

5th Annual Technology and Justice for All CLE



Presented by the Computer and Technology Section of
the State Bar of Texas
February 11, 2022

The Work is Remote But Ethical Duties Aren't!



Pierre Grosdidier
Houston
City of Houston

Grecia Martinez
Dallas
Ryan LLC

18-months into
duty of competence
and a (real) virtue

Unsplash

The internet's source of freely-usable

Powered by creators everywhere

DANKE!

THANK YOU!

MERCI!

GRAZIE!

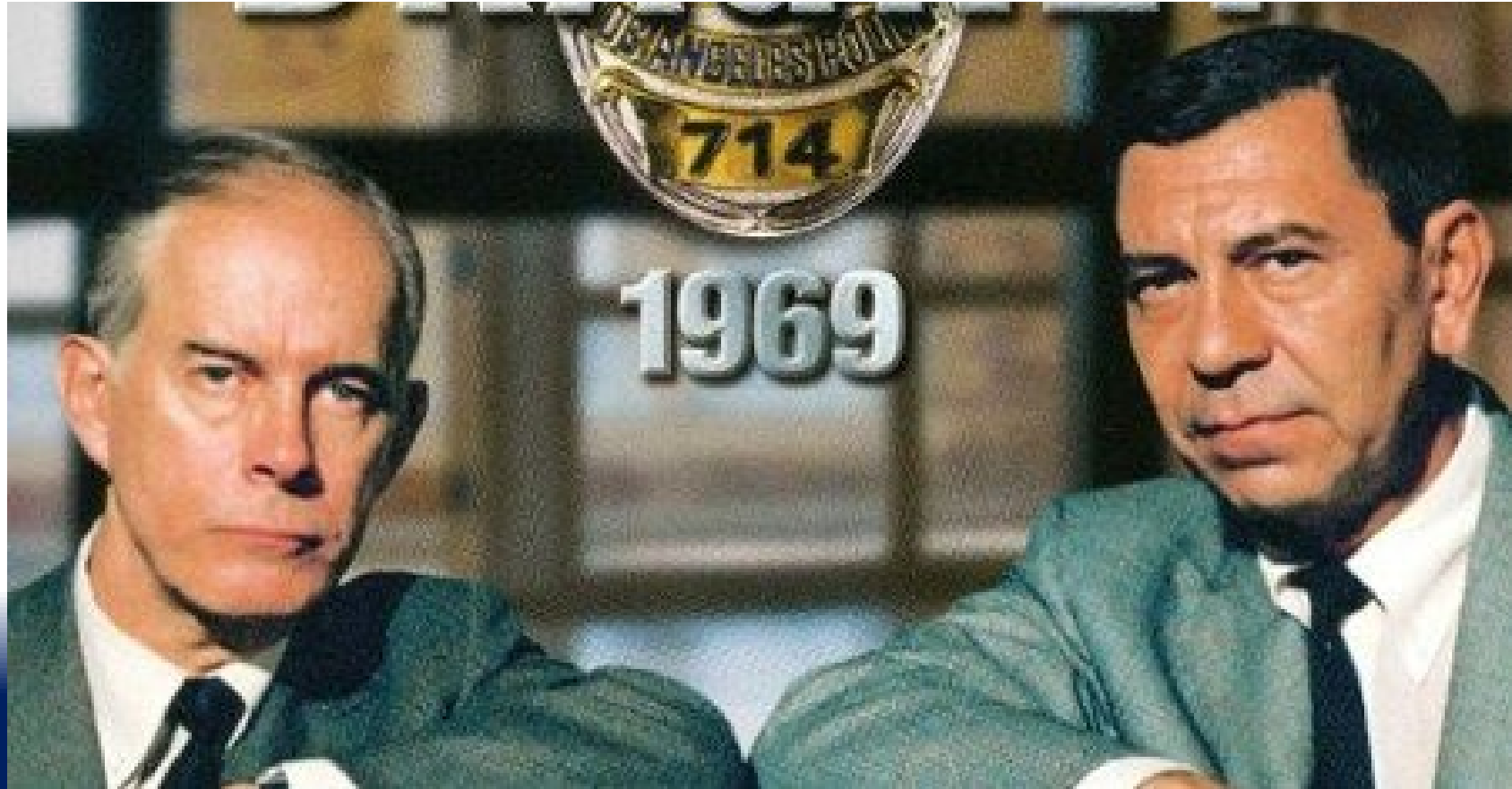
GRACIAS!

