

# Attorney-Client Relationships & Responsibilities for Criminal Defense Lawyers

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Strengthening  
the **sixth**  
JUSTICE FOR ALL



# General Ethical Responsibilities

Begin at  
the beginning,  
and go on till  
you come to  
the end:  
then stop.

-Alice in Wonderland



# Roles of the Lawyer

- **Advisor:**
  - Provide **Client** with an *informed understanding* of legal rights.
  - Explain **to Client** the practical implications of decisions.
- **Advocate:**
  - Zealously assert **Client's position**.
- **Negotiator:**
  - Seek result advantageous **to Client**.

## **Preamble: Commitment to the Profession and the Community**

### **Seek improvement of:**

- The law & the administration of justice
- The “quality of services” rendered by the legal profession.

### **The RPC are:**

- Created by lawyers
- Exist to guide an attorney’s actions
- Enforced by lawyers via the VSB & Courts

# Self-Governance & Self-Regulation

“To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. **An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.**”

# Responsibilities to the Community

- Responsibility:
  - Hold system accountable.
  - Observe the Rules ourselves.
  - Hold one another accountable. (RPC 8.3)
    - A lawyer should “help the bar regulate itself **in the public interest.**”
    - “Neglect of these responsibilities **compromises the independence** of the profession **and the public interest which it serves.**”



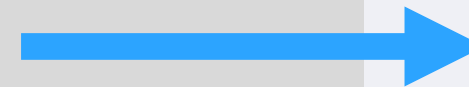
# Poll Question #1

How many Bar Complaints were filed in VA in 2022?

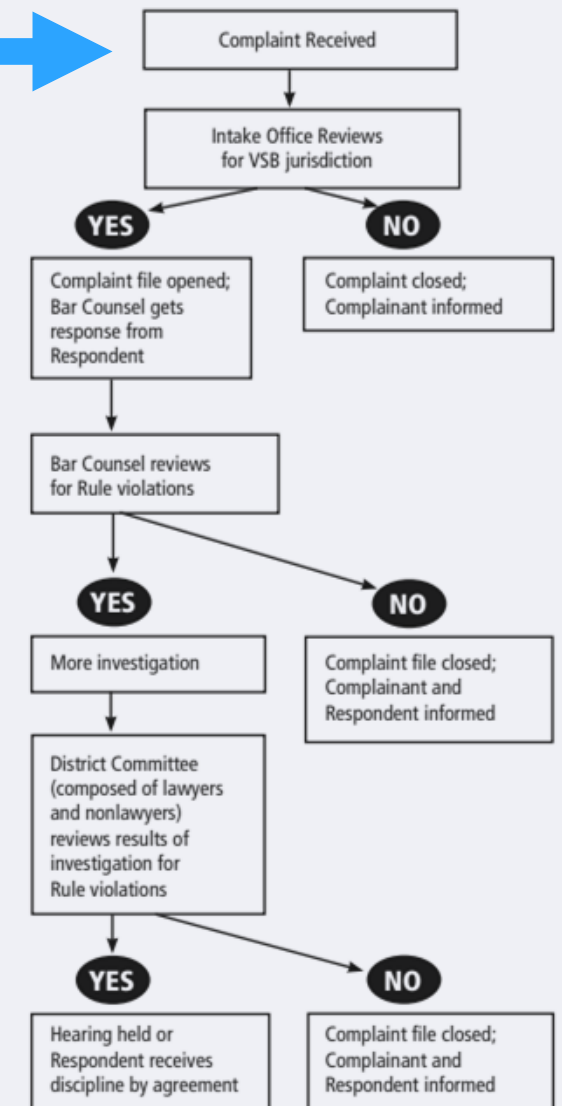
- A. 258**
- B. 1,423**
- C. 3,113**
- D. 5,628**

