CLE Seminar for In-House Counsel Wednesday, June 24, 2020

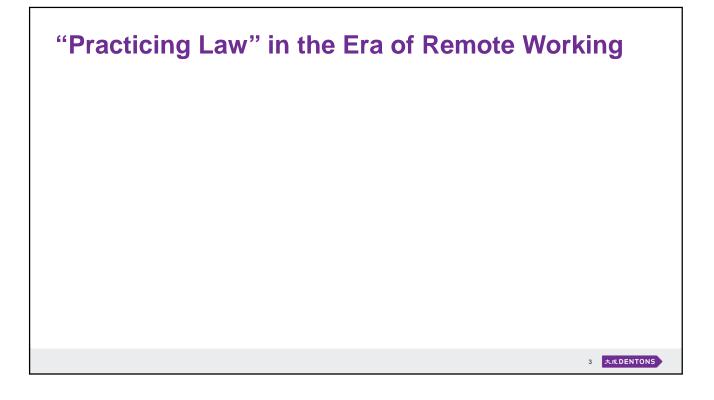
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Ethics Issues for In-House Counsel in 2020

Susan Mitchell, Partner and US Deputy General Counsel Los Angeles

Agenda

- "Practicing Law" in the Era of Remote Working
- Privilege Parameters in Your Organization
- New Attorney Hires and Conflicts Risks
- Challenges to Ethical Duties of Competence and Confidentiality During the Pandemic
- Reporting Misconduct





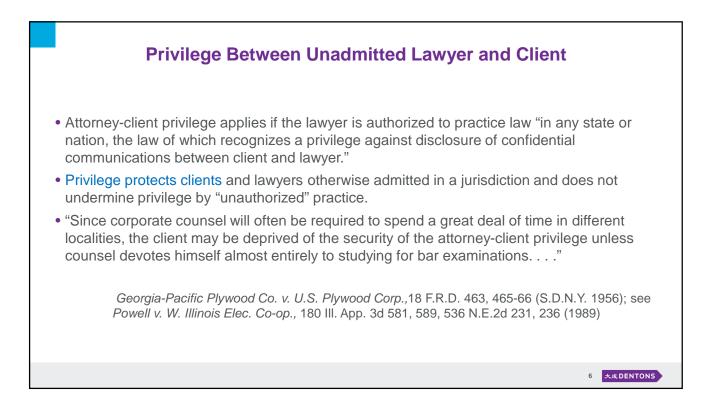
- The Rules of Professional Conduct apply to all State Bar members, whether active or inactive.
- A "law firm" is defined as the legal department of a corporation or other organization, or a legal services organization.
- The Rules apply whether you are acting in a legal capacity or in a business capacity.

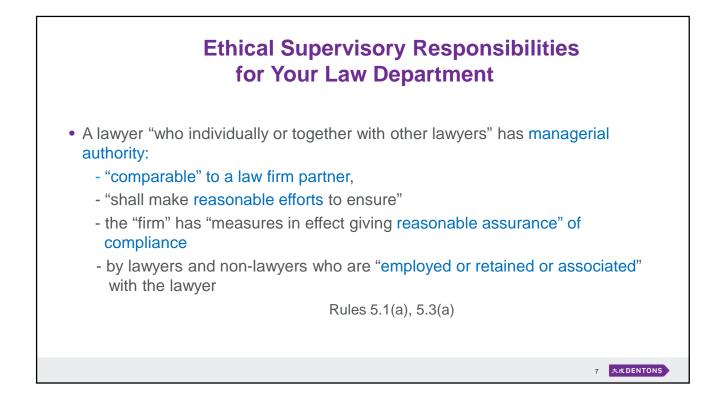
ABA Model Rules ("Rule"), Rule 1.0(c)