DANK JE WEL!

• • • • •

This is a true story . . .

- *"The names have been changed to protect the innocent."*
- Mr. Taking (a/k/a Jon)
- Mr. Defend
- Ms. Para
- Ms. Steneaux
- Witness
- Redacted




Rule 1.01, cmt 8: Maintaining Competence

- Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology. . . .
- Terminology:
 - Proficient: not defined.
 - “Competent” or “Competence” denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.


*"The facts, Ma'am.
Just the facts."*




Depo
start
time:
1 pm




Ms. Para
[Redacted]


 3

 4

11:46 am

To: Ms. Steneaux
cc: Mr. Defend

 You replied to this message [Redacted] 12:33 PM.



 Witness - Exhibit 1.pdf 25 MB	 Witness - Exhibit 2.pdf 12 MB
 Witness - Exhibit 3.pdf 4 MB	 Witness - Exhibit 4.pdf 3 MB

[Message Came from Outside the City of Houston Mail System]

Hello **Ms. Steneaux,**

I have attached Defendants' Exhibits 1-4 which will be used for the deposition of **Witness** [Redacted]. We may be forwarding additional Exhibits throughout the morning.

Thank you so much for your courtesy and assistance. **Ms. Para**

Ms. Para

Paralegal to **Mr. Taking**

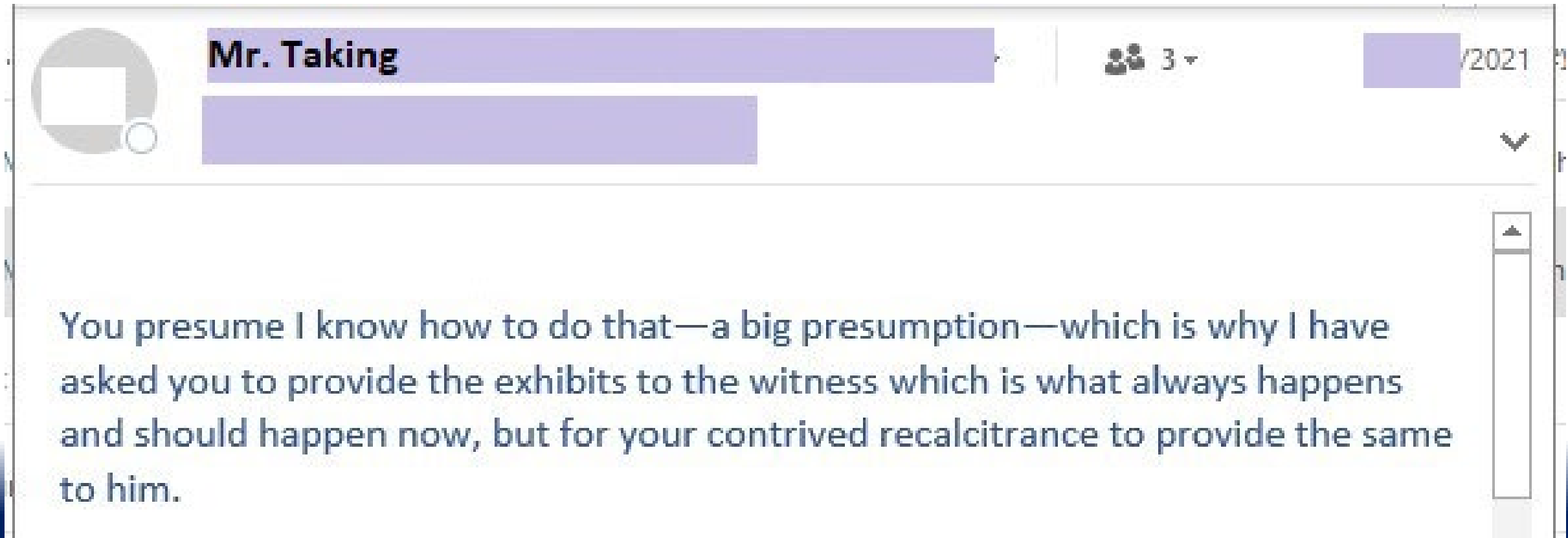
Pre-deposition emails

- 12:37 PM. Mr. Taking: “please make sure Witness has all of the exhibits so he can follow along with them during the examination.”
- Mr. Defend: “share your screen.”
- Mr. Taking:

Are you refusing to send the exhibits to the witness? I am not required to use Sharescreen and I do not plan to do so. I would hope we do not have to take this up with the court, but we can do so if need be.

A few emails later

- Mr. Defend: “All you have to do is share your screen.”



Deposition by Zoom

THE VIDEOGRAPHER: We're now on the record.

4 My name is Redacted. I'm a videographer for Redacted
5 Litigation Services. Today's date is Redacted,
6 2021, and the time is 1:04 p.m., Central time.

7 This remote video deposition is being held
8 in the matter of Redacted.

17 Mr. Taking. Are you in your office?

21 Witness. No. I'm in the office of Redacted counsel.

