January 2011. In addition to her extensive professional experience in the Solicitor's Office, April has worked in private practice and as the Deputy Chief Public Defender and the Assistant Public Defender in the Richland County Public Defender's Office. Her teaching experience includes current positions as Adjunct Professor at the University of South Carolina School of Law and Instructor at South University in the Legal Studies Department. In addition, April serves as a Faculty Member for South Carolina Prosecution Commission on Prosecution Coordination's Prosecution Bootcamp and previously served as a Junior Faculty Member for the William W. "Bill" Daniel Trial Advocacy Program in Athens, Georgia and as an Instructor for the National Advocacy Center, Executive Office for United States Attorneys. She received her JD from the University of South Carolina, School of Law, and her BA in Political Science and Psychology from Washington University in St. Louis, MO.

Michael Virzi teaches Legal Writing and Professional Responsibility at the University of South Carolina School of Law, where he has also taught Fundamentals of Law Practice and Professionalism and Advanced Legal Writing. He has a solo practice in Columbia, focusing on lawyer ethics, discipline, and malpractice for the past sixteen years. Prior to that, Michael served for three years as an Assistant Disciplinary Counsel in the South Carolina Supreme Court's Office of Disciplinary Counsel. He is currently the Chair of the Bar's Professional Responsibility Committee and a Past Chair of the Ethics Advisory Committees. Michael is also the Ethics Chair for the South Carolina Association for Justice and is a frequent CLE speaker and law school guest lecturer on the topics of ethics, malpractice, and lawyer discipline. He is a member of the ABA Center for Professional Responsibility, the Association of Professional Responsibility Lawyers, the South Carolina Association of Ethics Counsel, and Phi Delta Phi. He graduated *cum laude* from the University of South Carolina School of Law in 2000, after which he practiced primarily business litigation for several years before joining the Office of Disciplinary Counsel.

Annual Ethics CLE - RCBA 2021

Virtual Court & Ethical Dilemmas

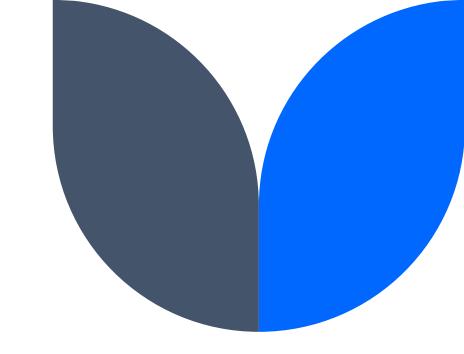
The Honorable Costa Pleicones and Daniel Coble











Agenda (45 Minutes)

- 1. What are the new rules?
- 2. Learning new technology (competency)
- 3. Ethics and privacy
- 4. Examples
- 5. Summary



Introduction

COVID19 has changed everything.

Technology requirements grew 10 years in span of 1 year.

The good, the bad, and the virtual.

1.) What are the New Rules?

S.C. Supreme Court Order – COVID19 SCACR 612

More...

Supreme Court Order

RE: Use of Remote Communication Technology by the Trial Courts (August 27, 2021)

Definitions

- Remote Communication Technology (RCT): technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time. This can range from a telephone call or conference call which provides only audio to sophisticated software products like WebEx, Zoom or Microsoft Teams which allows both audio and video to be shared. When this order refers to using RCT, Enhanced Remote Communication Technology (ERCT) may be used instead.
- Enhanced Remote Communication Technology (ERCT): a form of RCT such as WebEx, Zoom and Microsoft Teams which allows audio and video to be shared at differing locations in real time. When this order indicates ERCT is to be used, that form of RCT must be used.



RE: Use of Remote Communication Technology by the Trial Courts (August 27, 2021)

Discretion of Judges. In various provisions of this order, the decision to allow RCT to be used rests in the discretion of the judge. Even when the language in this order indicates RCT may be used, the facts and circumstances in a particular case or matter may indicate that the use of this technology is inappropriate. To some extent, the exercise of this discretion will necessarily be influenced by the technical skill of the judge, attorneys, other case participants and any supporting staff who will be using this technology. Finally, for some proceedings, this order may restrict this discretion. For example, this order may indicate that certain proceedings must be conducted using ERCT. Another example is that for some types of proceedings the consent of the parties or a sufficient justification must exist before RCT of any type may be used.



