

Office of General Counsel



Practicing in a Virtual World

Tuscaloosa County Bar Association
November 6, 2020

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Alabama State Bar
General Counsel
Montgomery, Alabama

What's Going On



Right Now?

What is New at the Alabama State Bar?

1. Bob Methvin is the new ASB President.
(Taze Shepard is the new President-elect).
2. New Bar Commissioners Elected.
3. Advertising Rules comment period has ended.
4. Transition from Casemaker - - - - > Fastcase.
5. Hired a new ALAP Director – Jeremy Rakes, B.S., M.S.
6. Hired a new PMAP Director – Autumn Caudell, J.D.
7. 2020 meetings have been ***Virtual***.

What is my view of the job?



Hopefully you don't think this...



.... or this



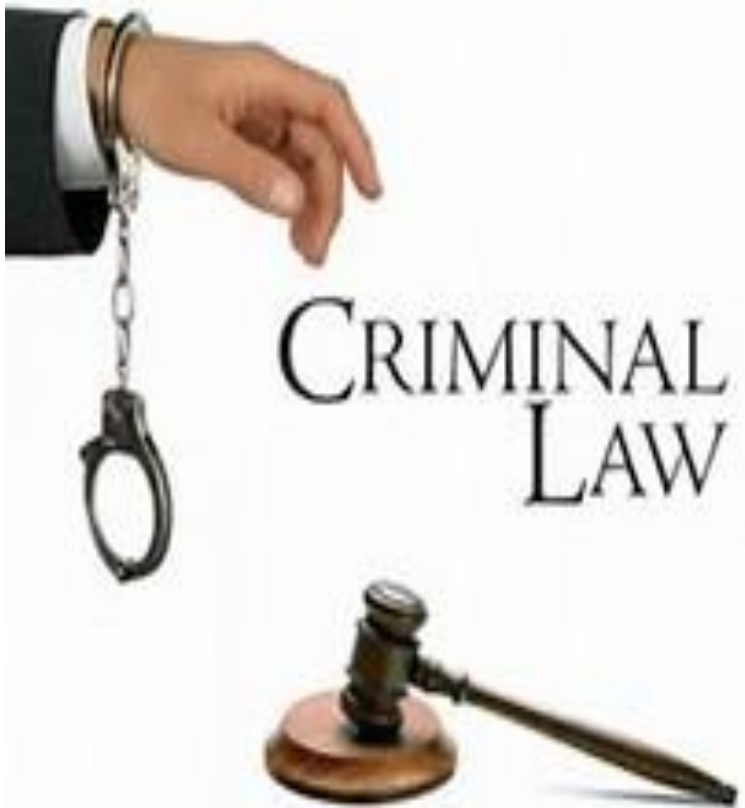
... but instead think this.



2019 Disciplinary Stats

• Complaints Received	1374
• Complaints Screened Out	974
• Formal Investigations Opened	298
• Private Reprimands	17
• Public Reprimands	12
• Suspensions	31
• Disbarments	14
• Surrender of License	1
• Formal Opinions Issued	0
• Informal Opinions Issued	3260

Beware Criminal and Family Law?



Most Violated Rules

Rule 1.4(a) & (b) Communication

Rule 1.3 Willful Neglect

Rule 8.4(g) Conduct adversely reflecting fitness to practice law

Rule 1.15 Safeguarding client/3rd party property

Rule 1.16 Declining/terminating representation

Most Violated Rules

Rule 1.5 Fees

Rule 1.1 Competence

Rule 5.5 Unauthorized practice of law

Rule 8.4(c) Conduct involving dishonesty/fraud

Can an Alabama Lawyer be
sanctioned for private conduct?

Answer: YES

Rule 8.4, *Ala. R. Prof. C.*

Misconduct

It is professional misconduct for a lawyer to:

...

(d) Engage in conduct that is prejudicial to the administration of justice

...

(g) engage in any other conduct that adversely reflects on his fitness to practice law.

Common Violations of Alabama Rule 8.4(g)

1. Attorneys getting arrested.
2. Social Media Outbursts.
3. Outrageous conduct not subject to a criminal penalty.

Not Common:

4. Bostock v. Clayton County, 590 U.S. ____ (2020).

Recent Example

Attorney initially spoke with a male African-American representative before being transferred to a female representative. During the recorded conversation with the female representative, attorney stated:

“I’ll tell you what; look here you fucking bitch. I’m just going to haul you into fucking court. Go fuck yourself, you fucking cunt. You’re about as much help as that fucking n****r that I spoke with. “

Attorney later exclaimed: “Fuck you. Fuck you, you bitch.”

Attorney also stated as follows:

“There’s some . . . I promise you there’s somebody at Samsung that’s an Asian, that’s above you. No lady, no woman at Samsung is the highest level. I can promise you that. So there is somebody above you. I would like to speak with them, please.”

Attorney threatened the female representative when he stated,

“I will shoot you in the fucking head . . . I want you to go fuck a dick.

Additional Remarks

1. 74% of complaints are screened out.
2. Diversity Task Force.
3. Proposed Advertising Rule Changes.