22 Q. Okay. Do you have access to e-mail where you
23 are?

24 A. I do not.

25 Q. Have you been provided by Mr. Defend with
1 some exhibits that were delivered to him today for your
2 deposition?

3 A. I have not.

4 Q. Is he located in the same office that you're
5 in?

6 A. He is.

7 Q. How far apart are you all?

8 A. He's across the table from me.

9 Q. He's across the table for you -- from you?

10 A. Yeah, that's correct.

11 Q. Okay. And he's on a computer; is that right?

12 A. That is correct.

13 Q. Are you willing to open up the exhibits and
14 look at them as we go forward, if he will simply extend
15 the courtesy of providing them to you?

16 A. No, I don't think I have access to his
17 computer, so.

24 MR. Defend: Jon, this is your
25 deposition. Get on with it, please.

1 MR. Taking: Are you unwilling to do that?

2 MR. Defend: I am unwilling to do that.

3 MR. Taking : Why?

4 MR. Defend: I do not have to justify
5 this. This is your deposition. It's for you to get
6 ready for it, Jon.

- M
- C
- W
- V



7 MR. Taking: . . . You're
10 refusing to make those exhibits available to the
11 witness; is that right?

12 MR. Defend: The burden's on you, Jon,
13 to provide the -- to show the witness the -- the
14 exhibits via Zoom. It's a very simple procedure via
15 sharing your screen on Zoom. I see no reason why you
16 can't do that.

17 MR. Taking: Counsel, will you tell me
18 where that burden is established by rule or otherwise?

19 MR. Defend: Irrelevant, Jon. Just
20 proceed with your deposition.

21 MR. Taking: Will you answer my question
22 and explain to me why, since you're sitting across the
23 table from the witness, you're refusing to pull up the
24 exhibits and he can see them in their entirety?

25 MR. Defend: Jon, as usual, you are
1 completely disorganized. I'm not going to -- to assist
2 you in your disorganization.

3 MR. Taking: What did you just say that I
4 am, sir?

5 MR. Defend: I said you're completely
6 disorganized as you've always been. It's up to you to
7 proceed with your deposition.