RE: Use of Remote Communication Technology by the Trial Courts (August 27, 2021)

- Constitutional Rights of Parties. In the absence of a waiver, judges should not allow RCT to be used in a manner which would violate the rights of a party under the either the State or Federal Constitution.
- Victims' Rights. ... Nothing in this order shall be construed as preventing a judge, in the exercise of discretion, from allowing a victim to hear and/or view a proceeding or trial by RCT.
- Public Access. When a hearing, trial or other court proceeding is of a nature that it would normally be open to the public,...
- Consent of the Parties. ... a judge may use RCT to the extent consented to by the parties.
- Attorney-Client Communications. If the use of RCT results in the attorney and the client being at different locations, a means must be available for the attorney and client to communicate confidentially while RCT is being used...



RE: Use of Remote Communication Technology by the Trial Courts (August 27, 2021)

- Recording Remote Proceedings. Other than the judge or court staff assisting the judge, no person shall record any court proceedings which are conducted using RCT...
- Effect of Remote Proceedings; Direct Contempt. Proceedings conducted using RCT shall have the same effect as if all of the participants had been physically present in the courtroom....
- Exhibits. In the event an exhibit is to be introduced during the course of a proceeding conducted using RCT, the party introducing the exhibit must ensure that the judge, the other parties and counsel, and any court reporter all have a copy of the exhibit prior to the time it is introduced. This copy may be provided in paper or electronically. Nothing in this order shall be construed as preventing a judge from requiring the original of an exhibit to be presented to the court.



SCACR 612

USE OF REMOTE COMMUNICATION TECHNOLOGY

By order, the Supreme Court of South Carolina may provide for the use of remote communication technology by the courts of this State to conduct proceedings, including, but not limited to trials, hearings, guilty pleas, discovery, grand jury proceedings, and mediation or arbitration under the South Carolina Court-Annexed Alternative Dispute Resolution Rules. 1 For the purposes of this rule, remote communication technology means technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at different locations in real time. The use of this technology for oral argument and hearings before the Supreme Court of South Carolina and the South Carolina Court of Appeals is governed by Rules 218 and 240, SCACR.



2.) Learning New Technology

RCTs

Professional Conduct

Technology



I can see you. Can you see me? No? Ok.

-Everybody



Professional Conduct

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including a reasonable understanding of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit information related to the representation of a client

Learning New Technology RCTs

Zoom



WebEx



Microsoft Teams











Download RCTs

> Zoom WebEx Teams Etc.

2

Login

Username
Password
Profile Picture
Display Name

3

Hardware

Camera
Microphone
Lighting
Background
Phone/Scanner

4

Client Prep

Practice Location 5

Exhibits

Share Publish

3.) Ethics & Privacy

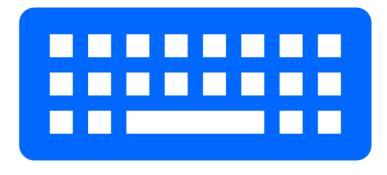
Chatrooms

Clients

Cameras

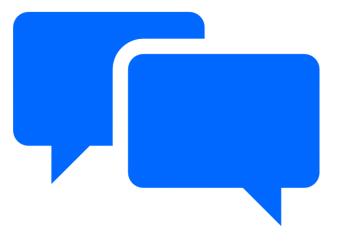
Chatrooms

- Treat them like emails
- Avoid ex parte
- Administrators see all



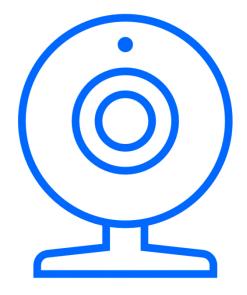
Clients

- Are they with you?
- Attorney/Client communications
- Preparation



Cameras

- They are always on
- What is the view?
- Don't forget the microphone
- Dress appropriately



VIRTUAL COURT & ETHICAL DILEMMAS

4.) Examples

A lawyer was reprimanded for her conduct during an immigration hearing conducted by videoconference. During the course of the examination of the [client] by the single-member panel, the lawyer on many occasions whispered answers which were taken up by the client and repeated to the panel member's questions. A virtual courtroom setting will result in lawyers being in closer proximity with their clients during questionings or examinations. Counsel must be cautious and avoid the tendency to engage in inappropriate communication with their clients that may obstruct proceedings and result in disciplinary actions.

