

Ethics in Patent Law

Matias Ferrario & Leland Black, PhD



1. A Brief Overview of the Rules & Grievances

2. Decisions

3. Where to Turn with USPTO Ethics Questions

4. Professionalism While Working Remotely

5. Final Thoughts



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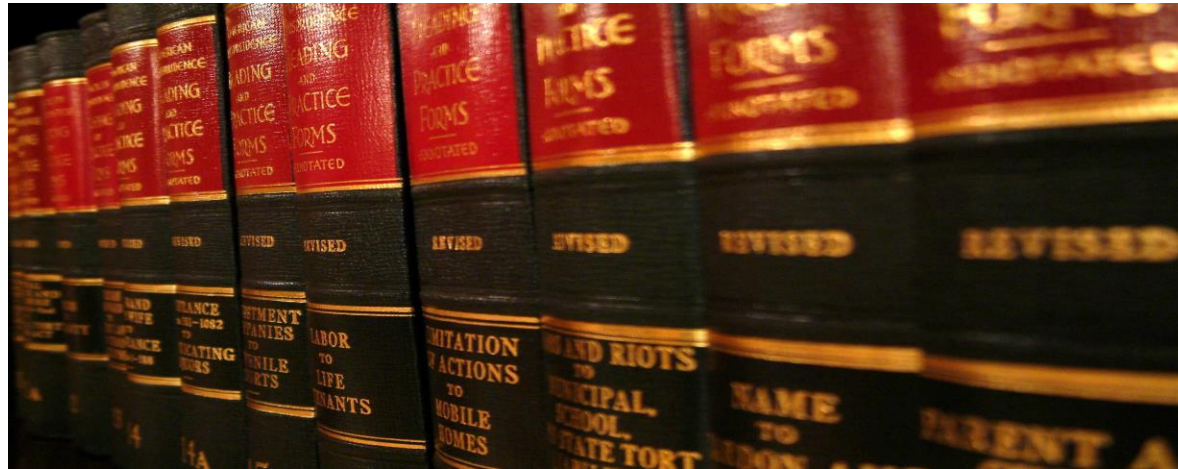


USPTO's Office of Enrollment and Discipline

- The United States Patent and Trademark Office (USPTO) is the federal agency for granting U.S. patents and registering trademarks
- The Office of Enrollment and Discipline (OED) is responsible for registering attorneys and agents to practice before the USPTO
 - Develops and administers registration examination
 - Investigates allegations of misconduct by both patent and trademark practitioners

The Rules

- 37 C.F.R. §11.101-901 (effective May 3, 2013)
- Based on 2011 Model ABA Rules
 - In interpreting PTO Rules, comments and annotations to ABA Rules are non-binding but persuasive



The Rules

- §11.101 - Competence
 - Competent representation requires the legal, *scientific, and technical* knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- §11.102 - Scope of representation/allocation of authority
 - Must abide by client's decisions
- §11.103 - Diligence
 - A practitioner shall act with reasonable diligence and promptness in representing a client.
- §11.104 - Communication
 - Inform client – anything requiring informed consent in these rules
 - OED decisions where practitioner didn't inform client

The Rules

- §11.105 - Fees

(a) Shall not be unreasonable; (b) Communicated to client, preferably in writing with reasonable timing; (c) A fee may be contingent on the outcome... except if prohibited by law.

A contingent fee agreement... shall be in a writing signed by the client and shall state [all details as to calculation]. At conclusion, practitioner shall provide client with written statement [showing fee calculation].

- §11.108 - Conflict of interest: Current clients: Specific rules

(a)-(h) essentially same as ABA Model Rules

(i) A practitioner shall not acquire a proprietary interest in the cause of action... except that the practitioner may: (3) In a patent case or a proceeding before the Office, take an interest in the patent as part or all of his or her fee.