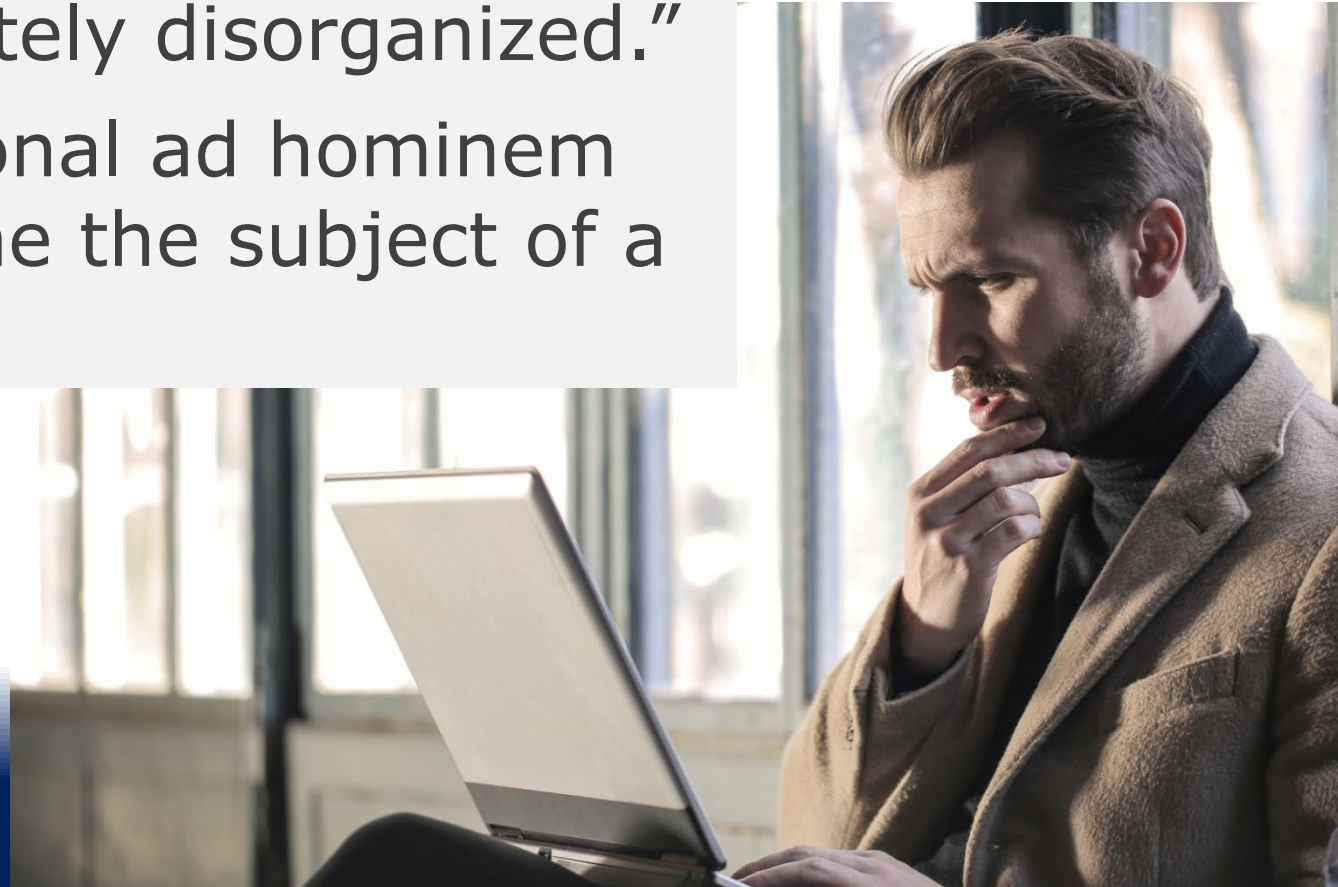
8 MR. Taking: Your unprofessional
9 ad hominem attack against me will become the subject of
10 a motion for sanctions. I just want to let you know
11 that.