VIRTUAL COURT & ETHICAL DILEMMAS

https://ablawg.ca/2020/06/03/lawyer-ethics-in-the-virtual-courtroom/



The Michigan Court of Appeals has fined a lawyer \$3,000 and referred him for possible further discipline after determining he raised his middle finger to an opposing lawyer during recent oral arguments.

But James Heos, the veteran East Lansing attorney who made the gesture, said Friday he thought he was giving the finger to his blank computer screen — which was not working — and he had no idea the three judges on the panel or anyone else could see him.

"It's a very embarrassing situation," said Heos, 74, who said he has already mailed his check to the clerk of the court.

VIRTUAL COURT & ETHICAL DILEMMAS

https://www.freep.com/story/news/local/michigan/2021/05/28/lawyer-james-heos-middle-finger-michigan-court-appeals/7485405002/



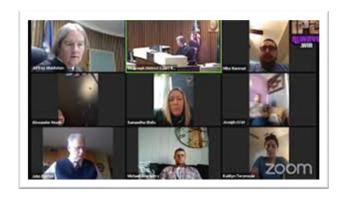
"Then we'll bring this fool in," Middleton says at the 17:25 mark as Saxton appears with the uncensored screenname. "Good morning, sir, what's your name?"

VIRTUAL COURT & ETHICAL DILEMMAS

"My name is Nathaniel Saxton, sir," he said.

"Your name's not \$@#%@ 3000, you yo-ho, logging in to my court with that as your screenname." the judge said. "What kind of idiot logs into court like that?"

https://www.syracuse.com/us-news/2021/05/michigan-judge-blasts-fool-who-entered-virtual-court-hearing-with-explicit-screenname.html





Thank you

Virtual Courts and Ethical Dilemmas

Annual Ethics CLE - RCBA 2021



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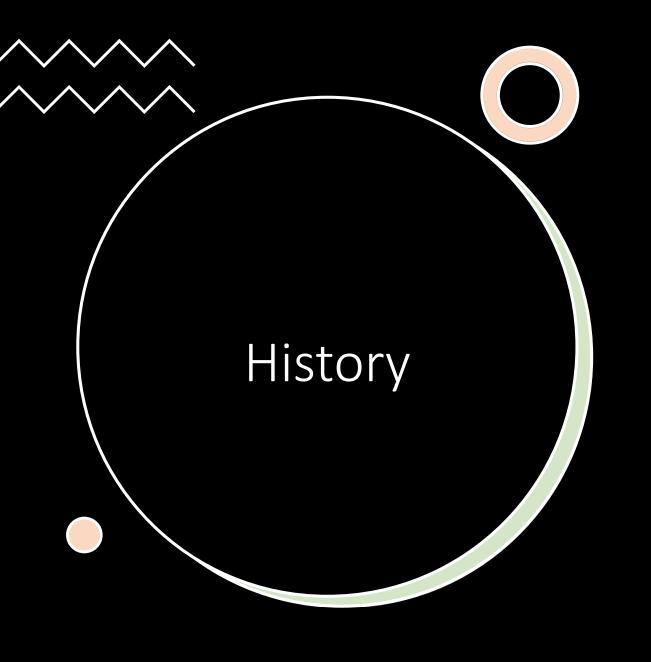
MICROAGGRESSIONS AND MICROINTERVENTIONS

你对老外很好!

You're a very nice foreigner!

Definition

- A comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group (such as a racial minority) – Merriam Webster
- Also called "subtle acts of exclusion"



- It's nothing new
- Originated from the work of Harvard psychiatrist Chester M.
 Pierce in the 1960s.
- First used to refer to communications with Black Americans and later women
- Now generalized to any group that may be marginalized

Microaggressions are confusing

Sender may be well-intentioned

Sender may be attempting to be funny

Sender may not realize a comment is hurtful

- Age
- Gender
- Culture
- Stereotypes

More confusion

Sender may be trying to be supportive

In fact, most microagressions come from good people.

And a little more

- Comments and actions are subtle
- How subtle?
- Quiz time!
 - Give yourself a Y for things you do and an N for things you don't do.
 - Nobody will see or ask about your responses.