Frequent Causes of Grievances

- Neglect
 - Failure to reply to Office actions
 - Failure to communicate with client
 - Failure or delay in filing patent application
 - Failure to revive or assist in reviving abandoned applications
 - Failure to turn over files to new representative

- Concealing information from client, e.g.:
 - Date of Office action
 - Date of abandonment
 - Reason for abandonment
 - Misrepresenting to client status of abandoned application as pending

- Unauthorized Practice of Law

Frequent Causes of Grievances

- Making false or misleading statements to USPTO, e.g.:
 - In advocacy before examiners, TTAB, PTAB
 - To revive abandoned application
 - To obtain extension of time for reply
 - In response to an OED inquiry
- Fee-Related Issues
 - Repeated failure to reply to fee-related Missing Parts
 - Failure to return client's advanced fees
 - Improper commingling of client's advanced legal fees with practitioner's funds
 - Checks returned or EFTs dishonored for insufficient funds
 - Charging excessive interest on unbilled fees

§11.20 - Types of Sanctions

- Exclusion
- Suspension
- Reprimand or Censure

- Probation may be imposed in lieu of or in addition to other sanctions

- A warning may be issued, but it is neither public nor a disciplinary sanction
 - See 37 C.F.R. §11.21

§11.54(b) – Determining Disciplinary Sanctions

- Factors the Court is to consider when determining appropriate disciplinary sanctions:
 1. Whether the practitioner has violated a duty owed to a client, to the public, to the legal system, and/or to the profession
 2. Whether the practitioner acted intentionally, knowingly, or negligently
 3. The amount of the actual or potential injury caused by the practitioner's misconduct
 4. The existence of any aggravating or mitigating factors

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Guess the Sanction

Case #1

- The attorney failed to comply with her state bar's CLE requirements, and her license was suspended
- The attorney continued to practice law
- The Board of Professional Responsibility of the state's Supreme Court publicly censured the attorney

Case #1

- §11.804(h)(1) – “It is professional misconduct for a practitioner to be publicly disciplined on ethical or professional misconduct grounds by any duly constituted authority of a state.”

Case #1

- The practitioner:
 - Did not respond to notice of complaint from OED
- Sanction: **Public Censure**
- The case: *In re Bradley*, No. D2020-05 (USPTO Dir. February 28, 2020).

Case #2

- Sole owner of Intellectual Property Services USA Incorporated (“IPS”)
 - IPS is incorporated in Sweden but maintains an address in Alexandria, VA
- Sent solicitation letters to trademark registrants who had upcoming renewals due
 - Solicitation letters sent from Europe by a service provider
 - Solicitations did not include the words “Advertising Materials”
- Received a legal opinion from a reputable U.S. law firm which analyzed and approved these activities prior to engaging in these activities

Case #2

- §11.701

- “A practitioner shall not make a false or misleading communication about the practitioner or the practitioner's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

- §11.703(c)

- “(c) Every written, recorded or electronic communication from a practitioner soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication...”

Case #2

- The practitioner (admitted 1999):
 - Now fully understands why his conduct violated the Rules
 - Is an active member of the CA state bar and is in good standing
 - Has no disciplinary history
- Sanction: **Public reprimand, 24 month probation, & Practitioner must withdraw from IPS as soon as possible**
- The case: *In re Guttenberg*, No. D2015-15 (USPTO Dir. March 9, 2015).

Case #3

- Falsely informed two clients that he filed patent applications and trademark applications on their behalf
- For three years misled the two clients into believing that their applications were being examined by the USPTO
- Created and sent to the two clients:
 - Counterfeit patent application filing receipts
 - A response to a fictitious inquiry by a patent examiner about the “pending” applications
 - Bills for work he did not perform and USPTO fees that were not incurred

Case #3

- §10.23(a) - Engaged in disreputable or gross misconduct
- §10.23(b)(4) - Engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation
- §10.23(b) (5) - Engaged in conduct that is prejudicial to the administration of justice
- §10.77(c) - Neglected legal matters entrusted to his care
- §10.23(c)(2)(i) - Knowingly gave false and/or misleading information to a client in connection with business before the Office
- §10.84(a) - Failed to seek the lawful objectives of a client through reasonably available means; failed to carry out a contract of employment entered into with a client for professional services
- §10.23(b)(6) - Engaged in other conduct that adversely reflects on the practitioner's fitness to practice before the USPTO

Case #3

- Sanction: **Prior to Order, practitioner resigned**
- The case: *In re Goldstein*, No. D2014-10 (USPTO Dir. Mar. 31, 2014).