12 MR. Defend: Please go ahead and do
13 that, Jon.

14 MR. Taking: Oh, I intend to, Mr. Defend.

Recap.

- ▶ Mr. Taking: "You presume I know how to [share a screen with Zoom]--a big presumption."
- ▶ Mr. Defend: "you are completely disorganized."
- ▶ Mr. Taking: "Your unprofessional ad hominem attack against me will become the subject of a motion for sanctions."



10 minutes into the deposition

7 MR. Taking: Ms. Para, will you put up the
8 first page of Exhibit 1.

9 MR. Defend: I'm sorry. Jon, who are
10 you talking to?

11 MR. Taking: I'm talking to my legal
12 assistant who's on the call.



Back to Rule

- Because of the process, each and remain prominent in the practice of law, including associated with relevant technology.

- Terminology:

- Proficient: not defined.
- "Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

Series-Qualifier Canon. When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.

Back to Rule 1.01, cmt 8

- Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology. . . .

- Terminology:

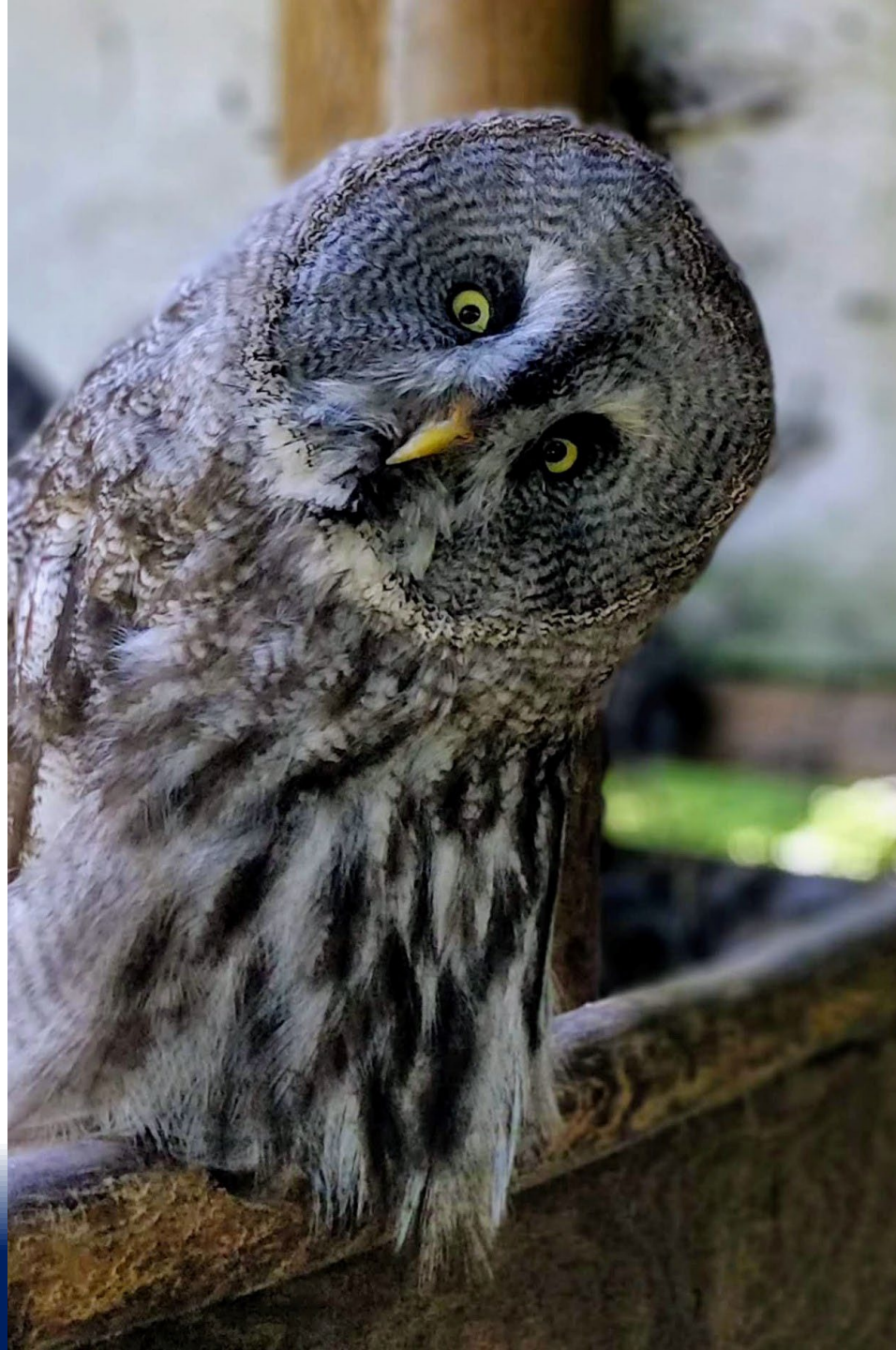
- Proficient: not defined.