**Answer = 3,113**

	Fiscal Year <b>2020</b>	Fiscal Year <b>2021</b>	Fiscal Year <b>2022</b>
<b>Active Membership</b>	31,693	32,427	31,655
<b>Total Complaints Received</b>	3,091	2,924	3,113



### How Complaints About Lawyers Are Handled





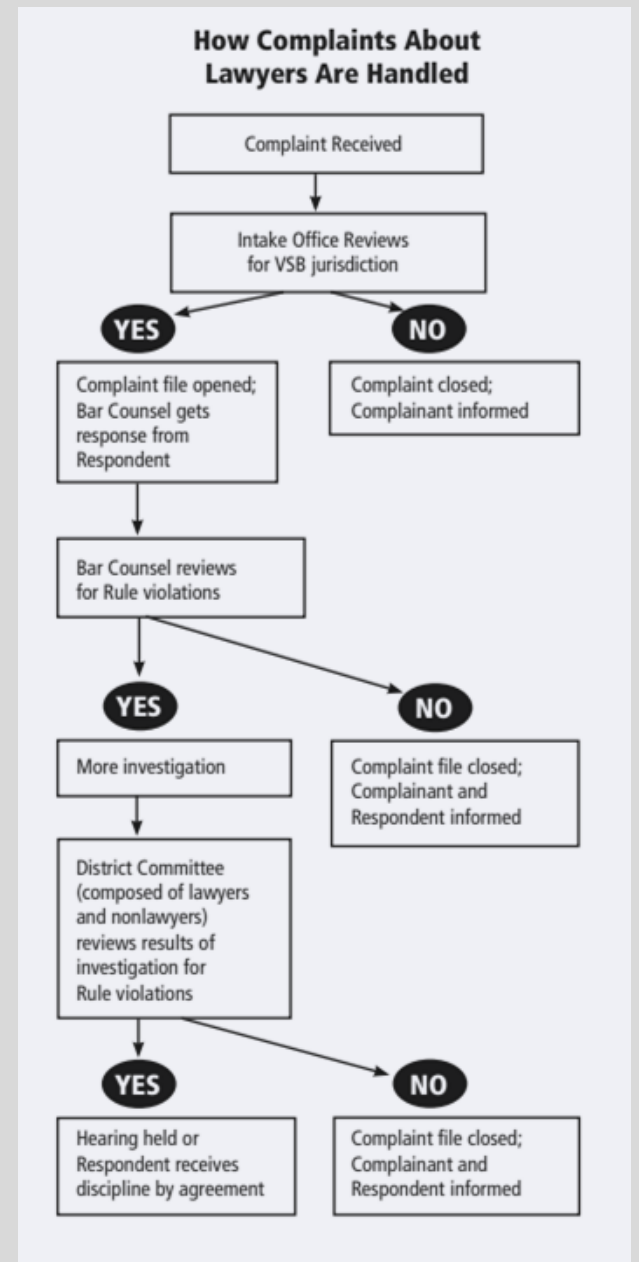
## Poll Question #2

What percentage of 2022 Bar complaints in VA were founded & resulted in disciplinary action?