Case #4

- Suspended from practice for 90 days in Virginia based on misconduct related to his forgery and notarization of documents in a European patent application
 - Claimed missed PCT filing deadline was due to attorney error; was due to lack of instructions from client
 - Forged notarized letter from his law office's docket clerk explaining the "attorney error"
- Requested his reciprocal discipline be imposed *nunc pro tunc*
- The Director may impose discipline *nunc pro tunc* only if the practitioner
 - Promptly notified the OED Director of their discipline in another jurisdiction
 - Establishes by clear and evidence that they voluntarily stopped practice before the Office
 - Complied with all duties of suspended practitioners

Case #4

- §11.804(h)(1) – “It is professional misconduct for a practitioner to be publicly disciplined on ethical or professional misconduct grounds by any duly constituted authority of a state.”

Case #4

- The practitioner:
 - Did not withdraw from pending cases before the USPTO
 - Did not notify NY of his suspensions by VA and DC
 - Did not take steps to remove attorney advertisements

- Sanction: **90 day suspension, effective as of date of order**

- The case: *In re Gitler*, No. D2019-48 (USPTO Dir. August 11, 2020).

Case #5

- In-house counsel entrusted to approve patent related expenditures, including retaining outside professional assistance on behalf of his employer
- Incorporated Patent Services Group, LLC (“PSG”) in his wife’s name
- Over fourteen years, he prepared monthly invoices requesting payment for patent services allegedly performed by PSG and approved the invoices himself
- He deposited the employer’s payments into a PSG bank account he controlled
- Employer paid “PSG” \$4,841,146.09 over the fourteen years

Case #5

- §11.804(b):
 - “It is professional misconduct for a practitioner to commit a criminal act that reflects adversely on the practitioner’s honesty, trustworthiness, or fitness as a practitioner in other respects.”

- §11.804(c):
 - “It is professional misconduct for a practitioner to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

- §11.804(i):
 - “It is professional misconduct for a practitioner to engage in other conduct that adversely reflects on the practitioner’s fitness to practice before the Office.”

Case #5

- The practitioner:
 - Sentenced to 71 months in federal prison
 - Ordered to repay the money
 - Submitted an Affidavit of Resignation for the purpose of being excluded on consent
- Sanction: **Exclusion**
- The case: *In re Thorne*, No. D2015-19 (USPTO Dir. April 22, 2015).

Case #6

- Patent practitioner excluded from practice in 2017 started yet another “invention development, protection and promotion” business using a fake name
- Represented that fees paid by customers were used to pay attorneys to draft patent applications, when they were prepared by staff
- Filed trademark applications signing them with the fake name, “Nickolas Farbacks”
- When investigated by the Florida Bar, gave misleading information (e.g., “I don’t run the day to day; just an investor”)
- False Statements to Wyoming Secretary of State for signing incorporation documents with fictitious name – Nickolas Farbacks

Case #6

- §11.804(i) – “It is professional misconduct for a practitioner to engage in other conduct that adversely reflects on the practitioner’s fitness to practice before the Office.”
- § 11.804(c) and (d) – it is professional misconduct for a practitioner to engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or prejudicial to the administration of justice
- § 11.801(a) – a practitioner shall not knowingly make false statements of material fact in relation to a disciplinary matter
- § 11.801(b) – a practitioner shall not fail to cooperate with the OED in an investigation

Case #6

- §11.505 – A practitioner shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction
- §11.103 - A practitioner shall act with reasonable diligence and promptness in representing a client
- §11.104(a)(3) – A practitioner shall keep the client reasonably informed about the status of the matter
- §11.104(b) – A practitioner shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation
- §11.503 – (responsibilities regarding non-practitioner assistants)

Case #6

- Sanction: **Resigned, excluded on consent**

- The case: *In re Gray*, No. D2020-18 (USPTO Dir. March 30, 2020).