- “Competent” or “adequate competence” defined in terms of the ability to timely and effectively perform legal work with skill, and training and experience in the representation of clients.

Ordinary-Meaning Canon. Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.

Merriam-Webster: Proficient

- Good at doing something: skillful
- Well advanced in an art, occupation, or branch of knowledge
- Synonyms:
 - Accomplished, adept, experienced, expert, good, great, masterful, practiced, skilled, versed
- Antonyms:
 - amateur, inexperienced, unprofessional, unskilled



In-House Counsel: Maintaining Privilege

- Remote work is here to stay
- 55% of workers prefer to work from home at least 3 days per week¹
- Companies have adopted technologies to make remote work easier

1. PwC Remote Work Survey , January 2021

In-House Counsel: Maintaining Privilege

Texas Rules of Evidence - Rule 503¹

- A communication
- Between privileged entities (attorney, client, agent)
- For the purpose of seeking, obtaining or providing legal assistance to the client

Purpose: "...to encourage full and frank communication between attorney and their clients. . . [recognizing] that sound legal advice or advocacy depends on the lawyer's being fully informed by the client."²

1. Tex. Evid. 503(b).

2. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)

In-House Counsel: Maintaining Privilege

Attorney Work-Product Doctrine¹

Hickman v. Taylor²

- Core work product
- Non-core work product

1. Tex. R. Civ. P. 192.5

2. Hickman v. Taylor, 329 U.S. 495 (1947)

In-House Counsel: Maintaining Privilege

Exceptions – Tex. Evid. R. 503(d)

- Furtherance of crime or fraud
- Claimants through the same deceased client
- Breach of duty by a lawyer or client
- Document attested by a lawyer
- Joint clients

Waiver – Tex. R. Civ. P 193.3(d)

Client = Business Entity

Upjohn Co. v. United States¹

- In-house counsel represent the entity²

Texas: an employee is considered a privileged person if the employee

- a) has authority to obtain professional legal services or to act on the rendered advice,
or
- b) b) makes or receives confidential communication at the direction of the corporation and while acting in the scope of his/her employment³

Other Jurisdictions: Modifications of control test and/or subject matter test

1. 449 U.S. 383 (1981)
2. TEX. GOV'T CODE ANN. TITLE 2, SUBT. G, APP A., ART. 10, §9, Rule 1.12
3. TEX. EVID. R. 503(a)(2)(A-B)

Corporate employee seeking legal advice

Personal legal advice – clarify the representation

Misunderstanding could lead to involuntary extension of privilege

Always avoid discussions about employment

Exceptions – Officers

Potential conflict of interest – follow applicable conflict of interest rules

Technology – Collaboration, Communication, Client Relationship Management

EMAIL

In re Vioxx Products Liability Litigation¹

Text Messages

Sonrai Systems LLC v Romano²

Orchestrate HR Inc. v. Trombetta³

1. In re Vioxx Products Liability Litigation, 501 F.Supp. 2d 789 (E.D. La. 2007)
2. Sonrai Sys., LLC v. Romano, No. 16 CV 3371 (N.D. Ill. Jul. 13, 2020)
3. Orchestrate HR, Inc. v. Trombetta, No. 3:13-cv-2110-P (N.D. Tex. Mar. 27, 2014)