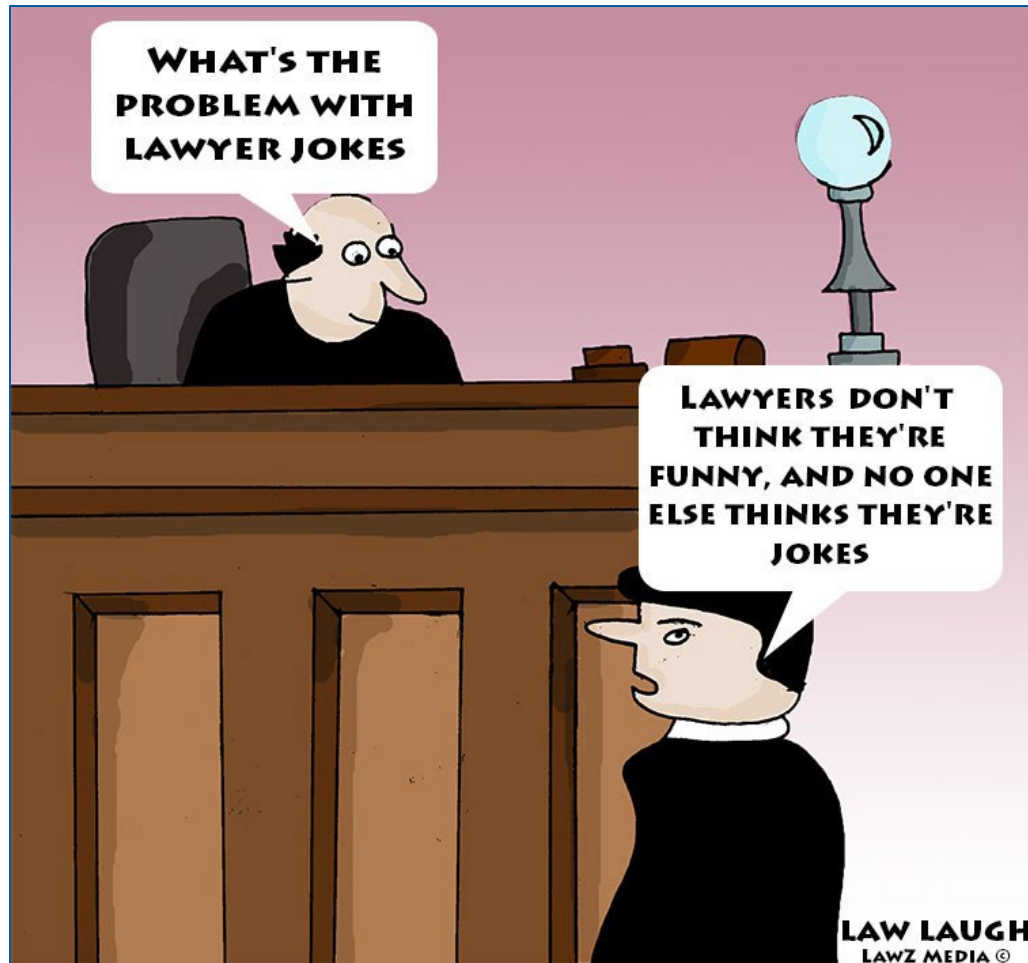
- A. 2.3%
- B. 11%
- C. 25%
- D. 38%

**Answer = 2.3%**

	<b>Fiscal Year 2020</b>	<b>Fiscal Year 2021</b>	<b>Fiscal Year 2022</b>
<b>Active Membership</b>	31,693	32,427	31,655
<b>Total Complaints Received</b>	3,091	2,924	3,113
<b>New Complaints Assigned to Bar Counsel</b>	651	562	473
<b>Cases Dismissed by Bar Counsel</b>	331	315	240
<b>Cases Otherwise Dismissed</b>	142	129	121
<b>Private Discipline</b>	50	43	38
<b>Public Admonition or Reprimand</b>	20	24	34



# Community Perspective: Building Trust & Being an Advocate



# Core Ethics Rules

# Competence: Rule 1.1

## Competence includes:

- Legal Knowledge & Skill
- Thoroughness & Preparation
  - Includes inquiry into factual as well as legal elements of case
- Applies to all aspects of representation.

## National Public Defense Workload Standards

Case type	Case weight (Hours per case)	Annual maximum cases per attorney*
High-level felony with potential life-without-parole sentence	286	7
High-level felony - murder	248	8
High-level felony - sexual assault	167	12
High-level felony - other	99	21
Mid-level felony	57	36
Low-level felony	35	59
High-level DUI	33	63
Low-level DUI	19	109
High-level misdemeanor	22.3	93
Low-level misdemeanor	13.8	150
Probation/parole violations	13.5	154

\*If working 2,080 hours per year on case-related work, excluding vacation, sick time, training and administrative tasks.