Rule 7 Series Advertising

Proposed Changes

- Getting rid of the word “Advertising”...now everything is about “communications.”
- Changes are partly designed to capture social media content.
- You retain your communications for 6-years (no longer send to the OGC)
- City, County or Town must appear in ads with individuals
- Must disclose if not licensed in Alabama

Professionalism

“Professionalism ultimately is a personal, not an institutional, characteristic...[I]ndividual lawyers must be the ones to cultivate this characteristic in themselves”

*A National Action Plan on Lawyer Conduct and Professionalism. A Report of the Working Group on Lawyer Conduct and Professionalism, Submitted to the CCJ Committee on Professionalism and Lawyer Competence, July 17, 1998, p.1.

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Perception v. Reality

In a well-known ABA Study:

- * 74% of respondents think lawyers are more interested in winning than in seeing that justice is served.

- * 73% think lawyers spend too much time finding technicalities to get criminals released.

- * 69% agree that lawyers are more interested in making money than in serving their clients.

American Bar Association Section of Litigation, Public Perception of Lawyers: Consumer Research Findings (2002).

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Perception v. Reality

Ranking the Honesty and Ethical Standards of each Profession:

Nurses	84%
Medical Doctors	67%
Police Officers	54%
Clergy	37%
Elected Officials*	12%-20%
Lawyers	19%

- 2018 Gallup Poll

* Poll broken down between governors, members of Congress, senators.

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Perception v. Reality

91% of Lawyers describe colleagues as civil/professional – however-

85% have experienced unprofessional behavior or rudeness in the last 6 months;

9% experienced prejudice (age, sex, race, culture);

< 90% agree incivility makes it harder to resolve cases; increases cost of litigation and discourages people from going into/staying in the profession.

Survey of Illinois Lawyers. Illinois Supreme Court Commission on Professionalism. (2014)

Office of General Counsel



ETHICS

A 3D illustration featuring six white, stylized human figures standing in a row on a reflective surface. Each figure is holding a large, thick, 3D letter. From left to right, the letters are: a red 'E', an orange 'T', a yellow 'H', a light green 'I', a green 'C', and a blue 'S'. The figures are positioned behind their respective letters, with their arms extended to hold them. The background is a plain, light gray.

Don't Rely on Your Friends for Ethics Advice



Rule 5.1 - Liability of Supervisory Lawyers

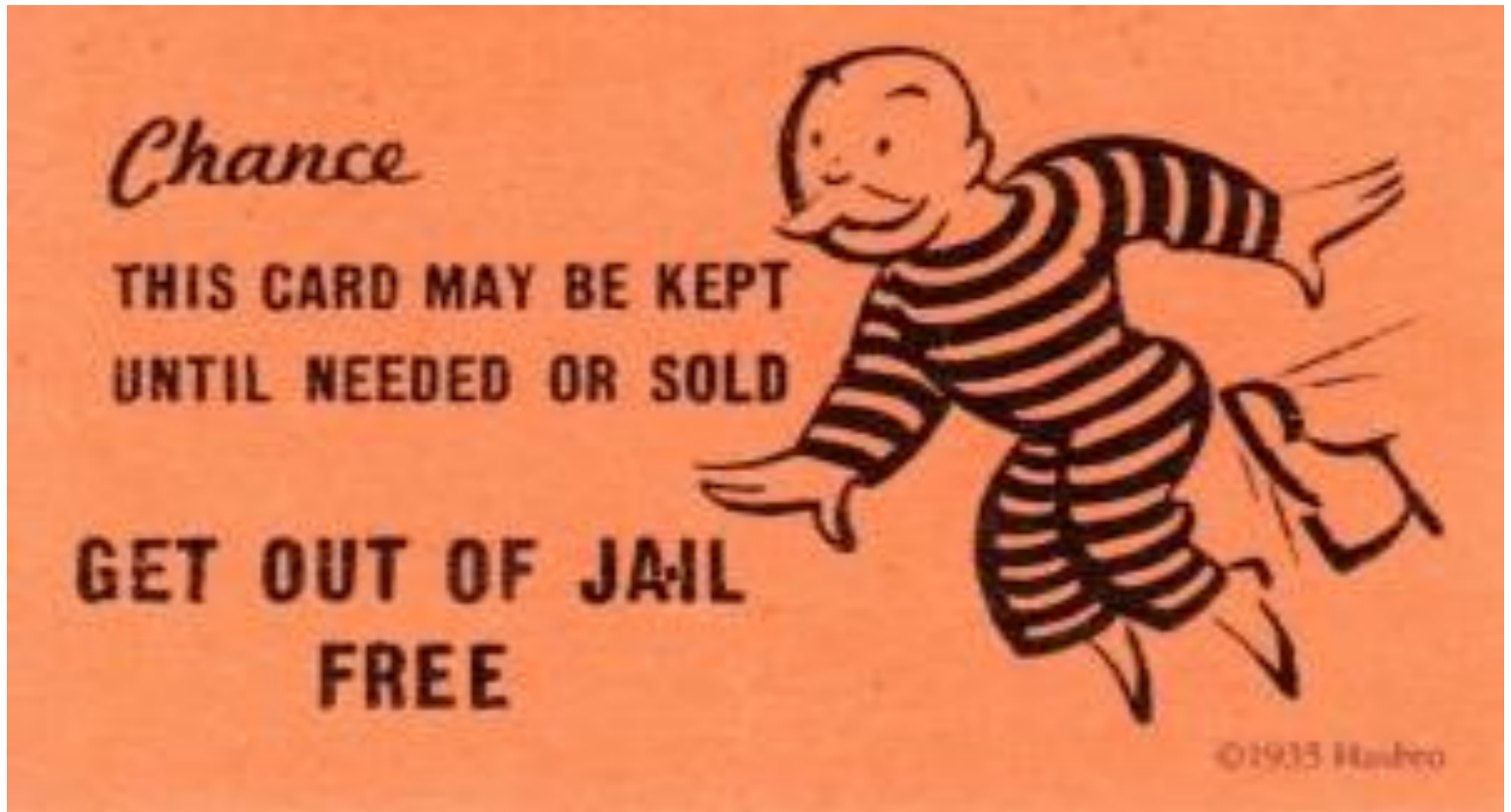
(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) The lawyer...has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

