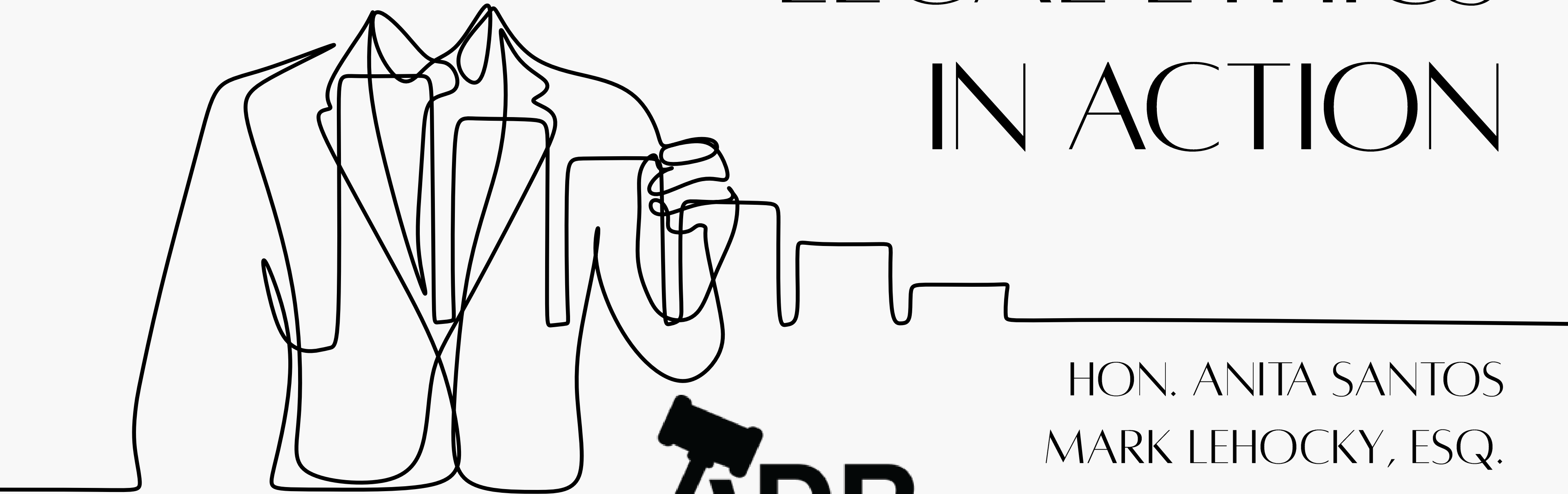


LEGAL ETHICS IN ACTION

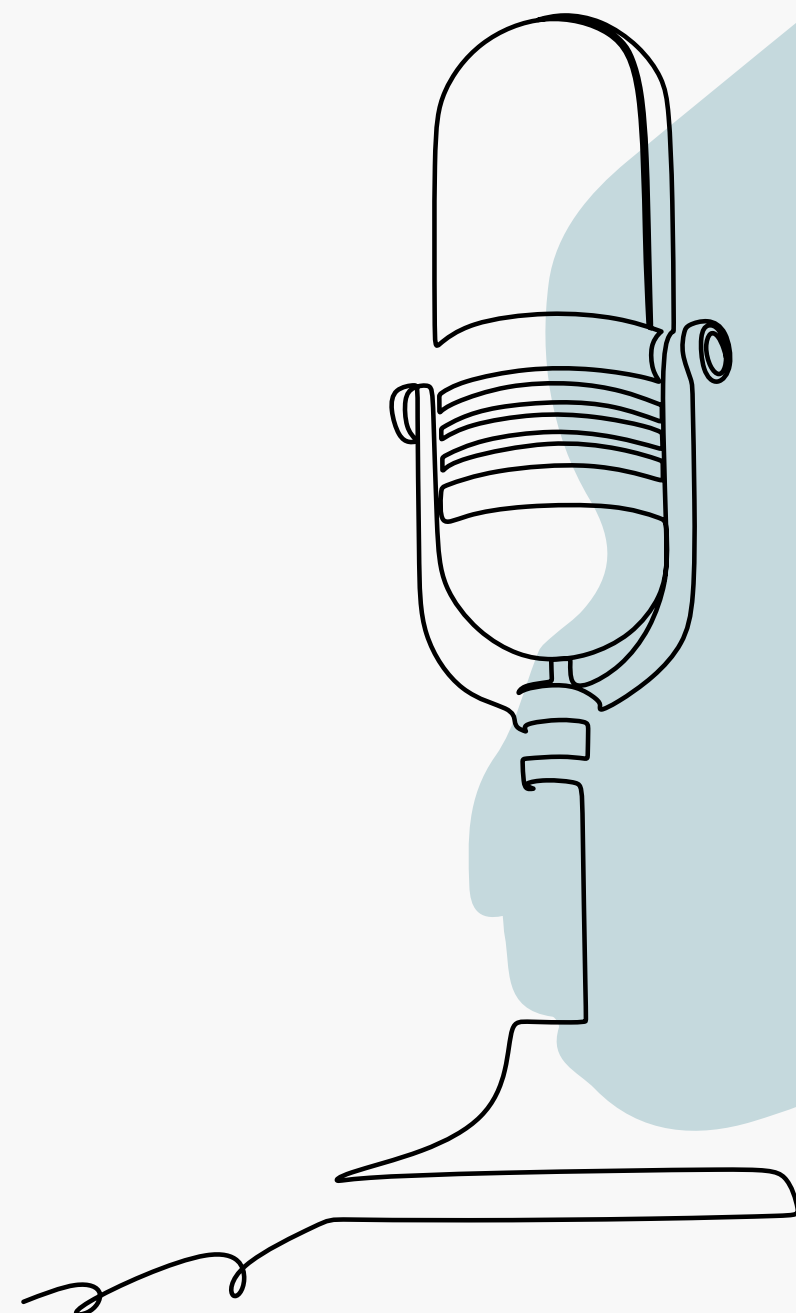


HON. ANITA SANTOS
MARK LEHOCKY, ESQ.