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PRESENTER

Technology – Collaboration, Communication, Client Relationship Management

SOCIAL MEDIA

Romano v. Steelcase Inc.¹

INSTANT MESSAGES

Skansgaard v. Bank of America NA²

VOICEMAIL

Howell v. Joffe³

1. Romano v. Steelcase Inc., 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010)
2. Skansgaard v. Bank of Am., N.A., No. 2:11-cv-00988 RJB (W.D. Wash. Mar. 4, 2013)
3. Howell v. Joffe, 483 F. Supp. 2d 659 (N.D. Ill. 2007)



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Technology – Collaboration, Communication, Client Relationship Management

COMMUNICATION/COLLABORATION PLATFORMS



teamwork.

zoom



Technology – Collaboration, Communication, Client Relationship Management

CLIENT RELATIONSHIP MANAGEMENT



Protecting Privilege and Work Product

➤ **Clear request/label for legal advice**

- “Seeking legal advice” or “In response to your request for legal advice regarding....”

➤ **Content matches label**

- “This recommendation reflects the legal department’s position regarding the potential litigation risk of the attached statement.”

➤ **Security and confidentiality**

- Encryption, password protection



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Protecting Privilege and Work Product

- **Limit group members**

- Create private channels, groups

- **Use do-not-forward designations to avoid disclosure**

- The label could protect in case of inadvertent disclosure¹

- **Set apart non-legal materials or discussions**

- Privileged communications should be separate from business advice to avoid waiver²

1. International Business Machines Corp. v. United States, 37 Fed. Cl. 599, 603 (Fed. Ct. Cl. 1997)

2. RCHFU, LLC v. Marriott Vacations Worldwide Corp., Civil Action No. 16-cv-01301-PAB-GPG (D. Colo. Mar. 29, 2018)



Protecting Privilege and Work Product

- **Prepare business colleagues in advance**

- In house training

- Audit

- Retraining

- **Conclusion**



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Watch your language:
what not to say in
a conversation or in an email

What not to

- True story,
- *"The name to protect"*



Conversation





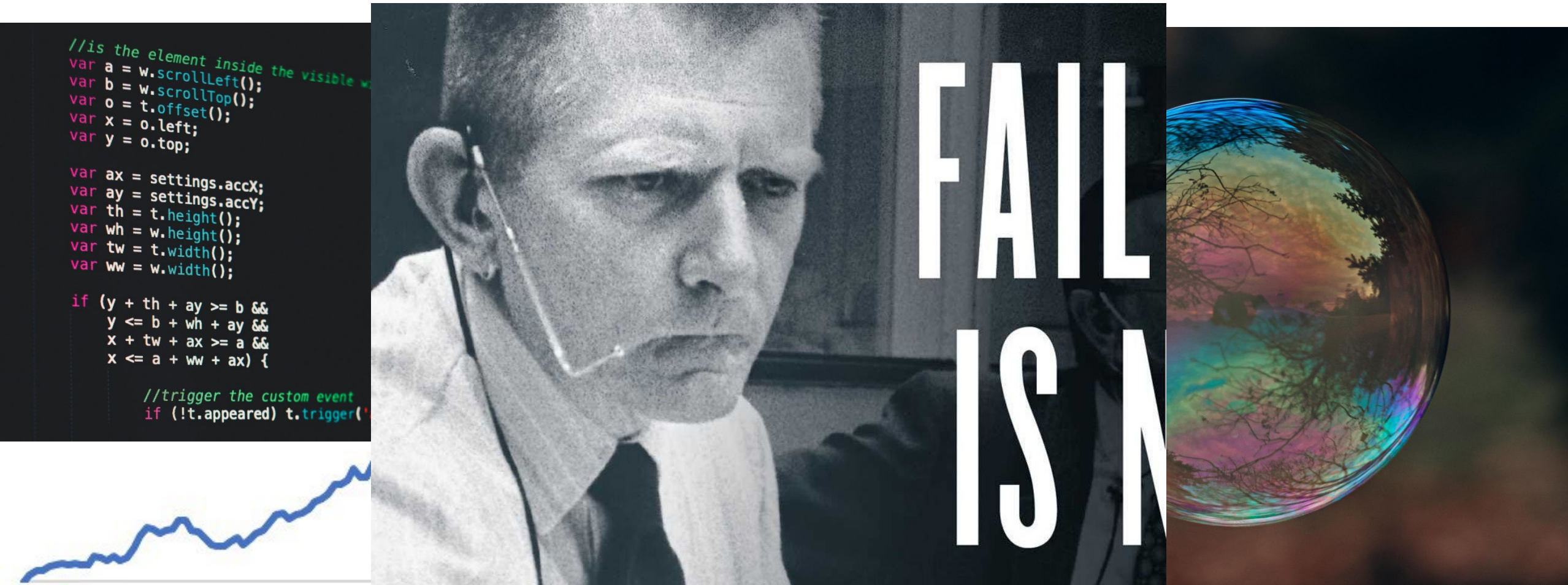
C., Esq.