A shovel is shown digging into the ground in a grassy field. The shovel's head is partially buried in the soil, which is a mix of brown and reddish-brown. The grass is green and appears to be a mix of different types. In the background, there is a chain-link fence. The text "CALL BEFORE YOU DIG" is overlaid on the right side of the image in a bold, white, sans-serif font.

**CALL BEFORE
YOU DIG**

Why Get an Ethics Opinion?



Ethics Opinions

Alabama Rules of Disciplinary Procedure Rule 18.

Conduct not subject to disciplinary action.

If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, to the Office of General Counsel, said inquiry shall be considered confidential. Additionally, if said lawyer receives a formal or informal opinion from the Office of General Counsel that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action.

Pandemics Are Unique



Interruptions to Society Are Not



THIS IS THE

NEW NORMAL

A 3D rendering of a white puzzle with one red piece in the center. The red piece has the text "WHAT ARE YOUR OBLIGATIONS?" written on it in white, bold, 3D capital letters. The puzzle pieces are interlocking, and the red piece is the only one of its color.


**WHAT ARE YOUR
OBLIGATIONS?**

You **MUST** Communicate With Your Clients



Rule 1.4 Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



“the single biggest
problem in
communication is the
illusion that it
has taken place”

-George Bernard Shaw

Additional Thoughts on Client Communication

1. Make sure the client knows how to communicate with you. (Set appropriate barriers)
2. Be careful contacting clients through social media.
3. Be mindful that the client may now live in a different home environment.
4. Be mindful of your appearance on Zoom calls.
5. Be mindful of your virtual backgrounds.

What else?

Cases Have to Keep Moving

Keep Moving Forward.

Walt Disney

Rule 1.3 Diligence

A lawyer shall not willfully neglect a legal matter entrusted to him.

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Committee Comments:

“The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.”