ADR SERVICES, INC. MCLE DAY
JAN. 11, 2023

SPEAKERS



HON. ANITA SANTOS

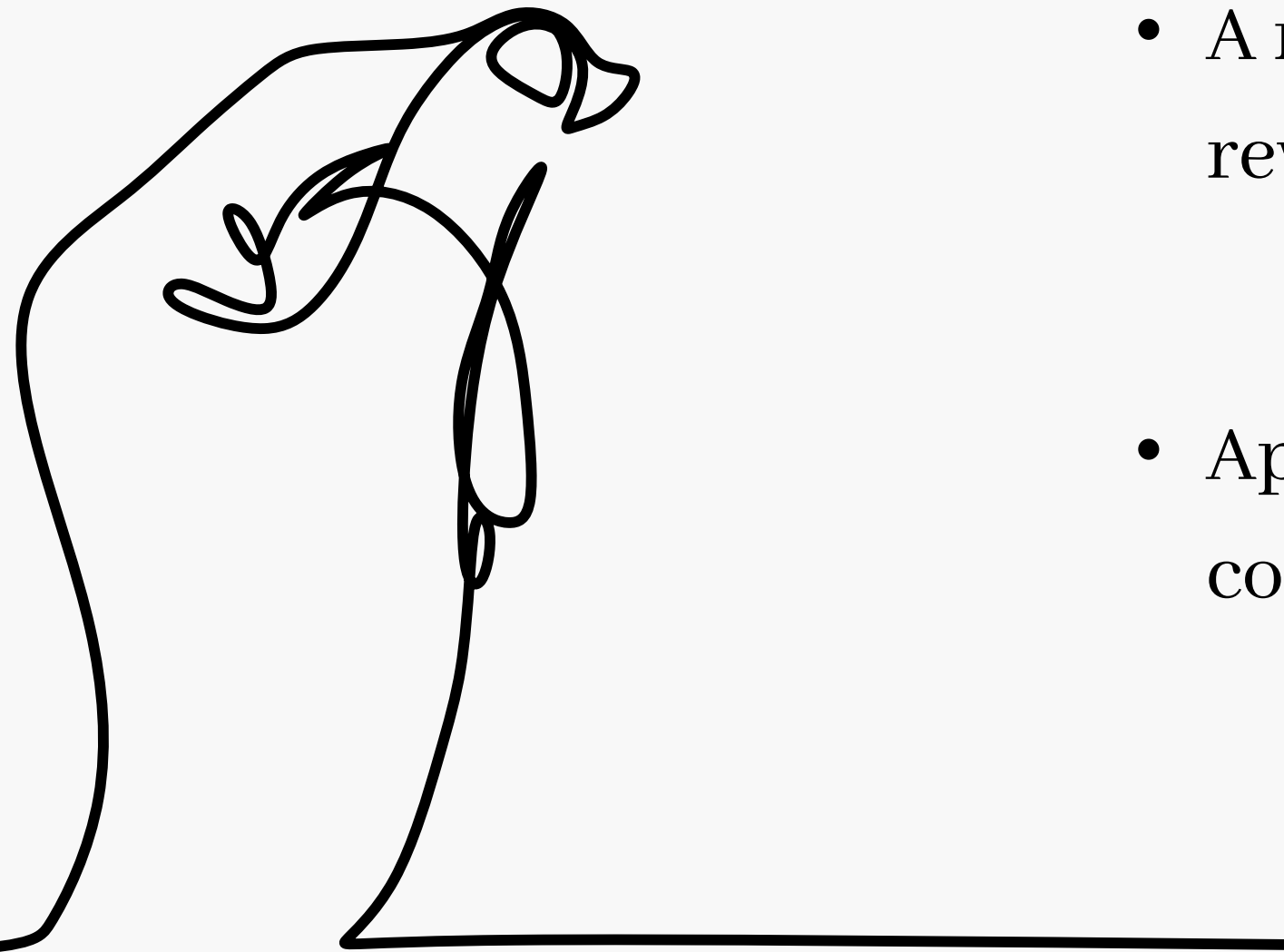
Mediator
Judge Pro Tem
Arbitrator



MARK LEHOCKY, ESQ.

Mediator
Arbitrator
Referee

OUR AGENDA



- A recap on California's Ethics Rules, as recently revised and interpreted
- Applying the Rules to ethical issues impacting compliance, competence, and confidentiality



2018–2019

2019–2020

California Supreme Court issues 69
new ethics rules

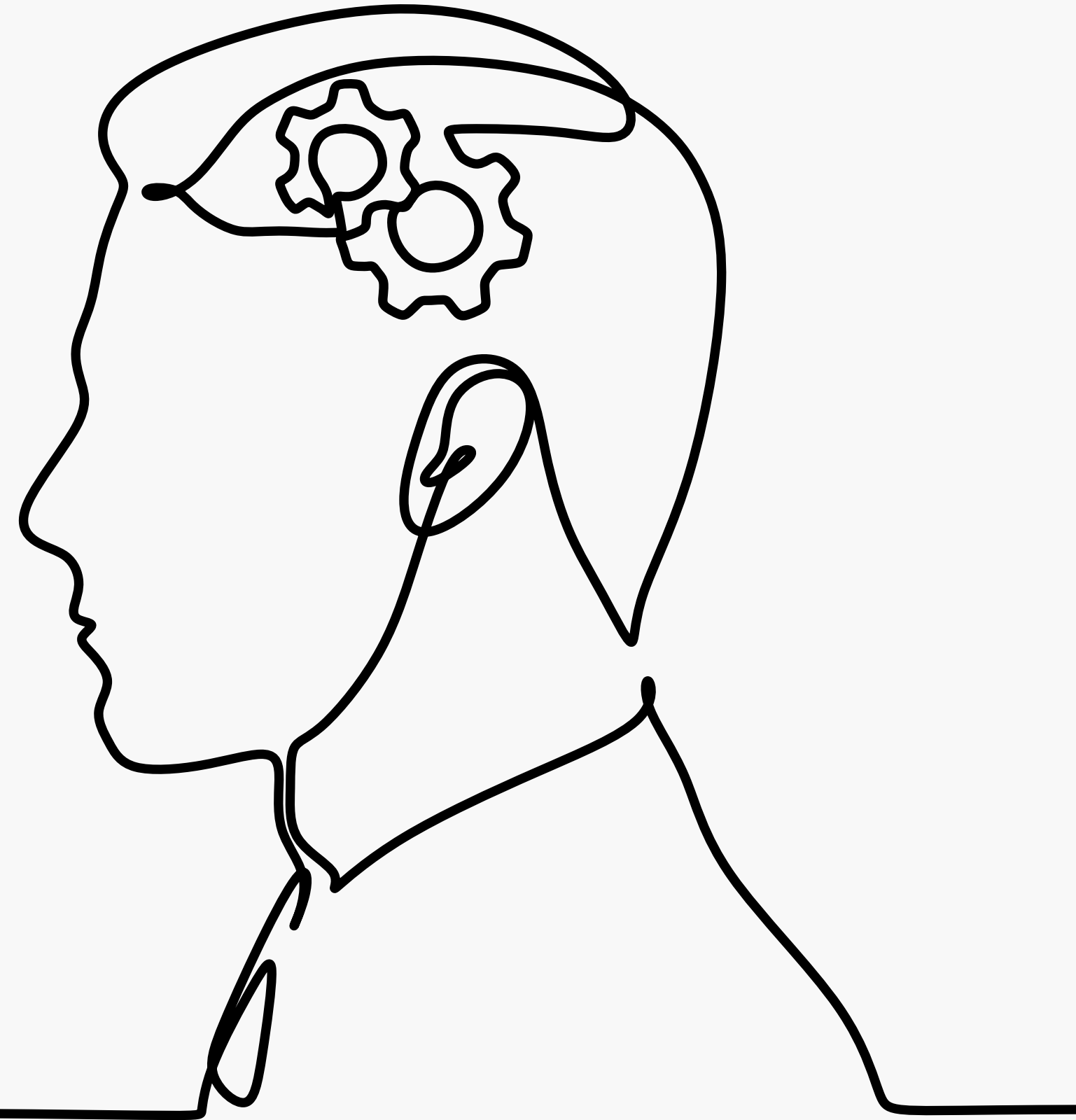
Revised rules track the ABA Ethics Rules
adopted by other states