- True story, *circa* 2021



What not to say in an email

- True story, *circa* 2000
- *"The names have been changed to protect the innocent."*



21. On or about June 27, 20[REDACTED], Executive [REDACTED] sent an email to senior employees and officers at Co. [REDACTED] about the potential license sale to the Oil Company. In that email, Executive [REDACTED] stated "we have to have this one as you know,"

Case 1:07-cr-[REDACTED] Document 3 Filed [REDACTED]/07 Page 11 of 25

discussed completing the deal after the end of the quarter, and directed certain employees to "minimize the circle of people involved in closing this deal and refrain from any further discussion of our closing strategy via e-mail or verbally."

22. On or about June 29, 20[REDACTED], Executive [REDACTED] sent an email to various senior employees and officers at Co. [REDACTED] stating that certain revenue has recently "vaporize[d]," that "we can't make the quarter" without certain additional revenue, and that "I don't have a back-up plan."

23. In or about early July 20[REDACTED], after the close of the fiscal quarter and year on June 30, 20[REDACTED], Executive [REDACTED] traveled to Country [REDACTED] to negotiate with the Oil Company. During those negotiations, the Oil Company resisted entering into the software license agreement proposed by Co. [REDACTED]. On or about July 5, 20[REDACTED], Executive [REDACTED] sent an email to senior officers at Co. [REDACTED] attaching a letter addressed to the Oil Company. In the email Executive [REDACTED] directed the recipients to "please destroy after reading." In the letter to the Oil Company, Executive [REDACTED] stated

24. On or about July 10, 20[REDACTED], no agreement had been reached. That same day, Executive [REDACTED] proposed that the Oil

Case 1:07-cr-[REDACTED] Document 3 Filed [REDACTED]/07 Page 12 of 25

Company sign a software license agreement with Co. [REDACTED], but promised to provide a "side letter" that would give the Oil Company the right to cancel the software license agreement if certain additional agreements were not completed between the parties by August 1, 20[REDACTED]. Executive [REDACTED] stated this proposal would allow Co. [REDACTED] to recognize the license revenue for its year ending June 30, 20[REDACTED], and would impose no financial risk on the Oil Company because the software license agreement would not be "valid" or "binding." Executive [REDACTED] attached a draft "side letter"

- Lessons learned:
 1. Try Zen
 2. Don't sign side letters (criminal; *Duh!*)
 3. Don't send "delete this email" emails (looks awful)
 4. Don't delete "delete this email" emails (aiding and abetting)



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