Source: RAND Corporation, National Center for State Courts, Law Office of Lawyer Hanlon, and the American Bar Association Standing Committee on Legal Aid and Indigent Defense.

# Diligence: Rule 1.3

- “Act with reasonable diligence & promptness in representing a client.”
- “A client's interests often can be adversely affected by the passage of time or the change of conditions”
- “Even when the client's interests are not affected in substance, however, unreasonable delay can **cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.**”

# Communication: Rule 1.4

A Lawyer Shall:

1. Keep the client **reasonably informed** about the status of a matter and **promptly comply** with reasonable requests for information.
2. Explain a matter to the extent reasonably necessary to **permit the client to make informed decisions** regarding the representation.
3. Inform the client of **facts pertinent** to the matter & of communications from another party that may significantly affect settlement or resolution of the matter.

## Poll Question #3

What percentage of **Founded** complaints cited poor communication as the primary reason for bringing the complaint?

- A. 5%
- B. 17%
- C. 25%
- D. 50%

**Answer: 25%**



# Community Perspective: Building Trust & Being an Advocate





# **Responsibilities & Roles in Decision-Making**

## Scope of Representation: Rule 1.2

Exclusively Client Decisions in Criminal Cases

A lawyer shall:

“Abide by a client’s decision concerning the **objectives** of the representation”

**What plea to enter.**

**Whether to waive right to jury trial.**

**Whether to testify.**

## Scope of Representation: Rule 1.2

A lawyer shall:  
“**Consult** with the client **as to the means** by which they are to be pursued.”

Exclusively Client Decisions in Criminal Cases

**What plea to enter.**

**Whether to waive right to jury trial.**

**Whether to testify.**

# Scope of Representation: Rule 1.2

## The Scope of Representation Comment (1):

- “Both lawyer and client have **authority and responsibility** in the objectives and means of representation.”
- The client has **ultimate authority to determine the purposes** to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations.
- Within those limits, **a client also has a right to consult** with the lawyer about the means to be used in pursuing those objectives.”

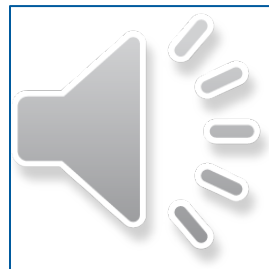
# Scope of Representation: Rule 1.2

- Lawyer not required to pursue objectives or employ means simply b/c a client wishes them to.
- “A **clear distinction between objectives and means sometimes cannot be drawn**, and in many cases the client-lawyer relationship partakes of a joint undertaking.”
- Lawyer should “**assume responsibility for technical & legal tactical issues**” in questions of the means, but
- “**Should defer to the client** regarding such Qs as the expense to be incurred & concern for 3rd persons who might be adversely affected.”

# “Object Anyway” -- James Batson

"The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to **touch the entire community**. Selection procedures that purposefully exclude black persons from juries **undermine public confidence in the fairness of our system of justice.**"

– *Batson v. Kentucky*, 1986



Radiolab presents  
**MORE**   
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**Ethics in Action:**  
PR Rules + Discovery

# Ethical Rules & Real-World Representation

- **Client: Donnie Davis**
- Charge: Robbery with a Firearm
- Facts:
  - William Wilson alleges backpack stolen at gun point.
    - Told police the backpack contained \$1,500 cash.
  - Davis stopped 2 days later for traffic infraction.
    - Wilson's backpack was found in the trunk. There was no money in it.
  - Davis arrested.
  - Wilson identifies Davis from a photo lineup.

# Rules & Realities – Scenario 1: General Obligations

You received discovery, including police reports, BWC footage, the photo array, & several lab reports. None is identified as RDM.