State Bar Committee on Professional
Responsibility and Conduct (CPRC)
issues a series of formal Opinions
applying the new rules

COMPETENCY ISSUES

In adopting new Ethics Rules, California Supreme Court rejected a proposed rule as to attorney's obligations to clients "with diminished capacity"

Absent a new rule, CSCPR issues Formal Opinion 2021-207, providing some guidance



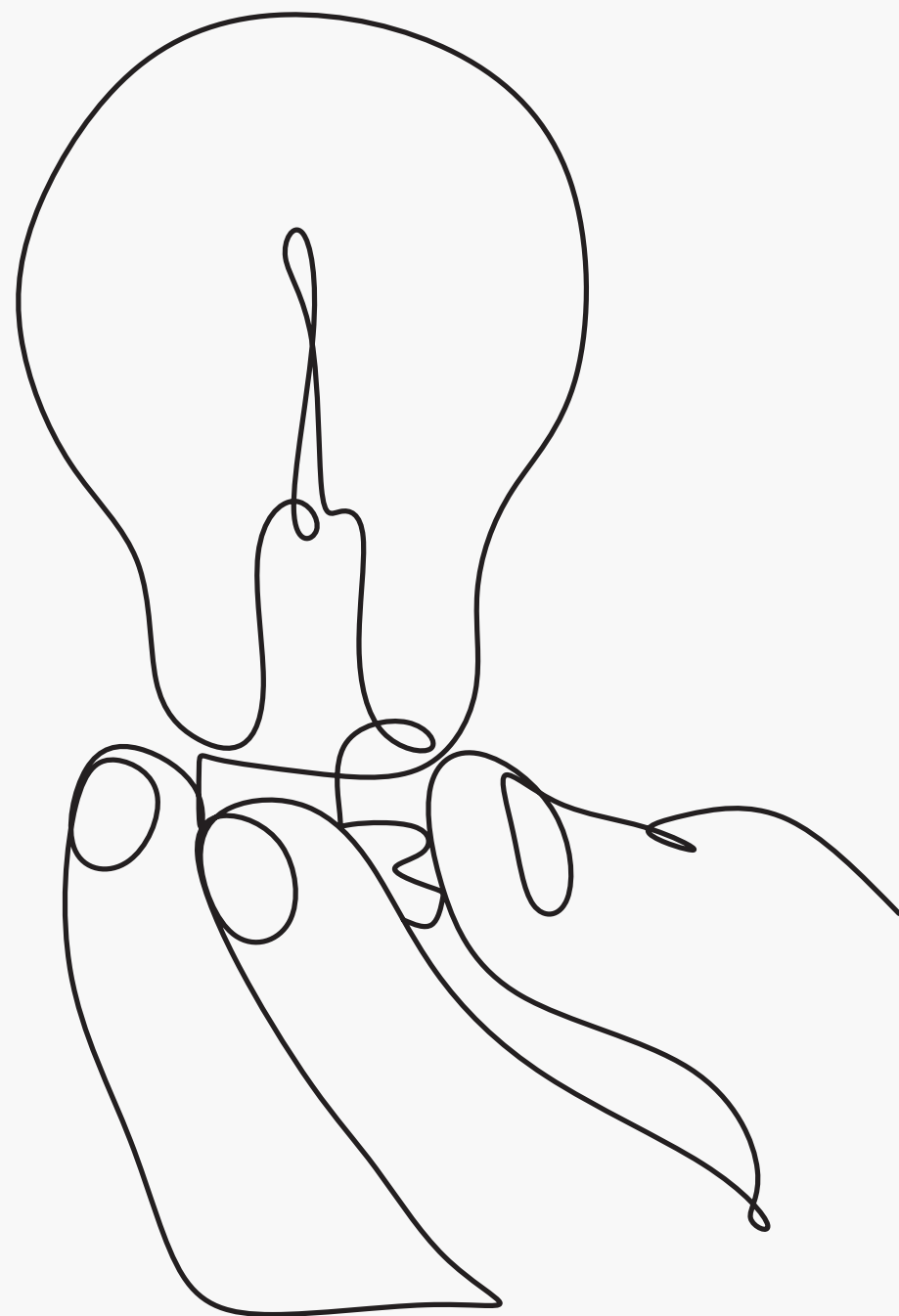
COMPETENCY ISSUES: SO WHAT TO DO?

Client has indications of diminished capacity and wants you to take actions on their behalf:

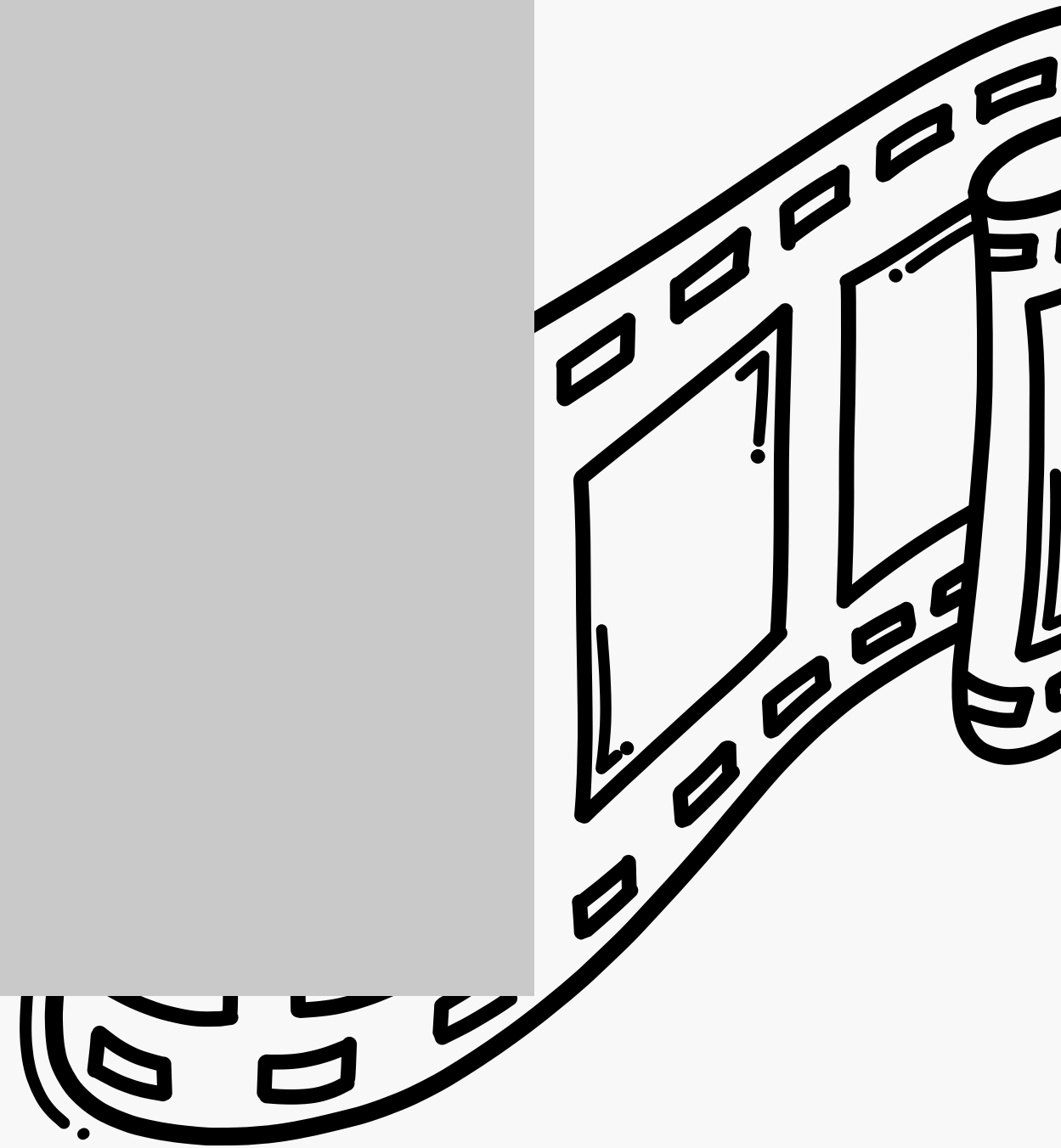
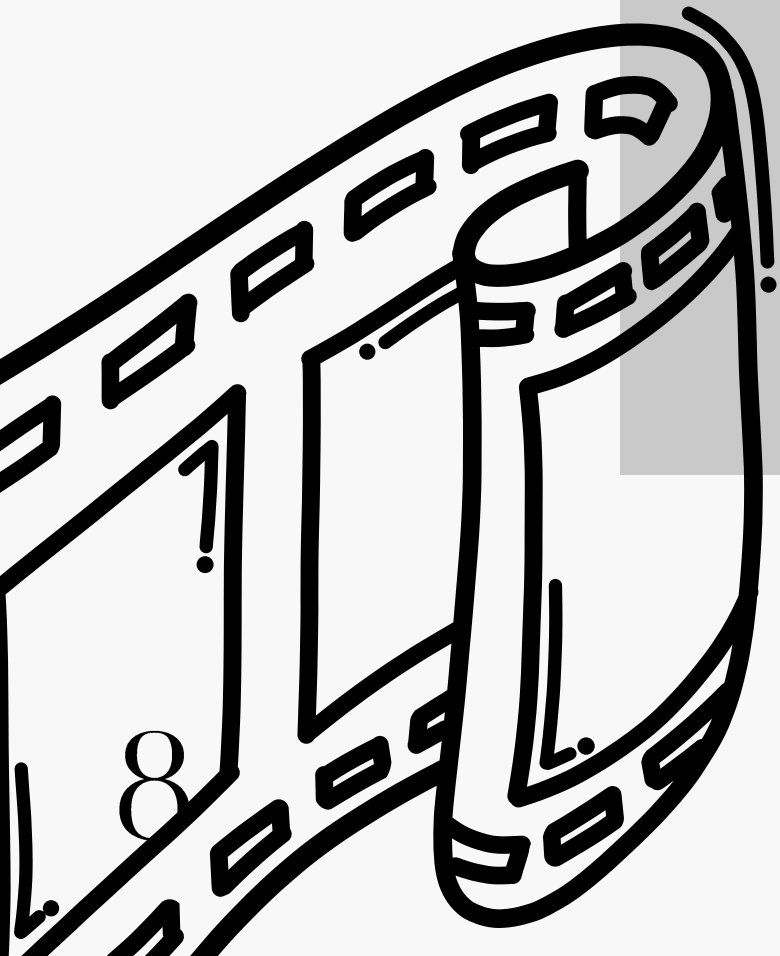
- Opposing a conservatorship application
- Changing their will to juggle beneficiaries
- Entering into contract at relative's urging
- Before client's capacity worsens



PROHIBITING HARASSMENT, DISCRIMINATION AND RETALIATION: RULE 8.4.1



- Prohibits discrimination, discrimination or harassment as to any client or in operating a law firm
- Requires lawyers to notify DFEH and EEOC of disciplinary actions taken by State Bar
- Requires “all law firm lawyers” to “advocate corrective measures” to address known improper conduct by firm, other lawyers and firm personnel



PHILADELPHIA (1993)