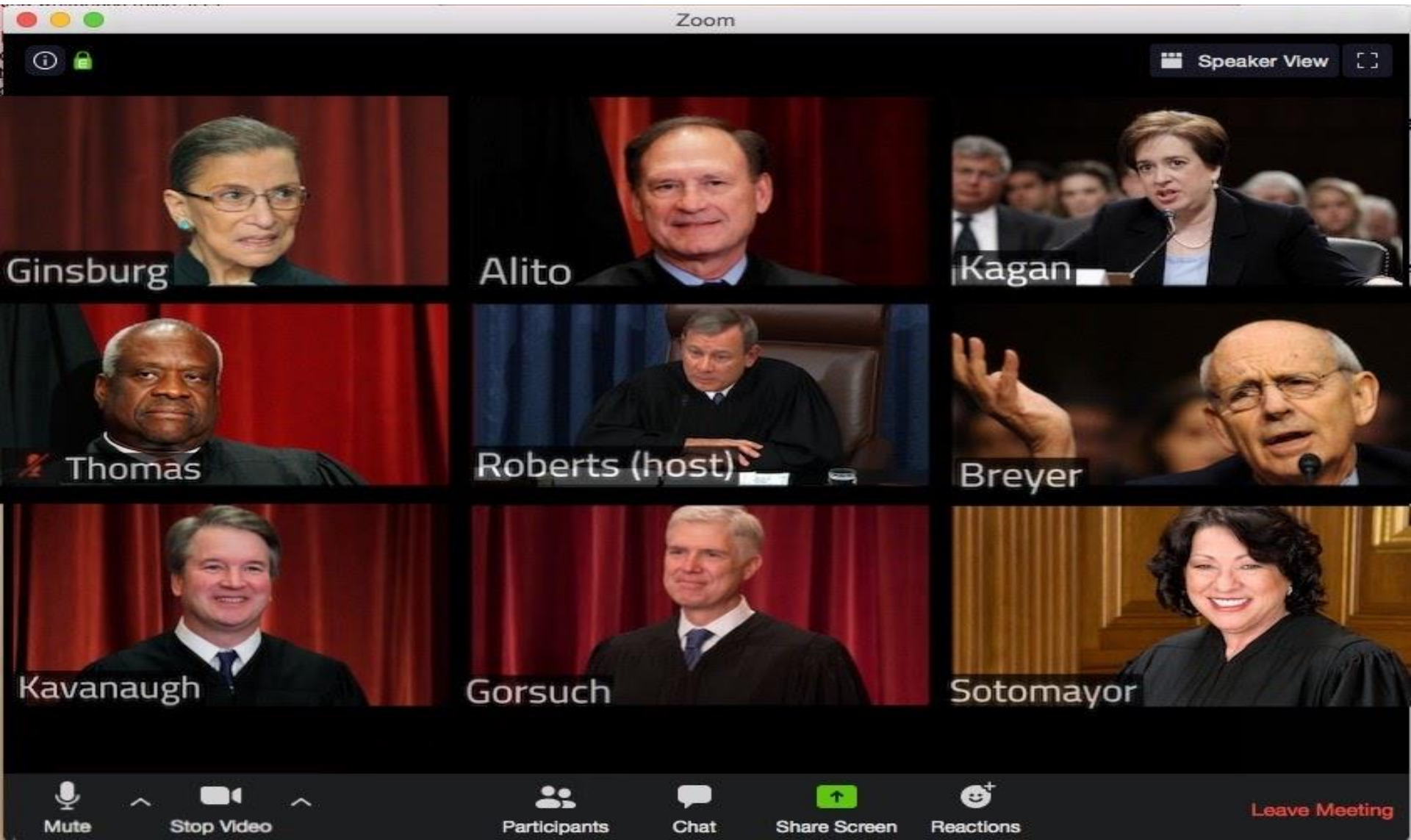
Living

In a

Virtual

World

Everybody is Doing It *Virtually*



Courts Are Now Prepared



DO NOT
RECORD



LIVE

Teal Ericson



YOU Must Be Prepared

✓ PLAN
✓ PREPARE
✓ PERFORM

Do Not be Afraid of Technology



Learning Technology Creates a Base



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.**

A lawyer and client may agree, pursuant to Rule 1.2(c), to limit the scope of the representation with respect to a matter. In such circumstances, competence means the knowledge, skill, thoroughness, and preparation reasonably necessary for such limited representation.

Rule 1.1 Competence

Competence = Knowledge (including technology)

Competence = Skill (admit exhibits remotely)

Competence = Thoroughness

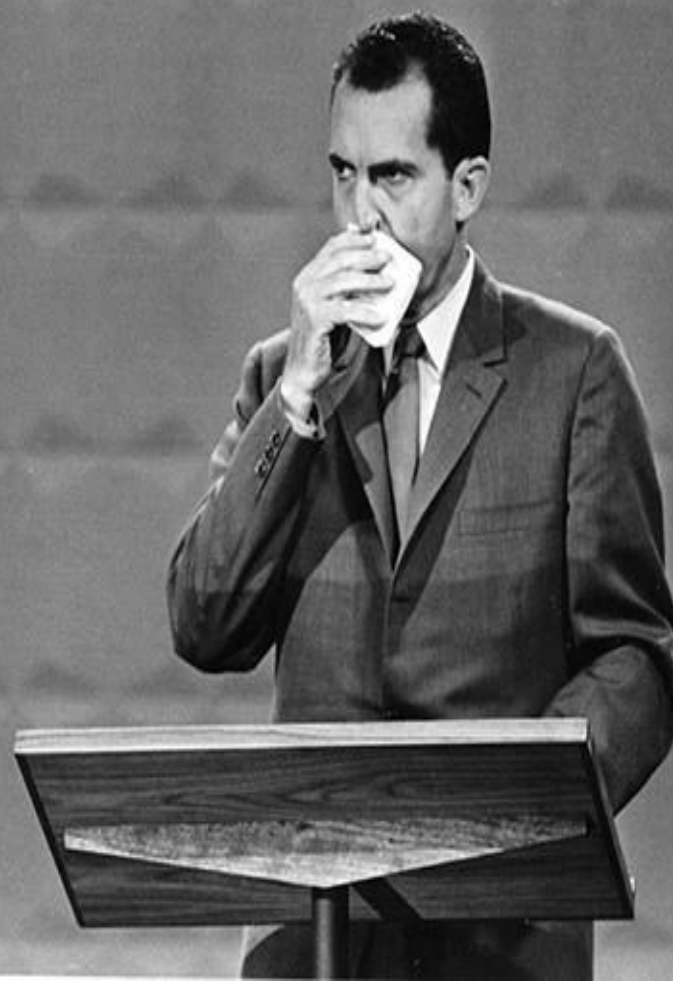
Competence = Preparation

That is reasonably necessary for the representation.