**Q: What are your obligations to provide Mr. Davis access to the discovery?**

**Answer:**

- **Must provide content**: read, view, hear, see the materials. *RPC 1.4(c)*
  - Insufficient to give a summary or overview.
  - Provide **sufficient info to participate** intelligently in decisions. *RPC 1.4, Comm. 5*
- **Must discuss content**
  - “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” *RPC 1.4*
  - ABA CJS 4-3.3 - share & discuss all evidentiary materials as early as practicable.

“Defendants are often in the **best position to know facts** about the case, such as who **witnesses** are, the **layout** of the crime scene, and knowledge about evidence that is found by police. After reviewing discovery, defendants can assist in their defense by **telling their attorney about facts that may not be true or witness statements that can be impeached**. They may be able to **help put the evidence in better perspective** so that the attorney can better grasp how to prepare for trial, such as the filing of motions to suppress or other motions.”

– Illinois State Bar, Advisory Ethics Opinion 13-10

## Poll Question #4

**You reviewed all of the discovery with Mr. Davis. He indicates he wants a copy of everything. Do you have to provide him one?**

**A. Yes**

**B. No**

**Answer: Yes**

## Scenario 1: General Obligations

**Q: Mr. Davis wants a copy of the discovery. Must you provide it?**

**A: Yes. Unless RDM, Davis has a right to copy of the discovery.**

- “A lawyer shall keep a client reasonably informed about the status of a matter and **promptly comply with reasonable requests for information.**” RPC 1.4(a)
- Duty to **provide sufficient info to participate intelligently in decisions** about the objectives of the rep & the means to pursue them. RPC 1.4, Comm. 5
- ABA CJS 4-3.9(b): “Defense counsel should promptly comply with the client’s reasonable requests for information about the matter **& for copies of or access to relevant documents.**”
- See *also* RPC 1.16(e) (right to a copy of the file at the termination of the case).

**Q: Davis wants 2 copies. Do you have to provide the 2<sup>nd</sup> copy?**

**A: Generally, no.**

- May charge reasonable fee for additional copies ***if*** C has resources to pay.
- May place reasonable limits on the number of copies.

## **Poll Question #5**

**Mr. Davis asks you to send his copy of the discovery to his mother. Do you have to do that?**

**A. Yes**

**B. No**

**Answer: Yes**

# Scenario 1: General Obligations

**Mr. Davis is in jail. Does that change your obligations and considerations about reviewing and providing discovery?**





# Scenario 1: General Obligations

**Incarceration does not change obligations**

## RPC 1.4: Communication:

- **Provide it**
- **Explain & Discuss it**

## ABA CJS 4-2.2(c): Confidential Communications

“Private facilities should also be provided for the review of evidence and discovery materials by counsel together with their detained clients.”

# Scenario 1: General Obligations

**Q: What changes if the CA identified items in discovery as RDM?**

**A: Very little**

- Does not change **obligation to fully review** all the discovery with Davis.
- **RDM is a limitation only on providing copies.**

**ABA CJS 4-3.9(b): Duty to keep client informed & advised about the representation.**

If dissemination of relevant case materials is restricted by law or court order, the attorney “should challenge such restriction . . . unless, after consultation with the client, there is good reason not to.”

## Scenario 2: CA Office View Only

**Rather than provide you with copies, the local practice is for the CA to only make the discovery available to view in their office.**

**Q: What obligations do you have to document what you review?**

**A: To the extent practicable, you must copy what you are viewing. Important information should be taken down verbatim.**

**Q: Can you take a photo of it?**

**A: Yes, unless there is an express policy prohibiting photos.**



## Scenario 2: CA Office View Only



**Q: Mr. Davis wants to go with you to the CA's Office to view the discovery. Do you have to bring him?**

**A: Yes.**

- Can provide insights and explanations that impact what you view as relevant.
- May be the only way to provide him with opportunity to view the content.
- Important to provide warnings to Davis.