DUTY TO SUPERVISE
AND
DUTY TO SPEAK UP

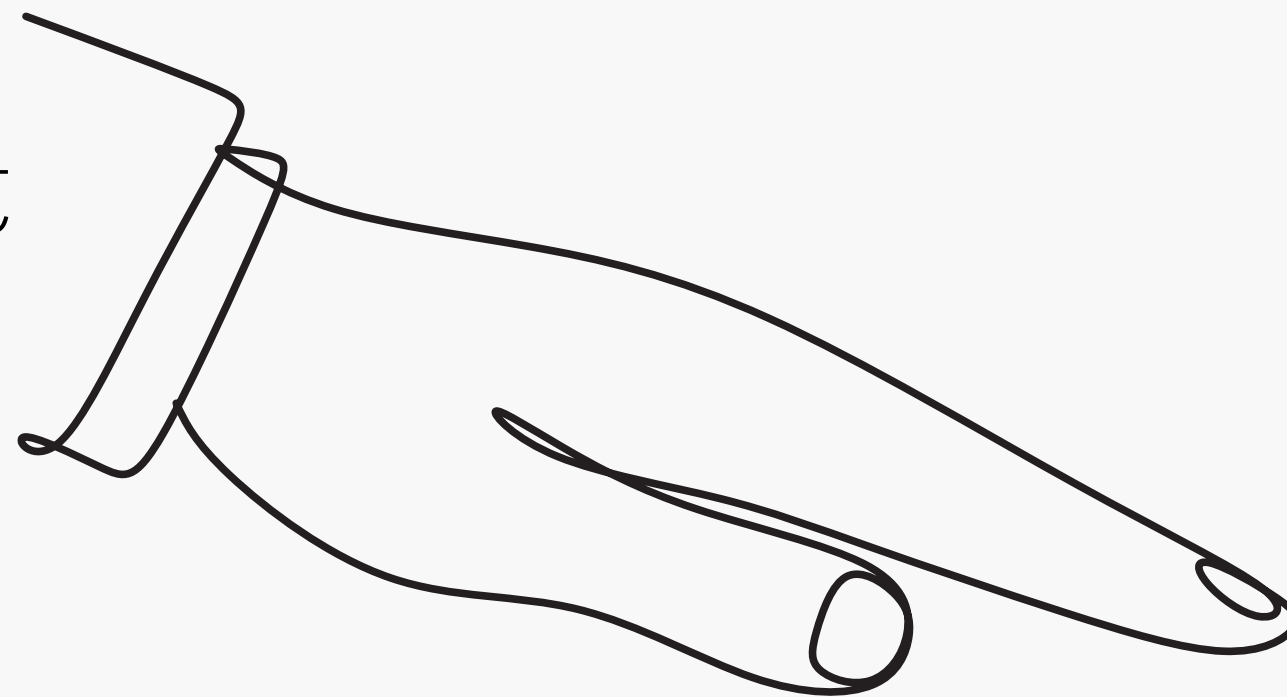
RULE 5.1

Requires supervising lawyer to make reasonable efforts to ensure ethical compliance by subordinates; and all firm lawyers may be “reasonably” responsible if they exercise authority and/or ratify conduct.

RULE 5.2

Eliminates a subordinate lawyer’s defense that they were “simply following orders” when charged with an ethical violation.

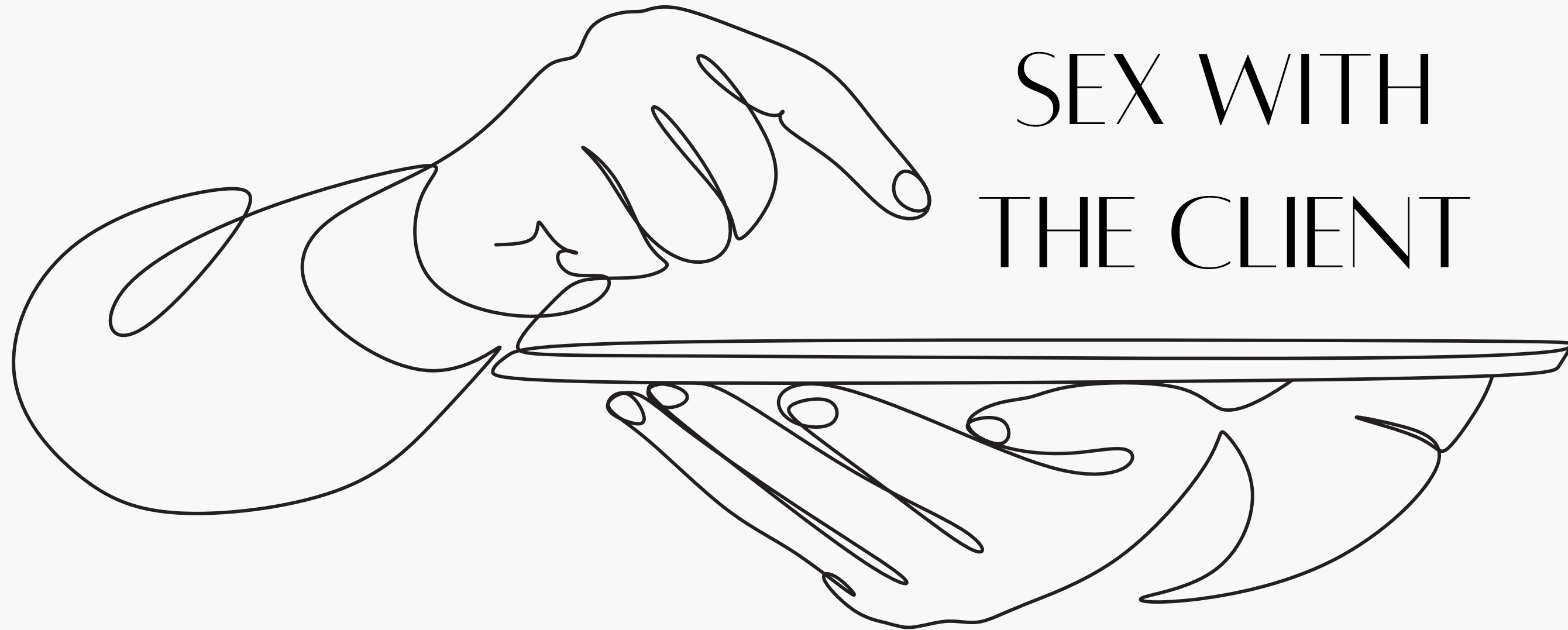
A firm refuses to represent transgender people.



The firm office manager insists on daily private viewing and approval of all female staff members' attire.