Case #7

- Practitioner filed a patent application for a client in July of 2015
 - “Cut-Resistant Hockey Sock”
- Upon publication of the application in 2017, the client noticed an element of his invention had been left out of the application – “Kevlar”
- Practitioner did not respond to client’s questions regarding the missing element
- Practitioner failed to reply to NFMP, and client found out application was abandoned via Google Patents
- Practitioner failed to reply to all subsequent communication from the client
- Practitioner repeatedly and intentionally dodged receipt of the OED Director’s Complaint

Case #7

- § 11.103 – a practitioner must act with reasonable diligence
- § 11.104 – a practitioner must reasonably communicate with client
- §11.804(i) – “It is professional misconduct for a practitioner to engage in other conduct that adversely reflects on the practitioner’s fitness to practice before the Office.”
- § 11.804(c) – it is professional misconduct for a practitioner to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation
- § 11.804(a) – it is professional misconduct for a practitioner to violate or attempt to violate the USPTO Rules of Professional Conduct

Case #7

- The practitioner:
 - Exhibited a dishonest and selfish motive
 - Failed to comply, exhibiting bad faith obstruction of disciplinary proceedings
 - Had substantial experience in the practice of law – 7 years' worth

- Sanction: **Excluded**

- The case: *In re Valadares*, No. D2020-19 (USPTO Dir. November 20, 2020).

Case #8

- In May of 2014, the attorney sent two packages containing \$60,000 and \$65,000, respectively, to Massachusetts from Bermuda
 - The packages were addressed to “Attorney at Law” and declared to contain “documents”
- The attorney was convicted of one count of felony Bulk Cash Smuggling in 2019
 - The attorney admitted to being aware of federal reporting requirements
 - Pled guilty

Case #8

- §11.804(b) – “It is professional misconduct for a practitioner to commit a criminal act that reflects adversely on the practitioner’s honesty, trustworthiness, or fitness as a practitioner in other respects.”

Case #8

- The practitioner:
 - Exhibited a dishonest and selfish motive
 - Had been licensed to practice for 43 years
 - Had no prior disciplinary record

- Sanction: **Excluded**

- The case: *In re Castiglione*, No. D2020-11 (USPTO Dir. November 25, 2020).

Case #9

- Initially charged with five felony money laundering counts following a federal raid on VIP Cannabis dispensary
 - Allegedly helped oversee an international drug-trafficking and money-laundering operation
 - Allegedly funneled money from Colombia through several bank accounts in Denver and into the purchase of a warehouse for growing marijuana
 - Caught with \$450,000 in the trunk of his car during the raid
- Charges were dismissed after Attorney argued that the federal crimes he was charged with all stemmed from activity that is legal under Colorado law
- Still sanctioned by the Colorado Bar for opening trust accounts for two medical marijuana dispensaries at a Wells Fargo

Case #9

- §11.804(h)(1) – “It is professional misconduct for a practitioner to be publicly disciplined on ethical or professional misconduct grounds by any duly constituted authority of a state.”

Case #9

- Sanction: **Public censure**
- The case: *In re Furtado*, No. D2019-49 (USPTO Dir. Sept. 20, 2019).

Case #10

■ 1st Patent series

- Filed provisional, failed to pay fee (even though client paid attorney)
- NFMP, no response, abandoned
- Filed a non-provisional claiming priority; never moved to revive the provisional

■ 2nd Patent series

- Filed two provisional applications, but failed to advise client on meaning of failing to file non-provisional applications before 1 year date.

■ 3rd Patent series

- Filed non-provisional applications
- Received NFMP
- Attempted to correct drawings
- Became abandoned

Case #10

- §11.101 – a practitioner must provide competent representation
- §11.102 – a practitioner shall abide by a client's decisions
- § 11.103 – a practitioner must act with reasonable diligence
- § 11.104 – a practitioner must reasonably communicate with client
- §11.105(b) – a practitioner must communicate the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible
- §11.115 – A practitioner has a duty to safekeep property and maintain required records

Case #10

- §11.804(i) – “It is professional misconduct for a practitioner to engage in other conduct that adversely reflects on the practitioner’s fitness to practice before the Office.”
- § 11.804(c) and (d) – it is professional misconduct for a practitioner to engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or prejudicial to the administration of justice

Case #10

- Sanction: **Resigned, excluded on consent**

- The case: *In re Gibson*, No. D2020-24 (USPTO Dir. May 18, 2020).