# Community Perspective: Building Trust & Being an Advocate



## Scenario 3: Voluminous Discovery

**Discovery includes 50 hours of calls from the jail. You have other cases and don't believe you can devote 50 hours to listen to the calls. Must you review all 50 hours?**



**A: It depends.** No “one size fits all” approach.

“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer. . . . A lawyer’s work load should be controlled so that each matter can be handled adequately.” *RPC 1.3 Comment (1)*

Attorneys have an ongoing obligation to monitor own workload & ensure adequate time to carry out representation.

-- ABA CJS 4-1.8: Appropriate Workload

## **Poll Question #6**

**Can you delegate the responsibility of listening to all the calls to your paralegal?**

**A. Yes**

**B. No**

**Answer: Yes**

## Scenario 3: Voluminous Discovery



**If the paralegal reviews the calls:**

**As the attorney you must:**

- Ensure they are properly trained.
- Supervise and review their work. RPC 5.3
- See also, ABA Formal Op. 506 (duty to supervise staff)
- Be responsible for legal conclusions about admissibility, relevance, etc.



# Scenario 3: Voluminous Discovery

**Q: Do you have to tell Davis that a paralegal reviewed the recordings?**

**A: Generally No.**

- You are not under any ethical obligation to tell Davis the means by which you reviewed the discovery.
- You do have to be honest in your dealings with your client.
- Opportunity to build a team that can help support client (and you).



## **Poll Question #7**

**The CA indicates they have reviewed the calls and assures there is nothing on them they will be offering at trial. Do you still have to review the calls?**

**A. Yes**

**B. No**

**Answer: Yes**

# Scenario 3: Voluminous Discovery

**Q: The CA indicates they have reviewed the calls & assures there is nothing on them they will be offering at trial. Do you still have to review the calls?**



**A: Yes. RPC 1.3 (Diligence)**

**Def. perspectives are different than state.**

- Opportunities for mitigating info re: guilt or sentence.
- Identify possible MH, difficulties in understanding/processing info, & gaps in knowledge.
- May lead to other witnesses or theories of defense.
- Prepared if CA "changes their mind."

## Scenario 3: Voluminous Discovery

**Q:** You review the calls and did not find anything relevant. Mr. Davis wishes to listen to all the calls. Do you have to make the recordings available?

**A: Yes.** You must give Davis the opportunity to review all discovery.



## **Scenario 4: Strategic Choices**

**Mr. Davis tells you he is not the person who committed the robbery and provides information about his alibi, including an alibi witness.**

**You know that if you request discovery under Rule 3A:11, you will be obligated to disclose your alibi witness information.**

**From prior experience, you know the CA will send the police to “talk” to your witness and worry the witness may decide not to testify after that.**

## Scenario 4: Strategic Choices

**Q: Can you decide not to file for discovery to avoid having to disclose Davis' alibi defense and witness?**

**A: No. You cannot make that decision without discussing it with Davis. Discussion should include pros & cons of not pursuing discovery.**

# Poll Question #8

Despite all your explanations, Davis indicates he wants you to file for discovery. Can you still decide to make the choice to not file for discovery because you believe it to be the best strategy?

A. Yes

B. No

Answer: No

## Scenario 5: Prohibiting Disclosure

**The CA offers to provide the name and key details about a CI who provided information to the police that formed the basis for following Davis. The CI would not otherwise be discoverable.**

**However, they will only provide this information if you agree not to share any of the information with Davis. The CA indicates this is because they fear for the CI's safety.**



# **Poll Question #9**

**Can you agree to the CA's offer to provide information regarding the informant on the condition that you not share any of the information with Davis?**

**A. Yes**

**B. No**

**Answer: No**

# Community Perspective: Building Trust & Being an Advocate



**Teamwork makes the dream work**

# Scenario 6: Inadvertent Disclosure

**Q:** In most of discovery documents CA blacked out Wilson's SSN & DOB. However, one report fails to redact the info. You believe this was an oversight by the CA. Can you use that info?