RULES 5.1, 5.2, AND 8.4.1



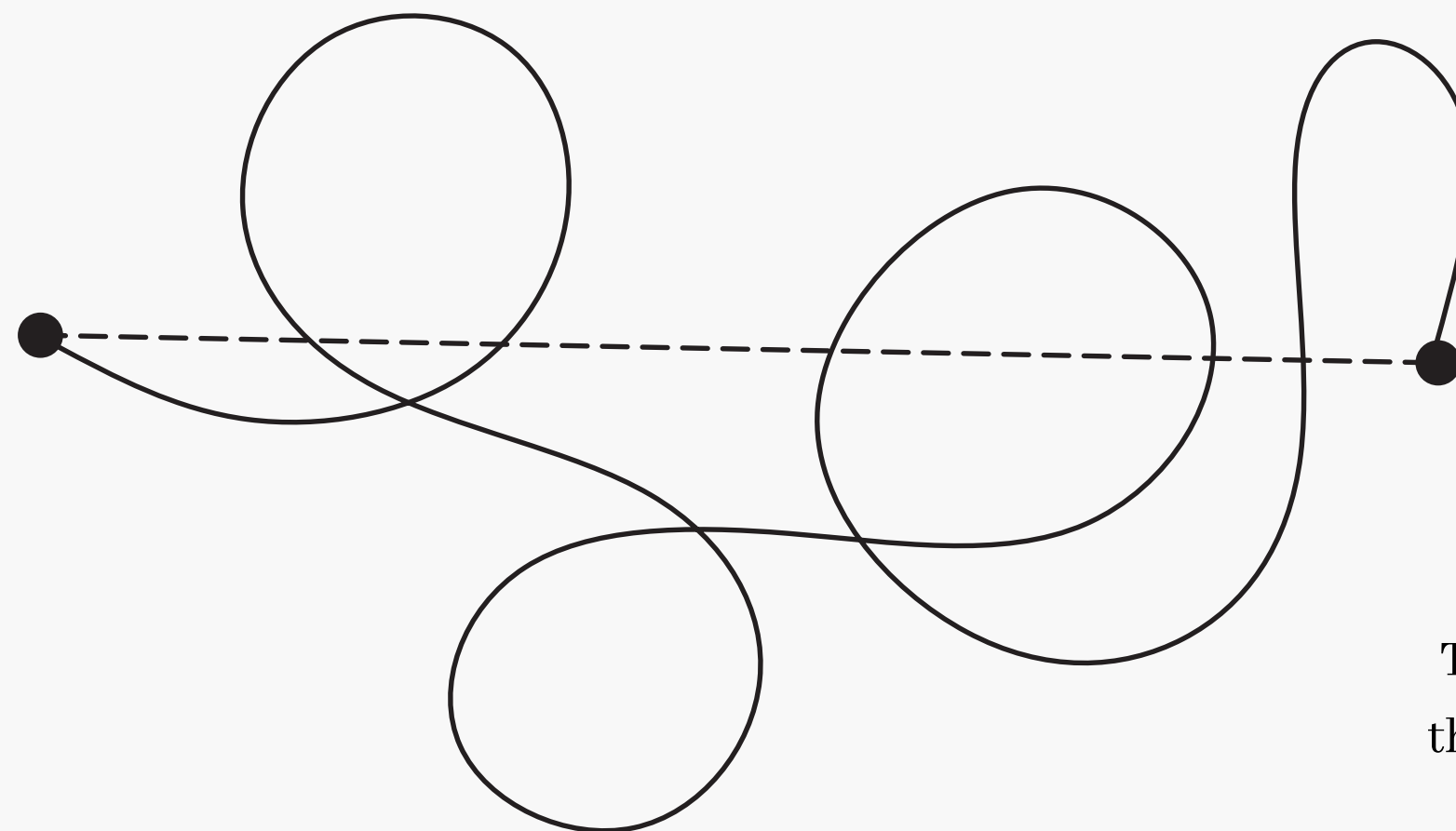
SEX WITH THE CLIENT

- Former Rules prohibited a lawyer from sex with a client if the act was coerced or considered a form of payment
- Revised Rule 1.8.10 prohibits lawyer-client sexual relations unless there was a preexisting consensual relationship
- Lots of ethical issues remain: confidentiality, consent, undue influence, breach of trust

CONSIDER:

AT FIRST...

A lawyer has a pre-existing sexual relationship with a lower-level employee with no control over legal affairs at a large corporation and the firm takes over representation of the corporation as a client.



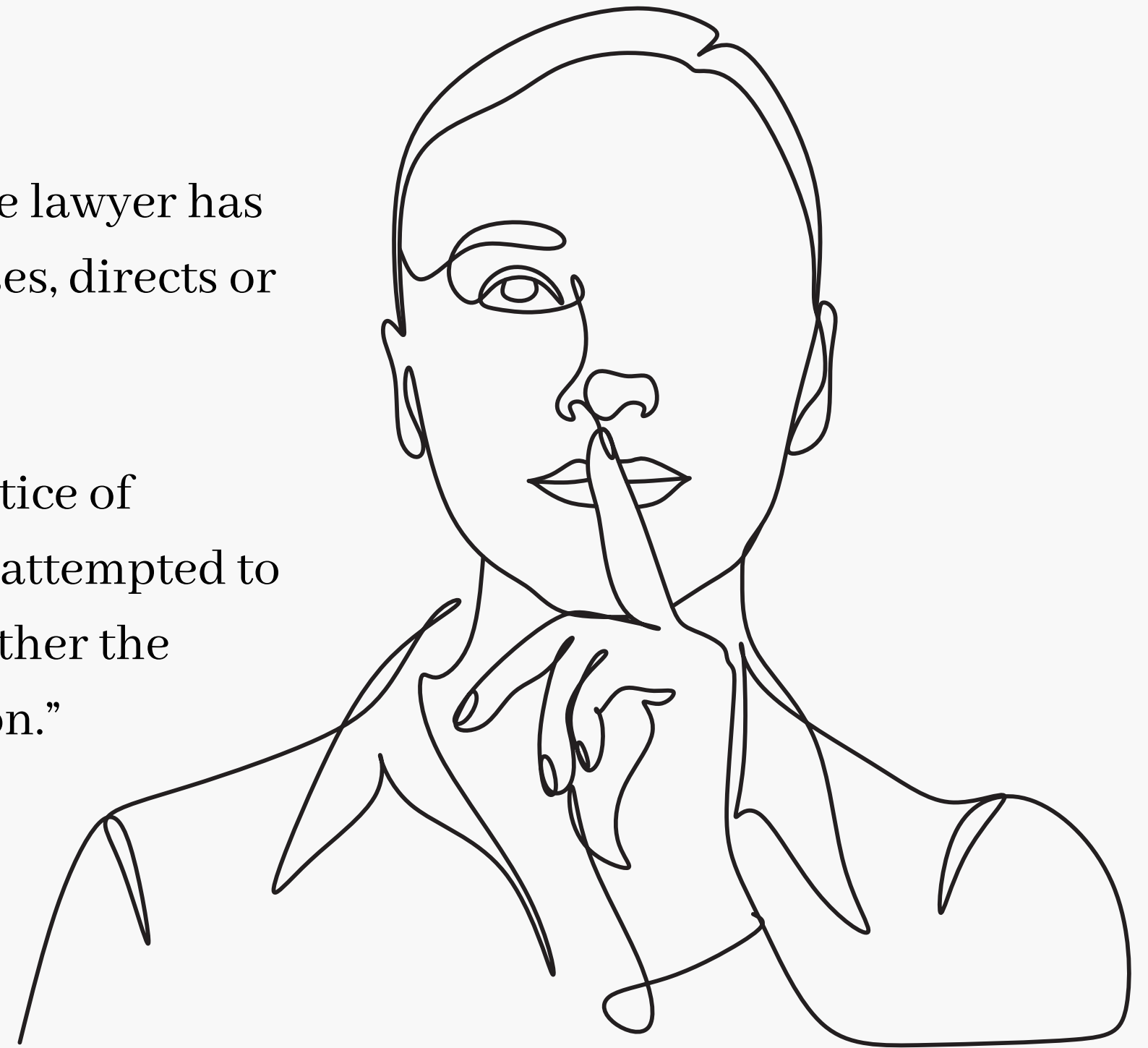
BUT THEN...