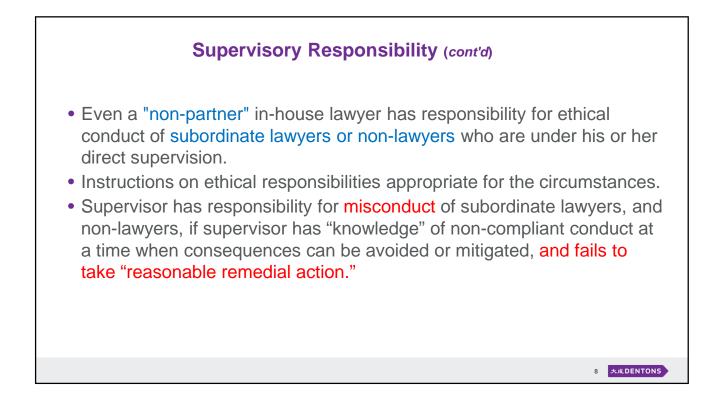
Registered In-House Counsel

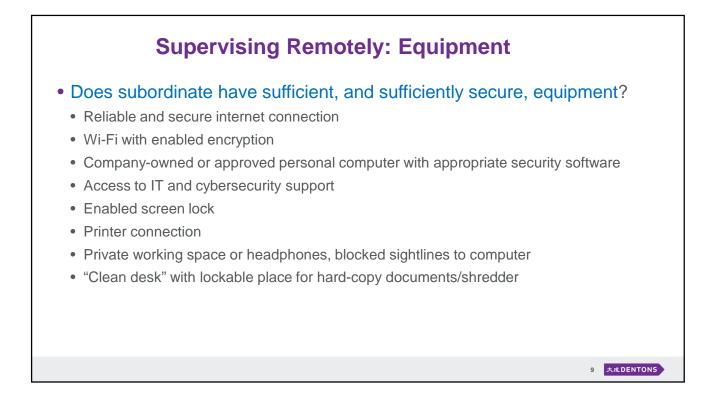
- Under ABA Model Rules, a lawyer may not "practice law" unless admitted to the Bar of the state in which the lawyer has established a "systematic and continuous presence," for the practice of law (Rule 5.5, Comm. 4).
- But "practice of law" is established by state laws which vary among jurisdictions.
- Most states have a rule of court permitting in-house counsel to practice law in a state in which they are not admitted under a restricted license.

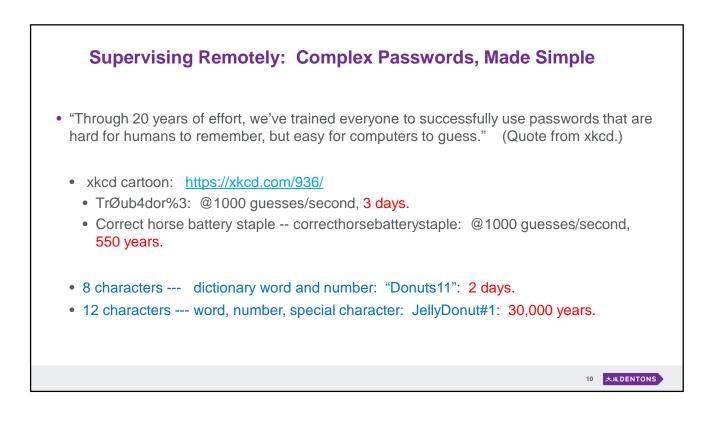
E.g., California Rule of Court 9.46; Ill. Supreme Court Rule 716