**Tech can
make you
better !**



Nixon-Kennedy Debate



Body Language Matters

Signs that someone is lying

Body language and speech expert Michael Kelly says someone who is lying might display one or more of these traits

- Looking away rather than making eye contact
- Holding eye contact too long
- Being too quick to end an interaction
- Distracting behaviours, such as touching their ears or playing with their hair or clothes
- Speed of the voice is too quick
- Trying too hard to sound natural so that they end up sounding false



Common lies

Men

- 1 Nothing's wrong, I'm fine
- 2 This will be my last pint
- 3 No, your bum doesn't look big in that
- 4 I had no signal
- 5 My battery died

Women

- 1 Nothing's wrong, I'm fine
- 2 Oh, this isn't new, I've had it for ages
- 3 It wasn't that expensive
- 4 It was in the sale
- 5 I'm on my way

Parents to children

Santa Claus

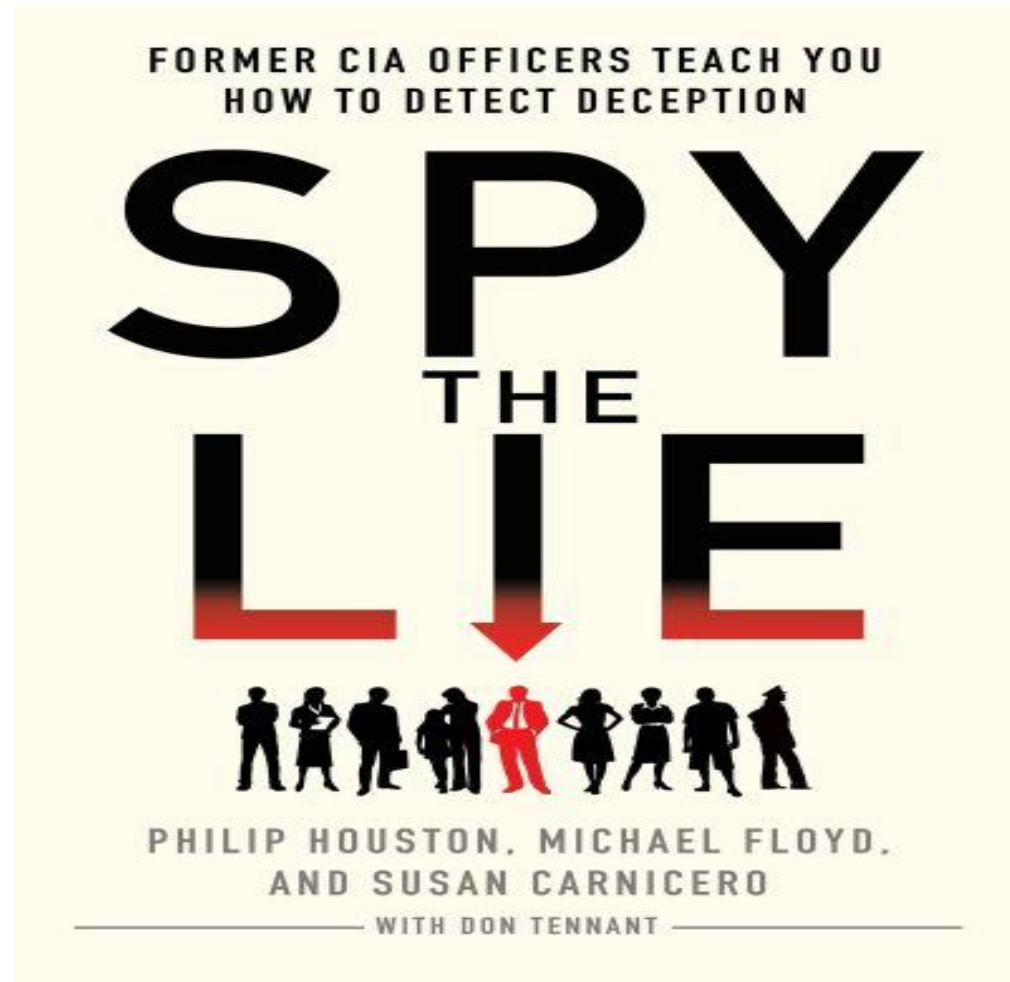
Tooth fairy

Getting them to eat dinner

The time to get them to bed early

Getting them to brush their teeth

Great Book



The Downside of Technology



LAWYER²⁴⁷

Data Breaches

Getting struck
by a lightning



1 in 960.000

Dating a
millionaire



1 in 220

Experiencing a
data breach

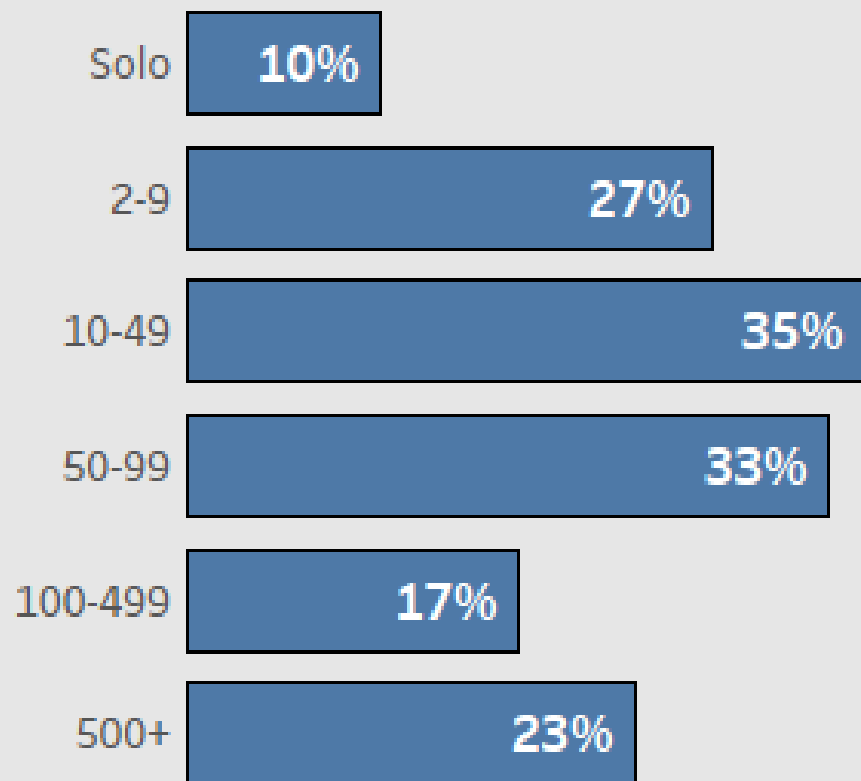


1 in 4

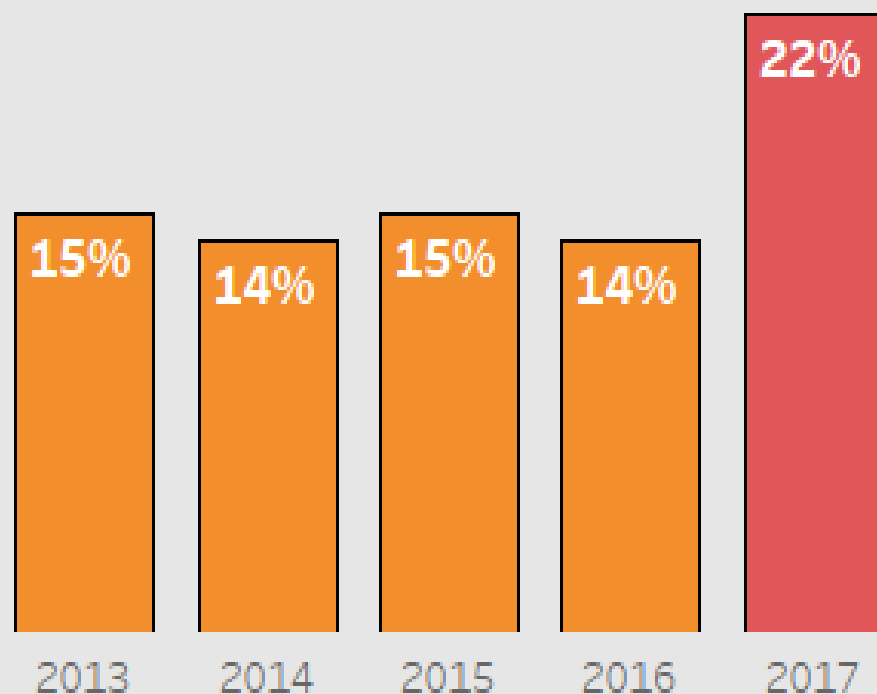
Midsize Law Firms Report Most Breaches

Over a third of firms with 10 to 99 attorneys were reportedly compromised in 2017.

Law firms that reported security breaches in 2017, by attorney count