The employee is promoted to be assistant to the corporation's general counsel and will be involved in all legal matters for the client.

WHAT ARE THE LAWYER'S OBLIGATIONS?

OTHER CONSIDERATIONS AND CONSEQUENCES

- If the client is an “organization” the rule applies where the lawyer has sex with a “constituent of the organization” who “supervises, directs or regularly consults with that lawyer.”
- If a person other than the client alleges a violation, no Notice of Disciplinary Charges may be filed until the State Bar has attempted to obtain a statement from the client and determined whether the client would be “unduly burdened by further investigation.”



DILIGENCE, AS WELL AS COMPETENCE, NOW REQUIRED

RULE 1.3

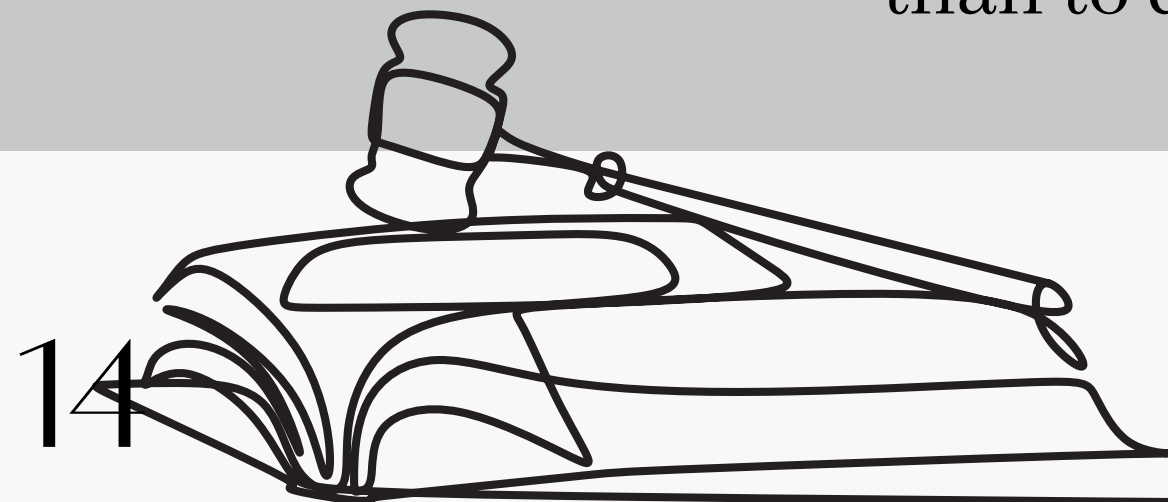
While duty of competence remains, new Rule 1.3 add a duty of diligence: A “lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to act with reasonable...diligence in representing a client.”

RULE 1.3(B)

“Reasonable diligence”: Lawyers shall “not neglect or disregard, or without just cause, unduly delay a legal matter...”

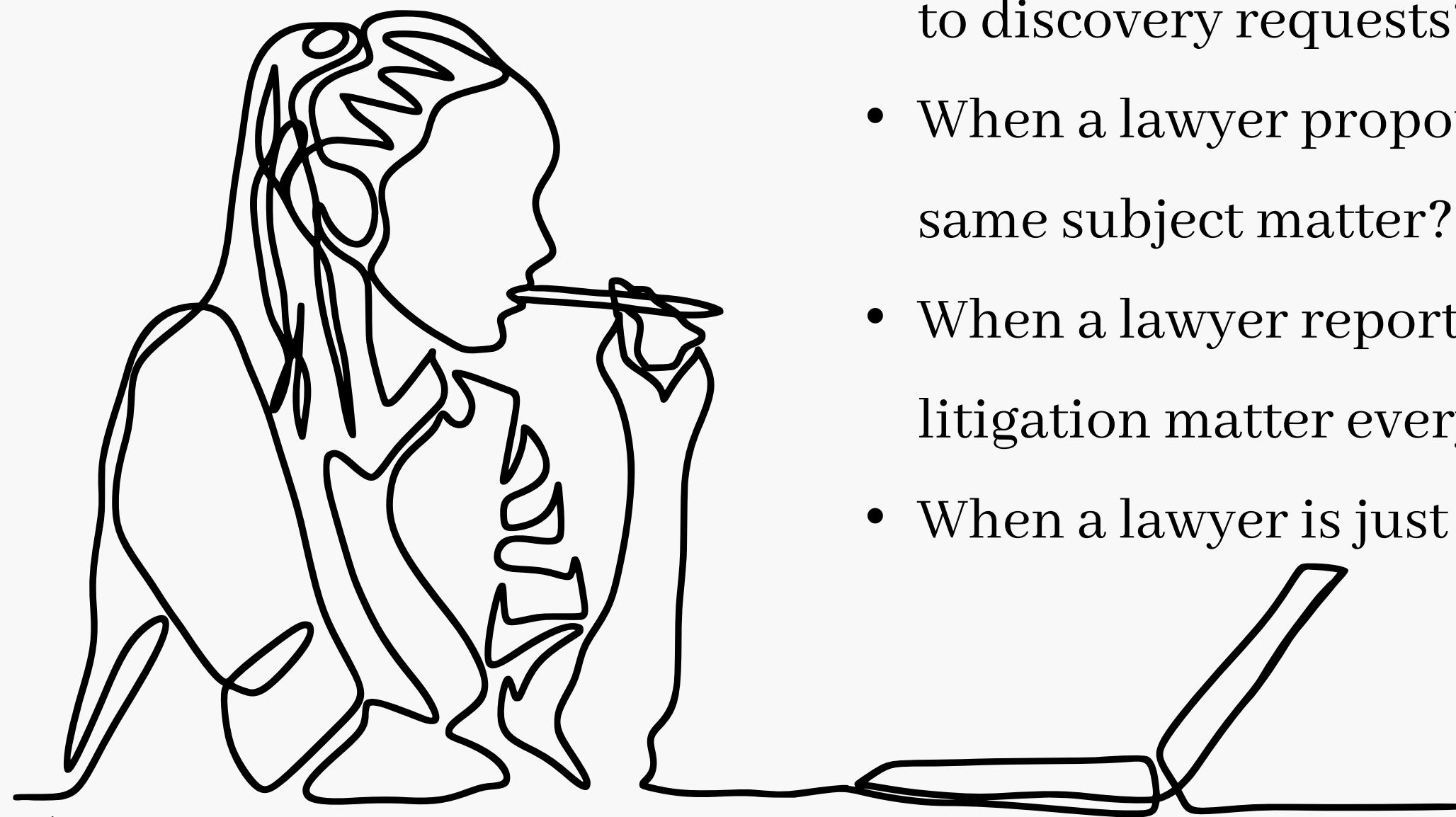
RULE 3.2

Also prohibits lawyers using means “that have not substantial purpose other than to delay or prolong the proceeding or to cause needless expense.”