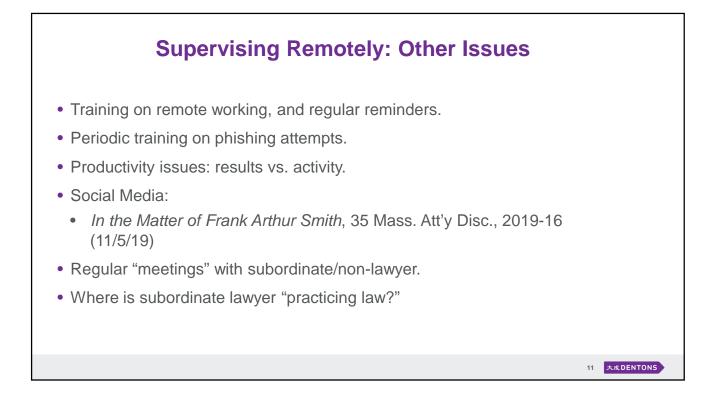




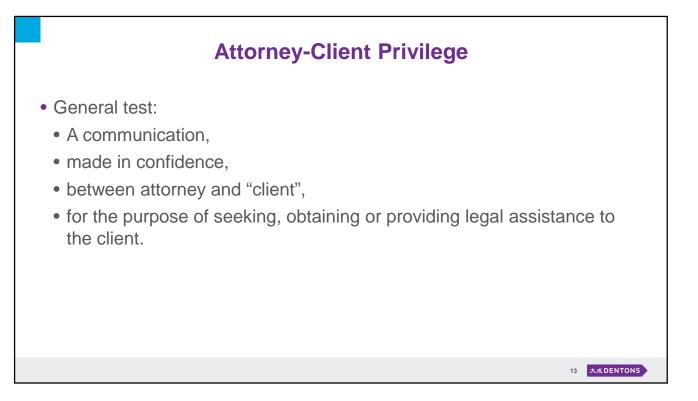


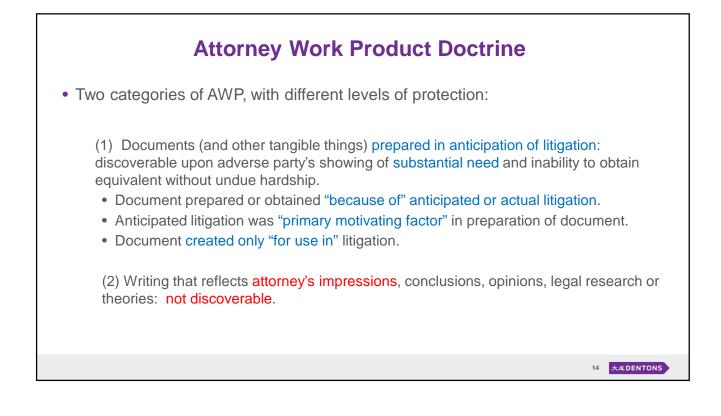


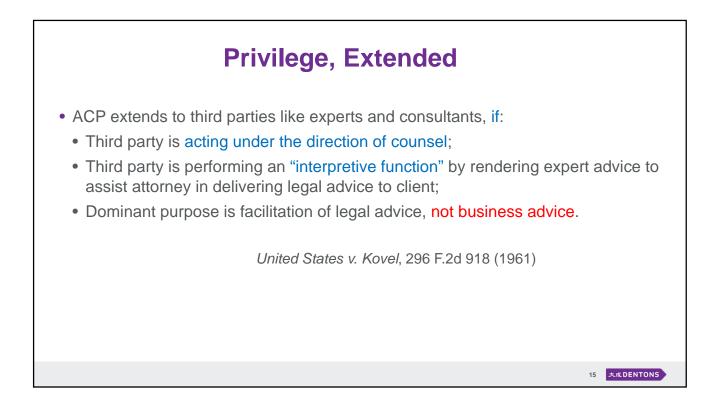


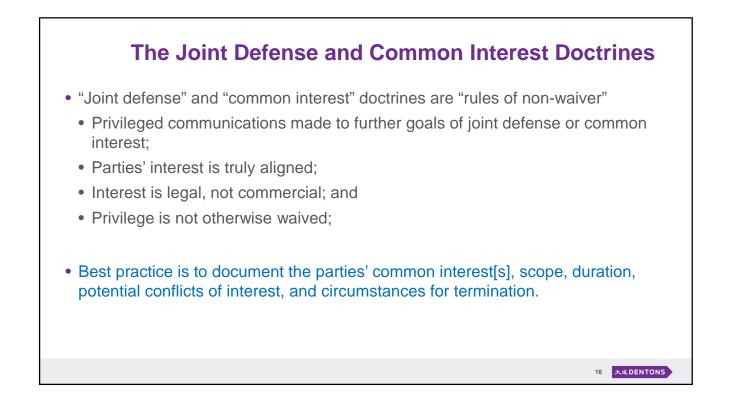


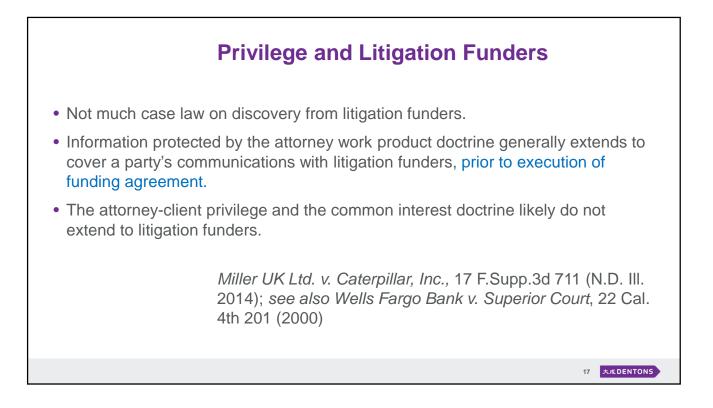


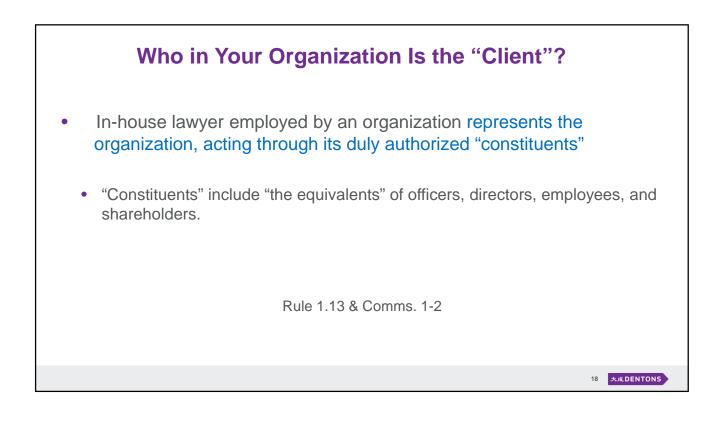








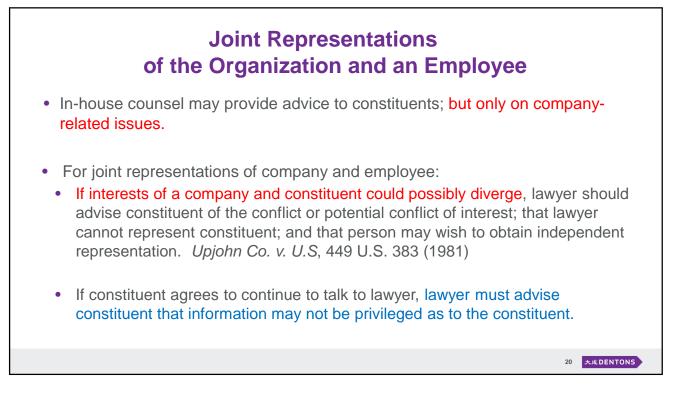




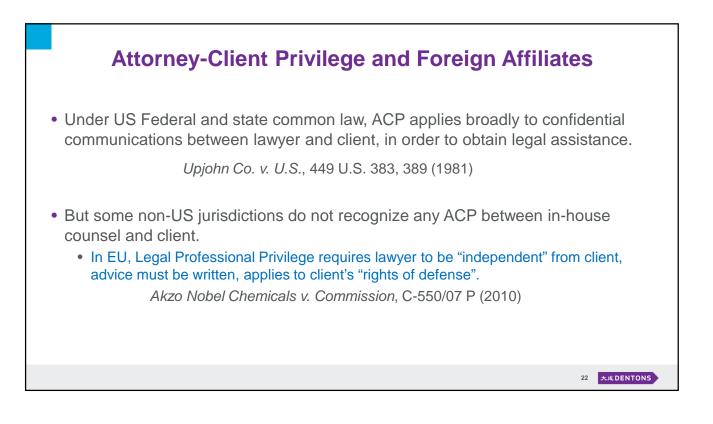
Legal Advice, Business Advice, and What Falls In Between

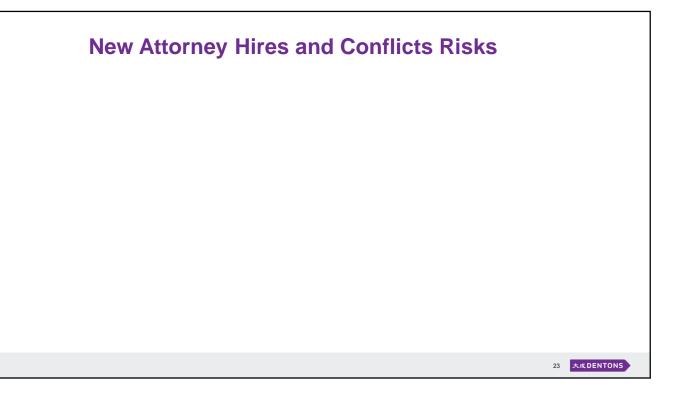
- In-house counsel often are called upon to participate in meetings involving significant business decisions -- those may or may not be privileged communications, depending on several factors.
- "Predominant purpose test": Legal advice must not be "incidental" to business advice.