The number of firms surveyed that have experienced a breach in the past jumped 8 percentage points



Source: ABA Techreport 2017

ABA Formal Op. 477R (5/21/2017)

“Securing Communication of Protected Client Information”

- **Reviews 2012 Model Rules Technology Amendments**
- **Duty to prevent inadvertent or unauthorized disclosures**
- **Reasonable efforts standard (safeguards)**
(sensitivity, likelihood, cost, difficulty, ease to use)
- **Special protections by agreement, law or circumstances**

What are “Reasonable Efforts”

- Know your technology. (Security on?)
- Know the information you are storing...and why.
- Use software that the manufacturer is updating.
(Not Windows XP, Windows 7)
- Are you encrypting your communications?
- Are you backing up your data?
- Are you using the Cloud?
- Are you working with reputable vendors?
- Are you training your staff?

When Your Home is Now Your Office

- Same security obligations exist.
- Home systems are generally more vulnerable.
- How are you backing up data from your home system?
- Are you using your firm issued computer?
- Be mindful of people in your home.

ABA Formal Op. 483 (10/17/2018)

“Lawyers’ Obligations After an Electronic Data Breach or Cyberattack”

- Before breach, develop data breach plan
- Must monitor for data breach
- Stop breach and restore systems
- Reasonably determine what occurred
- Provide notice of data breach to clients
- Notice must give sufficient information