1. When I go to a meeting with my team, I always sit in the same chair.

2. I have made assumptions about clients or colleagues that have been proven wrong.

3. Even if I don't say anything, I sometimes judge others by how they look or what they're wearing.

4. I have flat out told people they are wrong.

- 5) I often look at or reply to messages on my phone when I am with others.
- 6) I sometimes talk about people behind their backs, rather than discuss my criticisms with them directly.
- 7) I tend to botch foreign names, so I just shorten them up to make things easier.
- 8) I get along with everyone—after all, we're pretty much all the same.

9) I consider myself color blind.

10) I have told colleagues born in other countries they speak English well.

11) I have complimented a Black colleague on his/her intelligence.

12) I have commented on someone else's body or appearance to that person or others (including a compliment).

Scoring

- Give yourself 8 points for every N answer. If you said N to all 12, give yourself a 4-point bonus.
- The higher the score the better
- For any Y answer, you may or may not be microaggressive.
- Here's the reasoning behind each question.



Well, what
the ^@%*%#
am I
supposed to
do??!!

Changing Mindset

Subtle Acts of Exclusion (SAE) rather than microaggression



- Sender may become defensive because Sender wasn't being aggressive
- Receiver may be offended because calling it "micro" makes less of receiver's experience
- Calling it micro sends the message that the issue is unimportant

Changing Mindset

Subject – Person or group excluded

Initiator – Person who says or does the SAE

Observer – Person who witnesses the SAE

Ally – an observer who speaks out

Bystander – an observer who chooses to do nothing

Steps to take – Subject and Initiator Explore your own marginality. (Think all of those categories in Title VII laws as a start.)

Think about what was said or done to make you feel less than valuable

Listen for understanding

Steps to take -Observer

Make a choice – Do nothing, talk about it with others, engage the Initiator.

If you choose to engage

Do it with grace

Tell Initiator what they said or did and why it may be an SAE

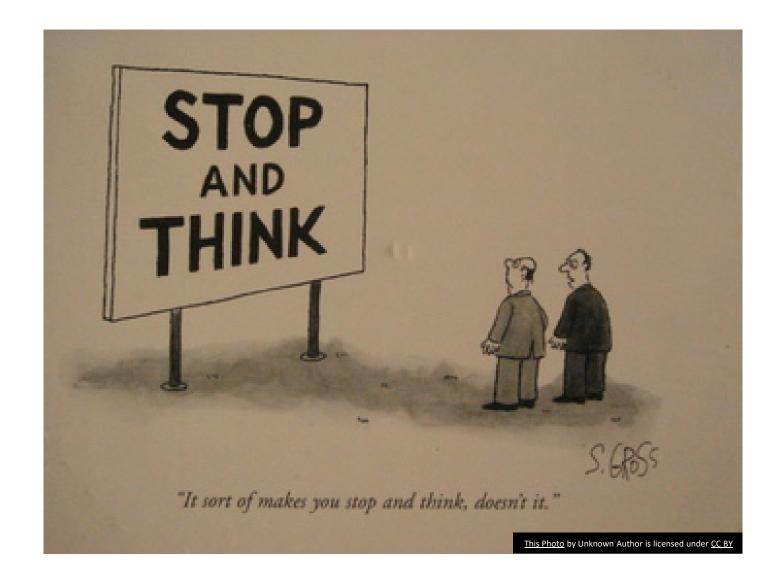
Listen and watch for response

Proceed with caution

Protect Initiator's "face"

Think before you speak

- Stereotypes or assumptions?
- Intrusive?
- Kind?
- Demeaning?



Think before you react





Assume good intent



Ask what the initiator meant – especially in cross-cultural situations



Explain how you perceived it – GENTLY (whenever possible)

References

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ETHICS IN REAL ESTATE TRANSACTIONS