Case #11

- An intellectual property-focused attorney was retained to file a notice of deposition and send a request for production in a marriage dissolution case
- Soon after, the attorney and the client developed a “loving, committed relationship” that became sexual
- The attorney retained new representation for the client, an attorney whose specialty was litigating marriage dissolutions
- The client dumped the attorney on the day her marriage settlement agreement was finalized
- When reported to his state bar, the attorney admitted violating the Rules Regulating the Florida Bar and cooperated with all proceedings

Case #11

- §11.804(h)(1) – “It is professional misconduct for a practitioner to be publicly disciplined on ethical or professional misconduct grounds by any duly constituted authority of a state.”
- Rules Regulating the Florida Bar
 - 4-1.3 – Diligence
 - 4-1.4 – Communication
 - 4-8.4(i) – “a lawyer shall not engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.”

Case #11

- The practitioner:
 - Was suspended from the practice of law in Florida for 90 days
 - Had no prior disciplinary record
 - Filed a response stating he did not contest the imposition of reciprocal discipline by the OED

- Sanction: **90 day suspension**

- The case: *In re Amaya*, No. D2020-27 (USPTO Dir. October 26, 2020).

Ethical Issue vs. No Ethical Issue

Case #12

- Member of a litigation team in a patent infringement suit
- Protective Order in litigation had a prosecution bar:
 - CONFIDENTIAL – NON-PROSECUTING ATTORNEY EYES ONLY
 - 56 Prior Art documents labelled as Confidential – Non-prosecuting Attorneys Eyes Only
- But, 56 Prior Art documents were:
 - Discussed in open court
 - Presented to the jury as evidence, and
 - Filed in the district court for use as trial exhibits without motions to seal
- Attorney prepared an IDS with 56 of the Prior Art documents for an IDS in an IPR
- Ethical violation?

Case #12

- Yes!
 - Court later determined the protective order still extended to the 56 documents
 - Attorney failed to obtain guidance from the district court regarding the protective order

- The case: *In re Janka*, No. D2011-57 (USPTO Dir. Nov. 21, 2011).

Case #13

- Attorney was a senior trademark attorney at a law firm
- Non-practitioner assistants helped Attorney in preparing and filing trademark documents with the USPTO
- Non-practitioner assistants were signing client names to USPTO trademark filings
- Filings carried a warning stating: The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both . . . And that such willful false statements and the like may jeopardize the validity of the application or submission or any registration resulting therefrom
- Ethical violation?

Case #13

USPTO Trademark Manual of Examining Procedure §611.01(c)

- All documents must be personally signed. 37 C.F.R. §§2.193(a)(1), (c)(1), 11.18(a).
- The person(s) identified as the signatory must manually enter the elements of the electronic signature.
- Another person (e.g., paralegal, legal assistant, or secretary) may not sign the name of a qualified practitioner or other authorized signatory.
- Just as signing the name of another person on paper does not serve as the signature of the person whose name is written, typing the electronic signature of another person is not a valid signature by that person.

Case #13

- Yes!
- Mitigating Factors
 - 14 years of practice without discipline issues
 - Acknowledged her ethical lapses and demonstrated genuine contrition
 - Cooperated with OED's investigation
 - Took corrective action upon learning of the impermissible signature practice
- Sanction: **Public reprimand, one year probation**
- The case: *In re Sapp*, No. D2019-31 (USPTO Dir. May 15, 2019).

Case #14

- Canadian trademark agent granted reciprocal recognition to represent parties located in Canada before the USPTO
- Agent is CEO of Trademark Angel, Inc., has assistants that live in Armenia and the Philippines, and hires U.S. licensed attorneys to work as independent contractors
- On at least 27 occasions, Agent falsely asserted to OED that she signed her own signature on the trademark application and accompanying declarations. IP addresses indicate that all documents were prepared, signed, and filed from a computer located in Armenia or the Philippines
- Agent also signed for applicants and independent contractors on multiple occasions
- Agent did not obtain informed consent from clients regarding the fee-splitting arrangement she had with the contracted attorneys