ARE THE DILIGENCE
RULES VIOLATED:

- When a lawyer seeks numerous extensions to respond to discovery?
- When a lawyer provides objections but no substantive response to discovery requests?
- When a lawyer propounds multiple rounds of discovery over the same subject matter?
- When a lawyer reports to their client on the status of a pending litigation matter every six months?
- When a lawyer is just lazy?



SPEAKING OF OBLIGATIONS TO CLIENTS: NEW OPINIONS

2020–204

Lawyer's duty when 3rd party
funding involved

2020–203

Lawyer's obligations when data
breach compromises stored client
information

2020–201

Duty to client when lawyer
departs their firm



<https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Opinions>



GUARDIAN NEWS (2022)

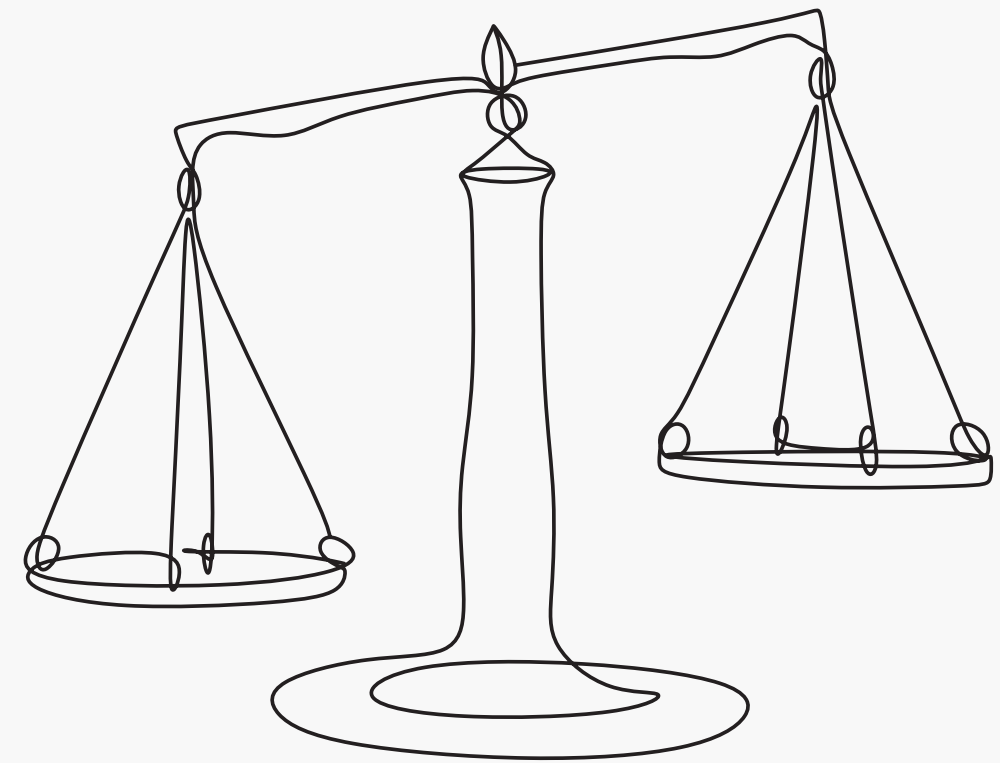
AND WHAT IF THE CLIENT LIES?

Opinion 2019-200 discusses three scenarios:

- Lawyer suspects witness in civil case testified falsely
- Lawyer is certain the witness has committed perjury
- Lawyer learns of perjury after trial testimony yet client insists on continuing to use perjured testimony

And also consider Opinion 2019-198: May lawyer attempt to settle case prior to withdrawing if lawyer believes client's case lacks merit?

Rule 1.16(a): Duty to withdraw if “lawyer knows or reasonably should know that the client is ...asserting a position in litigation...without probably cause and for the purpose of harassing or maliciously injuring any person”



IN THE NAME OF THE FATHER (1993)

SPEAKING OF CANDOR: RULE 3.3: LAWYER SHALL NOT...

- Knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement...
- Fail to disclose to the tribunal legal authority in the controlling jurisdiction known by the lawyer to be directly adverse to the position of the client...or knowing misquote...the language of of a book, statute, decision or other authority,
- Offer evidence that the lawyer knows to be false, and shall take reasonable remedial measures including disclosure to the tribunal if lawyer comes to learn of false testimony after the fact.

WHAT ABOUT THREATENING?

RULE 3.10

Lawyer “shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute”

RULE 3.10

Does not appear to prohibit statement that lawyer will present charges unless statement made to obtain an advantage in a civil dispute.



During a mediation session Defendant's attorney mentions that the plaintiff CPA was unlicensed during the period of employment at issue. Plaintiff's attorney angrily responds that his opponent has violated Rule of Professional Conduct 3.10 and threatens to report the violation to the State Bar.

DO WE SEE A PROBLEM?



CONFLICTS OF INTEREST

RULE 1.7

Lawyer “shall not, without informed written consent from each client...shall not represent a client if the representation is directly adverse to another client in the same or a separate matter”

Elsewhere refers to simply “adverse” and “materially adverse”

What is the difference?

- Best interests of the client should here, as elsewhere, be the primary consideration
- Informed written consent remains a safeguard for all

CONFIDENTIALITY: RULE 1.6

- (a) “A lawyer shall not reveal information protected from disclosure by Bus. & Prof. Code Section 6068 (e)(1) unless the client gives informed consent, or the disclosure is permitted by subparagraph (b).”
- (b) “A lawyer may, but is not required to, reveal information protected by Bus. & Prof. Code Section 6068(e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual,...





BETTER CALL SAUL (2020)

SAFEKEEPING OF CLIENT FUNDS

RULE 1.15

- Requires that advance fee deposits (often mislabeled as a “retainer”) be deposited into a client trust account maintained in CA (subject to a limited exception).
- This rule uses the word “funds received or held,” which means it applies to all such fees, even those received prior to effective date of the Rule.



CTAPP

Effective February 1, 2023, licensees are required to report to the State Bar if they’re responsible for complying with the duties related to the handling trust funds under rule 1.15 of the Rules of Professional Conduct.

<https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Client-Trust-Account-Protection-Program>

THANK YOU



HON. ANITA SANTOS

JudgeSantos@adrservices.com

Case Manager:

KatyTeam@adrservices.com



MARK LEHOCKY, ESQ.

Mark@marklehocky.com

Case Manager:

KatyTeam@adrservices.com