PRESENTED BY
CYNTHIA DURHAM BLAIR
BLAIR CATO PICKREN CASTERLINE, LLC



CONFLICTS OF INTEREST







Rule 1.7: Conflict of Interest: Current Clients



Rule 1.8: Conflict of Interest: Current Clients: Specific Rules



Rule 1.10: Imputation of Conflicts of Interest: General Rule



Letters of Engagement

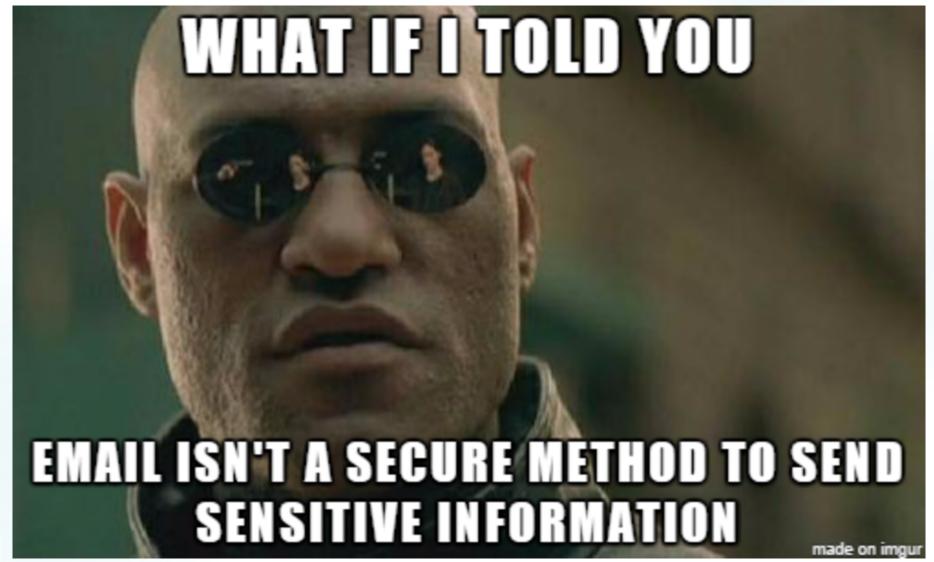
- Objective determination that lawyer can exercise independent judgment on behalf of each client
- Lawyer's representation of each party will not be materially limited by responsibilities to other party
- Lawyer informs each party of the potential conflicts of interest that may arise and the legal consequences
- Each client voluntarily consents
- Warning to notify lawyer immediately if a conflict arises

Rule 1.6: Confidentiality of Information



WIRE TRANSFER FRAUD







Business Email Compromise

- Easy access to information
- Use of unsecured email (mostly realtors)
- Spoofing of email addresses
- Fraudulent wiring instructions



Brower v. FrickTrentLizzio

 Make sure you are giving adequate warnings re: wire transfer fraud



ETHICAL MARKETING







Rule 5.4 – Professional Independence of a Lawyer



Rule 7.2 – Advertising



- Section 8(a) It is illegal to give or receive any
 - Thing of value pursuant to
 - An agreement or understanding to
 - Refer
 - Settlement services in connection with
 - A federal insured mortgage loan



- Referral = conduct directed to a person that affirmatively influences the selection of a settlement services provider
- Agreement or Understanding need not be in writing or even articulated or verbalized – practice or course of dealing is enough
- Thing of value very broadly defined
- All 5 elements MUST be present or no RESPA violation



 Section 8(b) – No person shall give... no person shall accept a split or percentage in connection with a real estate settlement service other than for services rendered



- Section 8(c) EXCEPTIONS:
 - To an attorney for services actually performed
 - By a title company to its duly appointed title agent for services performed in issuance of a title policy
 - By a lender to its duly appointed agent
 - Cooperative agreements between listing and selling agents



Ethics Update 2021

By Michael Virzi

Richland County Bar Association Free Ethics CLE

Friday, Oct. 22, 2021

I. Rule Changes

Rule 3.8

prosecutors' post-conviction duties

- (g) When a prosecutor learns of credible, material evidence or information such that there is a reasonable probability a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) make reasonable efforts to promptly disclose in writing that evidence or information to the defendant or, if the defendant is represented by counsel, to the defendant's counsel, unless a court authorizes delay; and
 - (2) promptly disclose in writing that evidence or information to the chief prosecutor in the jurisdiction where the conviction was obtained.
- (h) When a prosecutor knows of clear and convincing evidence or information establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall make reasonable efforts to seek to remedy the conviction.
- (i) A prosecutor who concludes in good faith, measured by an objective standard, that the evidence or information is not of such nature to trigger the obligations of paragraphs (g) or (h) of this Rule does not violate those paragraphs even if the prosecutor's conclusion is later determined to have been erroneous.