Case #14

- §11.101 – a practitioner shall provide competent representation
- § 1.503(b) – a practitioner having direct supervisory authority over a non-practitioner assistants shall make reasonable efforts to ensure the person's conduct is compatible with the professional obligations of the practitioner
- § 11.804(c) and (d) – it is professional misconduct for a practitioner to engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or prejudicial to the administration of justice
- § 11.105(e) – division of fees has specific requirements
- § 11.801(a) – a practitioner shall not knowingly make false statements of material fact in relation to a disciplinary matter
- § 11.801(b) – a practitioner shall not fail to cooperate with the OED in an investigation

Case #14

- Aggravating Factors

- Dishonest or selfish motive
- Pattern of misconduct
- Multiple offenses
- Bad faith obstruction of disciplinary proceedings
- Submission of false evidence, false statements, and other deceptive practices
- Refusal to acknowledge wrongful nature of conduct
- Indifference to making restitution

- Sanction: **Excluded from practice**

- The case: *In re Mar*, No. D2019-11 (USPTO Dir. Aug. 2, 2019).

Case #15

- Co-pending U.S. and International Patent Applications
- International search report identified ten prior art Y references
 - The Written Opinion explained all of the claims lacked inventive step in view of the references
- The attorney did not disclose the Y references to the U.S. patent examiner
- The issued U.S. patent was asserted in a patent infringement case
- Defendants asserted that the patent was invalid due to inequitable conduct

Case #15

- Yes!
 - §1.56 – a practitioner has the duty to disclose information material to patentability
 - Attorney could not explain the basis for her professed conclusion that the references were irrelevant and/or cumulative, stated she did not want to “bias” USPTO
 - References were deemed to be material

- The case: *Deep Fix, LLC v. Marine Well Containment Co. LLC*, Civil Action No. H-18-0948 (S.D. Tx. Feb. 18, 2020).

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Where to Turn with USPTO Ethics Questions

- Visit OED website: <http://www.uspto.gov/ip/boards/oed/ethics.jsp>
 - Has ethics rules you can browse
 - Has an ABA and USPTO Rule Comparison Chart – lots of similarities between USPTO rules and ABA rules
- Search OED decisions in the OED Reading Room: <http://e-foia.uspto.gov/Foia/OEDReadingRoom.jsp>
 - Has text search
- Can call OED: 571-272-4097
 - They will not issue written / advisory opinions
 - They will try to provide guidance and point you to cases or OED decisions that may be relevant

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Professional Rule

- §10.89(c)(5) – “A practitioner shall not engage in undignified and discourteous conduct before the Office.”
- §11.804(d) – “It is professional misconduct for a practitioner to engage in conduct that is prejudicial to the administration of justice.”
- §11.804(i) – “It is professional misconduct for a practitioner to engage in other conduct that adversely reflects on the practitioner’s fitness to practice before the Office.”