**A:** Yes.

- No ethical duty to disclose an adversary's error.
- Especially if it would be detrimental to or prejudice the client.
- Generally, no obligation to return or not use info given inadvertently.
- If an Order were entered that Wilson's SSN/DOB be redacted or kept confidential, should disclose to CA b/c risk knowingly violating a court order. *RPC 3.4(d)*

DEPARTMENT OF UNIVERSITY SAFETY - INCIDENT REPORT

Incident Type: Administrative Information

Location: Latch Bldg, Locker/Shower Room

Date: 05/04/98

Time: 1100

Assigned: 05/04/98

On Scene: 05/04/98

Reported: 05/03/98

Received: 0700

and: 0900

Received by: 4117

Initials: Citizen

Victim Name: [Redacted]

Victim Sex: [Redacted]

Victim Age: [Redacted]

Victim DOB: [Redacted]

Victim Race: [Redacted]

Victim Hair: [Redacted]

Victim Eyes: [Redacted]

Victim Height: [Redacted]

Victim Weight: [Redacted]

Victim Build: [Redacted]

Victim Complexion: [Redacted]

Victim Address: [Redacted]

Victim Phone: [Redacted]

Suspect Name: Gerald A. Sandusky

Suspect Sex: [Redacted]

Suspect Age: [Redacted]

Suspect DOB: [Redacted]

Suspect Race: [Redacted]

Suspect Hair: [Redacted]

Suspect Eyes: [Redacted]

Suspect Height: [Redacted]

Suspect Weight: [Redacted]

Suspect Build: [Redacted]

Suspect Complexion: [Redacted]

Suspect Address: [Redacted]

Suspect Phone: [Redacted]

Additional Information: [Redacted]

Parent of 11 year old male reported that her son was hugged in a shower room by a staff member. Investigation determined that a 10 year old male was also hugged in the shower at a different time by the same staff member. Investigation continuing by this department and Centre County Children & Youth Services Bureau & the Centre County District Attorney's Office.

Case Number: [Redacted]

Supervisor: [Redacted]

Officer: [Redacted]

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## Scenario 6: Inadvertent Disclosure

The discovery includes the CA's personal notes indicating concerns about Wilson's credibility re: having \$1,500 in cash in his stolen bag.

**Q: Do you have to tell the CA they sent their notes?**

**A: Yes.**

**RPC 4.4 (b)**

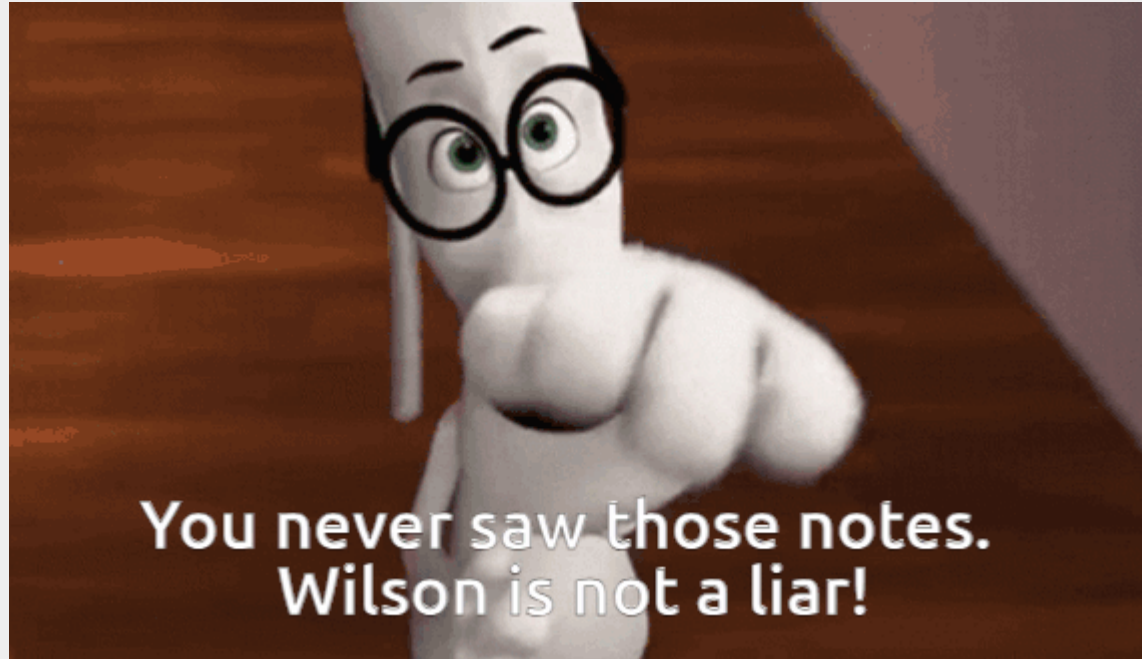
- If lawyer receives a document and they
  - Know or reasonably should know the document was inadvertently sent
  - Know or reasonably should know the document is privileged
- Should immediately terminate review/use of document
- Notify the sender
- Abide by sender's instructions to destroy or return the document