II. Discipline Cases

A. 10 Lawyers Who Fell Down on the Job

Each of these ten lawyers engaged in some combination of failing to pursue client's matters, failing to communicate with clients, failing to communicate with courts, and basically not keeping their arms around their client matters, resulting in disciplinary complaints from clients. The cases resulted, however, in very different levels of discipline based on very different aggravating factors: client prejudice, lying to cover their tracks (to a court or to ODC), failing to cooperate with ODC or the Commission, disciplinary history, or taking client money.

In re Smiley 4-month suspension + 1 year monitoring

• Fell down on the job, prejudicing a client, responded late to ODC twice.

In re Norton 1-year suspension

• Fell down on the job, prejudicing 7 clients.

In re Sheek 1-year suspension

• Fell down on the job, no client prejudice, but lied to the Court of Appeals to cover his incompetence, and had been previously cautioned and sanctioned for prior instances of incompetence and dishonesty.

In re Patterson 18-month suspension

• Fell down on the job, some client prejudice, then failed to respond to ODC in several matters and was placed on interim suspension 4 ½ years ago, and failed to cooperate with the trustee appointed to handle his client files.

In re Brooker public reprimand

• Fell down on the job, no client prejudice, lacked proper language in fee agreements.

In re Melnyk public reprimand

• Fell down on the job for 7 clients, but little or no prejudice.

In re Schnee disbarment

• Fell down on the job, prejudicing a few clients, lied to a judge about having forwarded an order for mental evaluation to SC DMH, lied to ODC about reasons for failing to act in another case

In re Jackson disbarment

• Fell down on the job, prejudicing clients, failed to make child support payments, & stole \$4,500 from a client

In re White 3-year suspension

• Fell down on the job, prejudicing a client, got suspended for 90 days, got reinstated, and fell down on the same job.

In re MacLean 3-year suspension

• Fell down on the job, got removed as counsel by the Bankruptcy Court from all pending cases, then got charged with possession of marijuana, cocaine, ecstasy, molly, and hydrocodone, failed to self-report under Rule 8.3.

B. Other Discipline Cases

In re Fisher January 27, 2021 Public Reprimand

Respondent is licensed to practice law in California. However, at all times relevant to the matters alleged in the formal charges, she was admitted pro hac vice in South Carolina. Respondent's great-aunt passed away in February 2009, and through a series of frivolous pleadings, motions, and appeals, Respondent raised various challenges to the will and protracted the related litigation for over ten years until the Supreme Court of the United States finally denied her petition for a writ of certiorari.

In our opinion addressing the lower court's award of sanctions against Respondent, this Court concluded Respondent lacked standing and repeatedly pursued claims that were meritless and wholly without evidence to support them. Fisher v. Huckabee, Op. No. 2018-MO-039 (S.C. Sup. Ct. filed Dec. 12, 2018) (withdrawn, substituted, and refiled Jan. 16, 2019). In doing so, we observed Respondent "has certainly engaged in abusive litigation tactics that amount to sanctionable conduct" under Rule 11, SCRCP.)

Respondent's misconduct resulted in a substantial waste of time, judicial resources, and estate assets.

In re Anderson April 21, 2021 public reprimand

Respondent engaged in a sexual relationship with a client during the client's divorce, in which he was representing her. As soon as the client's divorce was over, Respondent broke up with her.

In re Traywick
June 18, 2021
6-month suspension

Lawyer placed on interim suspension in June 2020. Disciplined one year later for posting racially insensitive comments the court found "incendiary" on a social media profile page that identified him and his law firm. The court found the two posts violated the Lawyer's Oath and tended to bring the profession into disrepute.

In re Sellers
August 11, 2021
disbarment

Respondent failed to respond to two ODC Notices of Investigation in two cases involving allegations of improper trust accounting practices. Respondent also failed to respond to Treacy letters in both cases. ODC issued a notice to appear and subpoena. Respondent provided an incomplete response on the eve of her on-the-record interview explaining she accidentally paid an employee with a check from the trust account rather than the operating account. Respondent did not provide any operating account records with her response and failed to produce reconciliation records requested in the notice of investigation. Respondent testified she used trust accounting software to record her trust account transactions and maintain her client ledgers but admitted she had never reconciled her trust account as required by Rule 417, SCACR.