Statutory Obligations

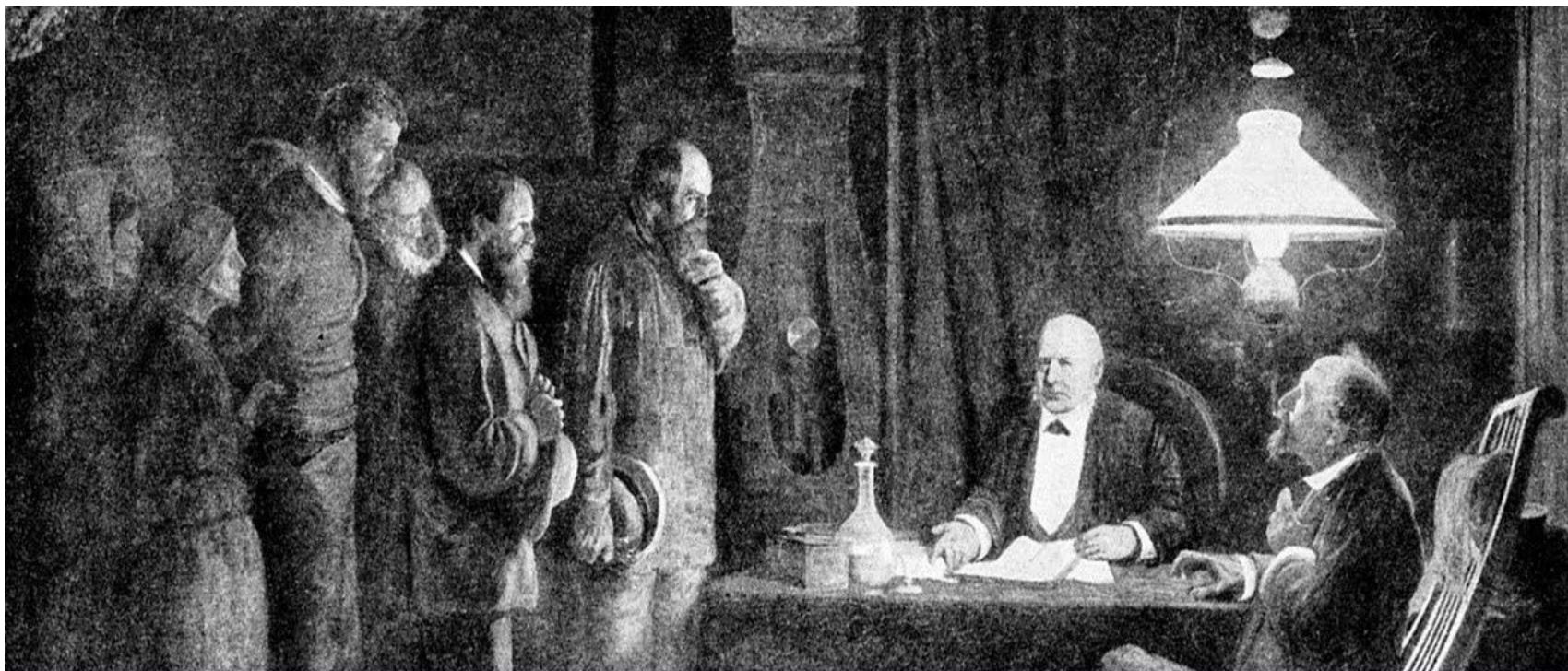
- Alabama Data Breach Notification Act (6/1/2018)
 - * Applies to lawyers and law firms
 - * Deals with “SPII”
 - * Requires tech safeguards & timely notice
- HIPPA
- Gramm Leach Bliley Act
- Sarbanes Oxley

Do Not Use Technology to Avoid the Rules



Do Not Use Technology to Avoid the Rules

- Pro Hac Vice.
- Do not listen in on conversations NOT meant for you.
- Do not get clients to do things that you could not do yourself.



ORGANIZATION AS CLIENT

Rule 1.13



Organization as “The Client”

- Rule 1.13 (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Organization as “The Client”

- Conflicts within the organization.
- Make it clear who you represent.
- Get permission of appropriate official to represent employees, officers, officials.
- If a conflict later develops, you may have to withdraw from representing all parties.

CONFLICT
OF INTEREST



Rule 1.7 Conflict of Interest:

General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to other clients, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

Rule 1.7 Conflict of Interest: General Rule

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interest, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the **same or a substantially related matter** in which that person's interests are **materially adverse** to the interests of the former client, unless the former client consents after consultation; or
- (b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Things to Think About When Representing Multiple Parties

1. Is this a case where the clients could conceivably be adverse (on any material issue/liability phase/damages phase).
2. Can I disclose the proper information to even obtain “informed consent.”
3. Do the parties want the same thing?

Things to Think About When Representing Multiple Parties

5. What about counter-claims against specific clients?
6. Defendant – is there going to be another lawsuit down the road to recoup from one of the parties?

Representing a Subsidiary

Subsidiary
Companies



Representing a Subsidiary

Formal Opinion 1992-20

“You may represent a wholly owned subsidiary ...while, at the same time, instituting litigation against the parent company if the subsidiary and parent are separate corporate entities.”

You may represent both entities in unrelated litigation if:

1. both entities have separate corporate identities
2. there is no risk that confidential information will be misused
3. and your representation of the subsidiary is not limited by your litigation involving the parent.

“I represent this person for the purposes of this deposition.”

1. You probably don't . . .
2. Must comply with Rule 1.2
& Rule 4.2

Rule 1.2(c): Limited Scope of Representation

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

The client's informed consent must be confirmed in writing unless:

1. Advice is solely a telephone consultation;
2. The representation is provided by a nonprofit legal-services program lawyer or you are participating in a pro bono program approved by the ASB and the lawyer's representation consists solely of providing information and advice or the preparation of legal documents; or
3. Court appoints the attorney for a limited purpose set forth in an order.