Real World Examples



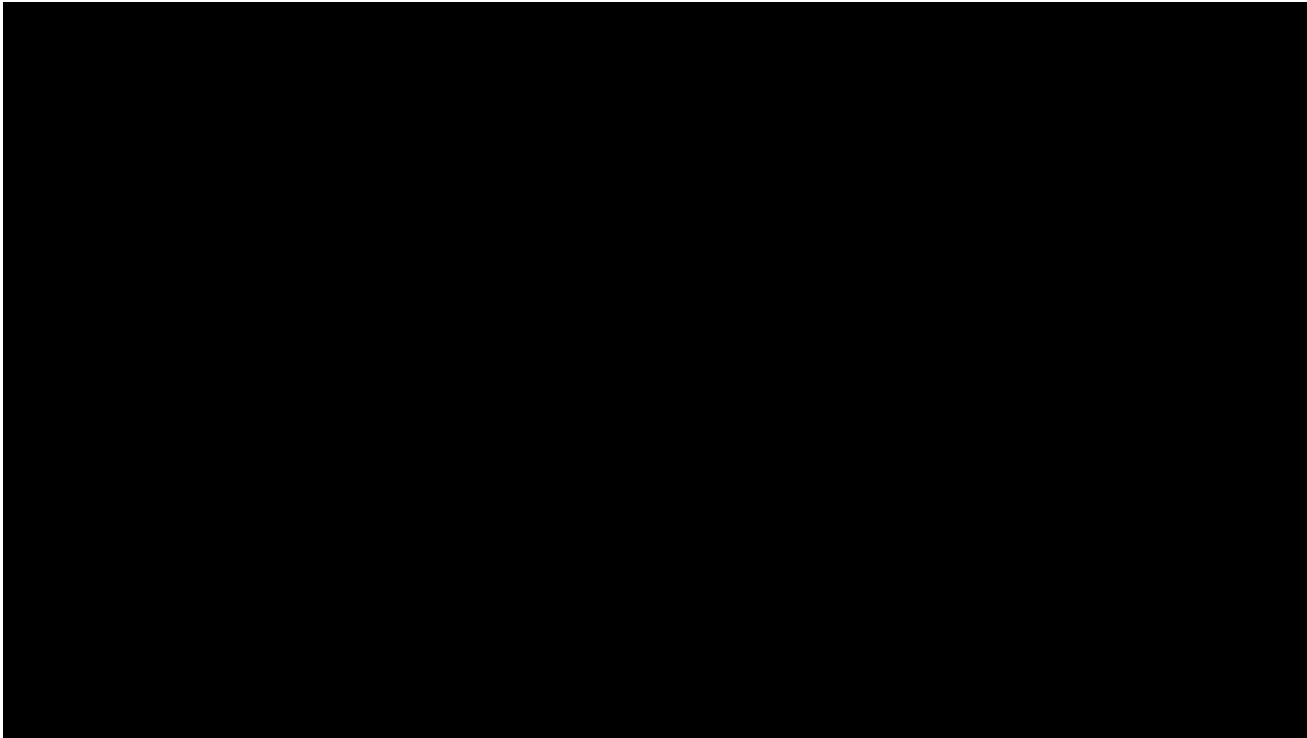
Real World Examples

"Welcome to the future."



Attorney Thomas McAdam puffs a cigar during a remote probate hearing. *Jefferson District Court*

Real World Examples



Judge Roy Ferguson @JudgeFergusonTX · 19h

IMPORTANT ZOOM TIP: If a child used your computer, before you join a virtual hearing check the Zoom Video Options to be sure filters are off. This kitten just made a formal announcement on a case in the 394th (sound on).
[#lawtwitter](#) [#OhNo](#)
[@zoom_us](#)

Kitten Zoom Filter Mishap
This is a live stream of virtual court proceedings in the 394th Judicial District Court of Brewster, Culberson, ...
[youtube.com](#)

862 10.9K 32.9K

Judge Roy Ferguson @JudgeFergusonTX

Replying to [@JudgeFergusonTX](#)

These fun moments are a by-product of the legal profession's dedication to ensuring that the justice system continues to function in these tough times. Everyone involved handled it with dignity, and the filtered lawyer showed incredible grace. True professionalism all around!

2:21 PM · Feb 9, 2021 · Twitter Web App

808 Retweets 106 Quote Tweets 13.1K Likes

- Virtual View From the Bench -

DURING THE COVID-19 PANDEMIC

A Letter from the Honorable Dennis Bailey

One comment that needs sharing and that is the judges would appreciate it if the lawyers and their clients keep in mind these Zoom hearings are just that: hearings. They are not casual phone conversations. It is remarkable how many ATTORNEYS appear inappropriately on camera. We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up won't cover up you're poolside in a bathing suit. So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or not.

Guidelines – Avoid all of this...

Virtual court hearings in 2020 have it all: Nudity, beer, bikinis and barking dogs

Andrew Wolfson Louisville Courier Journal

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Final Thoughts / Best Practices

- Be honest with your clients and the PTO
- Don't miss filing and other deadlines
- Don't mix client trust funds and personal funds
- Have sufficient funds in your accounts
- Don't try and hide your errors; make prompt restitution
- Respond promptly and candidly to any inquiry from the OED
- Make a reasonable inquiry before filing patent applications

Questions?



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Locations

Counsel to innovative companies and brands around the world

We help leaders create, expand, and protect the value of their companies and most prized assets by bringing an equal balance of business acumen, technical skill, and creative thinking to the opportunities and challenges they face.



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