For many clients, Respondent failed to fully disburse the funds she had in trust. For other clients, Respondent disbursed more than was deposited. Respondent sometimes failed to transfer earned attorney's fees from the trust account, leading to the commingling of her funds with her clients' funds and confusion about what amounts Respondent was owed. On at least one occasion, Respondent disbursed funds for a client before making the corresponding deposit. Respondent also issued refunds to and paid filing fees and costs for clients for whom no deposits could be identified.

Respondent paid her power bill, cable bill, and operating account negative-balance charge from her trust account.

In re Hopkins July 7, 2021 disbarment

Respondent admits he transferred money from his trust account to cover payroll and operating expenses for his law firm from November 30, 2017, to July 13, 2018, in the total amount of \$95,981.46. Respondent acknowledges he was using client money to keep his law firm afloat and states he always intended to repay the money. Respondent began to repay the trust account on June 26, 2018, and completely repaid the account on September 30, 2018.1 The trust account has been reconciled, and all monies are accounted for. Respondent has turned over all accounting and bookkeeping functions to a licensed Certified Public Accountant and has given all trust account responsibilities to another lawyer in the firm. Respondent has also completed the Legal Ethics and Practice Program Ethics School and Trust Account School.

In re Shabel September 22, 2021 public reprimand

Two checks from Respondent's former firm's trust account were presented against insufficient funds. As to the first check, ODC sent a notice of investigation, but the firm's office manager intercepted the notice and responded herself without informing Respondent or his law partner (Campbell, below). The second check was returned when the firm attempted to refund Client A the remaining funds it held on his behalf.

Respondent never had signatory authority on the firm's trust account, did not participate in monthly reconciliations, and did not take steps to ensure that the reconciliations were being performed. Respondent explained that he relied on his law partner to handle all financial matters for the firm.

Respondent admits he abdicated his responsibility for the trust account and that he did not discuss the requirements of Rule 417, SCACR, with his law partner. Respondent acknowledges he should have taken steps to ensure the firm was reconciling the trust account pursuant to Rule 417, SCACR.

In 2012, Respondent received a notice from the Internal Revenue Service (IRS) stating that as a partner in the firm, he was responsible for payroll taxes that had not been paid. After receiving the IRS notice, Respondent learned that although many payroll tax returns were submitted and taxes were withheld from employees' checks, the taxes had not been remitted to the IRS.

Respondent explained that he trusted his law partner and believed his law partner was handling the trust account and the payroll taxes but admitted he shared the responsibility and should have taken a more active role in the firm's financial affairs. Respondent expressed deep remorse for not being more involved in the operation of the firm as a partner. Respondent admits his failure to ensure payroll taxes were being remitted to the IRS and SCDOR violated Rule 8.4.

In re Campbell September 22, 2021 4-month suspension.

Campbell was Shabel's law partner (above). Respondent's office manager intercepted letters from ODC and provided responses without Respondent's knowledge or consent in several discipline cases involving bounced trust account checks and unhappy clients. Lawyer discovered the grievances when he received a Treacy letter from ODC that his office manager failed to intercept. Respondent wrote personal checks to cover the amounts the office manager had improperly disbursed from the trust account.

Respondent admits that prior to 2017, he abdicated his responsibility for the trust account to the office manager. Respondent did not perform monthly reconciliations himself and did not adequately supervise the office manager to ensure she knew how to perform the reconciliations.

In February 2017, Respondent attended the Legal Ethics and Practice Program Trust Account School. Based on a review of trust account records subsequently subpoenaed by ODC, Respondent is now properly performing trust account reconciliations.

In re Kern
August 4, 2021
September 22, 2021
resignation in lieu of discipline

The court granted the lawyer's motion to resign in lieu of discipline under Rule 35, RLDE, but detailed the allegations made against the lawyer in the disciplinary investigation and noted that they are "deemed to have been conclusively established for purposes of our consideration of Respondent's motion to resign in lieu of discipline." With criminal charges pending, the lawyer filed a petition for rehearing for the court to reconsider its unprecedented recitation of factual details in a Rule 35 order and the language that the allegations were conclusively established. The granted the motion for rehearing, dispensed with further briefing, and denied the motion to resign, directing ODC to continue the disciplinary action.