Rule 4.2 (b) Communication with Person Represented by Counsel

(b) A person to whom limited-scope representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer has been provided with a written notice of the limited-scope representation.

If such notice is provided, the opposing lawyer shall not communicate with the person regarding matters designated in the notice of limited-scope representation without consent or authorization as provided by Rule 4.2(a).

Recent Fact Pattern

1. Attorney represents Corporation A and Corporation B being sued over the sale of certain assets.
2. Attorney meets with an employee who has worked for both corporations and was intimately involved in the sale of the assets.
3. Attorney meets with the employee the day before the deposition to prep him. After the prep, tells the employee he only represents the corporations.
4. At the deposition, he asserts attorney-client privilege and instructs employee not to answer a question. On a break, he gives the employee legal advice.
5. Corporation A and the employee settle before trial. Corporation B goes to trial. At trial, attorney blames fraud on employee.

Beware of Metadata (or Be Aware of Metadata) ?



Ethical Propriety of Metadata Mining

Formal Opinion 20017 – 02:

“Lawyers have a duty under Rule 1.6 to use reasonable care when transmitting electronic documents to prevent the disclosure of metadata containing client confidences or secrets.”

Overbearing client?



Your Professional Judgment



Rule 5.4(c)

Professional Independence of a Lawyer

“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.”

Examples of Possible 5.4(c) Issues

1. Not allowing the lawyer to take depositions.
2. Limiting the lawyer's ability to file pleadings.
3. Limiting the lawyer's review of discovery.
4. Outsourcing discovery.
5. Limiting the travel of the lawyer.

REMEMBER THIS?

Rule 5.1 - Liability of Supervisory Lawyers

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) The lawyer...has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.



Lying Client Example

- You successfully win your case after your client testifies convincingly that he had no knowledge of a prior situation.
- After celebrating back at your office, the client says that, “Well, maybe I had some information on this issue.”

Rule 3.3 Ala. R. Pro. C.

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or,

(3) Offer evidence that the lawyer knows to be false. **If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.**

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.3 Remedial Measures

1. Counsel the client to be truthful.
2. Withdraw from the case if that will remedy the issue.
3. Disavow certain pleadings if offered in that form.
4. Notify the court.
5. Client may still dispute what he told the lawyer.
(Must withdraw)

Rule 3.3 Things to Think About

1. Do you “know” client is lying? (actual knowledge, mere suspicion is not enough)
2. Cannot ignore an obvious falsehood.
3. What does the “end of the proceeding “ language mean? (Can disclosure remedy the effect of the fraudulent conduct?)

My Client is Having a Crisis... What Do I Do?



Marengo Co. District Attorney Shot in Demopolis

Posted: Nov 15, 2018 2:24 PM CDT

Updated: Nov 16, 2018 9:16 AM CDT by [Alabama News Network Staff](#)



Cullman lawyer identified as victim in fatal home invasion

Alabama News Network has confirmed that Marengo County District Attorney Greg Griggers has been shot in Demopolis. Authorities say the suspected shooter was a former state trooper.

CBS
NEWS

NEWS ▾

2020 ELECTIONS ▾

SHOWS ▾

• LIVE ▾



Investigators believe federal judge was "intended target" of attack that killed her son and wounded her husband, source says

Rule 1.6(b) exceptions

Rule 1.6 CONFIDENTIALITY OF INFORMATION

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;...

The Courthouse is a Dangerous Place !

Witness in Montgomery Trial Gunned Down After Testifying

Montgomery Circuit Judge Roman Shaul has declared a mistrial in Jacques Boone's murder and assault case after a key witness for the state was shot and killed outside of the courthouse just five minutes after testifying.

Witness in Montgomery trial gunned down minutes after testifying

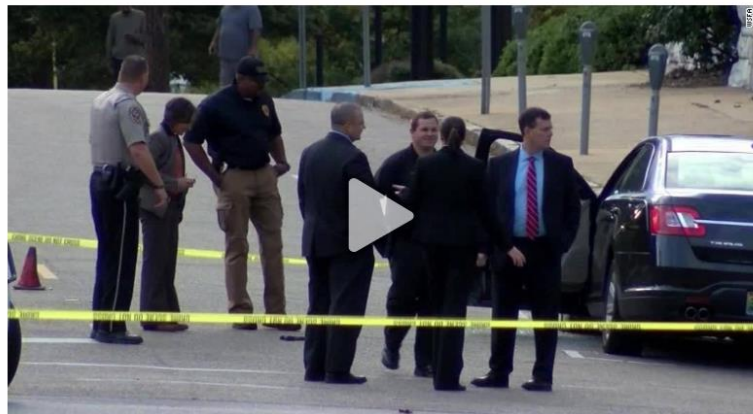


Defendant's brother kills victim's brother after testimony, police say



By Elliott C. McLaughlin, CNN

Updated 9:03 PM ET, Thu October 26, 2017



More from CNN



Teenage
Laurel Gi



Bull elep
Thailand

Paid Content



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