*You're a Liar!*

## Scenario 6: Inadvertent Disclosure

**You returned the CA's notes. Can you use the info you read?**





## Scenario 6: Inadvertent Disclosure

- Can't tell Davis about the info.
- Can't use the info itself.
- May be able to file a *Brady* Motion.



**Rule 4.4, Comment (3)** “Preservation of lawyer-client confidences is such a vital aspect of the legal system that it is appropriate to **require that lawyers not take advantage of a mistake** or inadvertent disclosure by opposing counsel to gain an undue advantage. This means that the lawyer is **prohibited from informing** the lawyer’s **client of relevant**, though inadvertently disclosed, information, and that the lawyer is prevented from using information that is of great significance to the client’s case. In such cases, paragraph (b) **overrides the lawyer’s communication duty under Rule 1.4.**”

“Where applicable discovery rules, agreements, or other law **permit the recipient to contest the sender’s claim of privilege**, use of such a process does not constitute “use” as prohibited by this rule.”

# Scenario 6: Inadvertent Disclosure

By agreement with the CA, Wilson's address and phone # have been redacted. You are at the CA's Office reviewing a report that has Wilson's phone number blacked out, but you can still read it?

Q: Can you use it?

A: Probably Yes.

- Akin to an inadvertent disclosure of metadata.
  - Metadata = info in electronic doc.; not patently visible.
- Majority: Unethical to seek out and use metadata.
- No specific VA rule on point.
- VA RPC similar to minority of states (only limit on privileged info).

5792-4

DEPARTMENT OF UNIVERSITY SAFETY - INCIDENT REPORT

Incident Type: Offense

Administrative Information

Location: 3. Condo/Resident Home/Loc./Priv./M

Room: Latch Bldg., Locker/Shower Room

Date: 05/04/98

Time: 1100

Assigned: 05/04/98

On Scene: 05/04/98

Reported: 05/03/98

Investigated: 0700

and: 0900

Received by: 4117

Assess Official: [Redacted]

Victim: [Redacted]

Sex: [Redacted]

Age: [Redacted]

DOB: [Redacted]

Height: [Redacted]

Weight: [Redacted]

Eye Color: [Redacted]

Hair Color: [Redacted]

Complexion: [Redacted]

Build: [Redacted]

Additional Information: [Redacted]

Suspect: Gerald A. Sandusky

Sex: [Redacted]

Age: [Redacted]

DOB: [Redacted]

Height: [Redacted]

Weight: [Redacted]

Eye Color: [Redacted]

Hair Color: [Redacted]

Complexion: [Redacted]

Build: [Redacted]

Additional Information: [Redacted]

Signature: [Redacted]

Date: [Redacted]

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# QUESTIONS



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