In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014); RCHFU, LLC v. Marriott Vacations Worldwide Corp., No. 16-CV-1301-PAB-GPG, 2018 WL 3055774, at *3 (D. Colo. May 23, 2018); Bankdirect Capital Finance, LLC v. Capital Premium Finance, Inc., 326 F.R.D. 176 (N.D. III. 8/3/18)









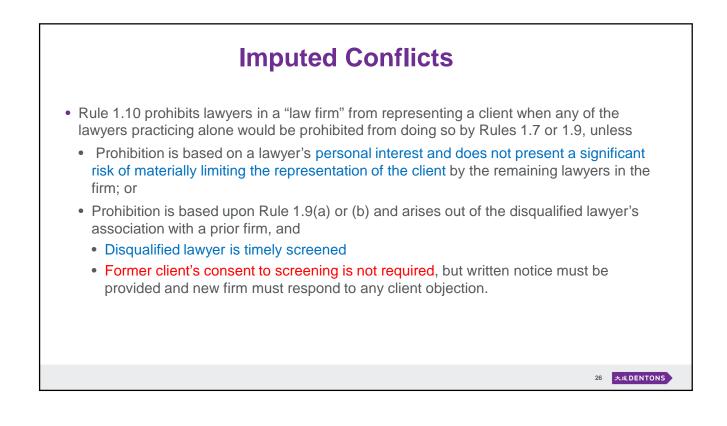


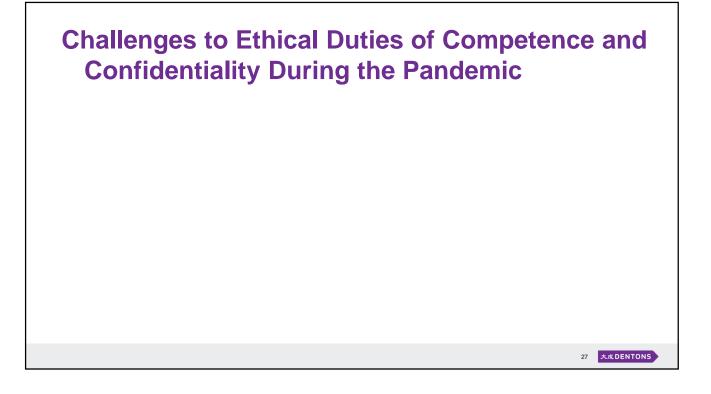
Rule 1.9, Former Client Conflicts

• Conflict of interest would be created if new client would be represented by law firm in "same or substantially related matter" in which new client's interest would be "materially adverse" to firm's former client's interests;

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- Lateral lawyer's former law firm represented potential new client in "same or substantially related matter" and lateral acquired client-confidential information that is material to the firm's current matter.
- Matter is "substantially related" if it involves the same transaction or dispute; or if there is a substantial risk that confidential information which normally would have been provided in the prior representation would materially advance new client's position.

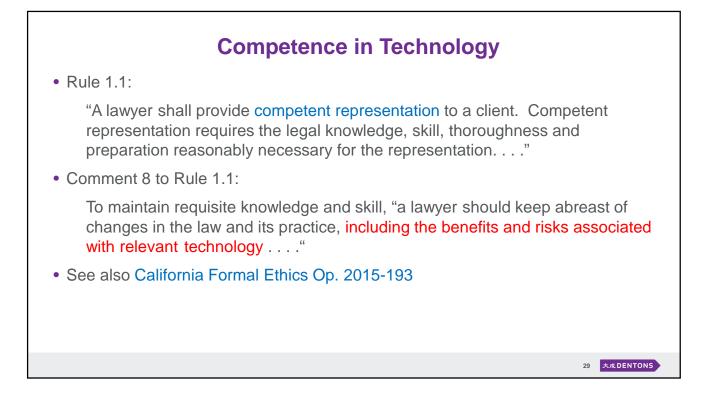


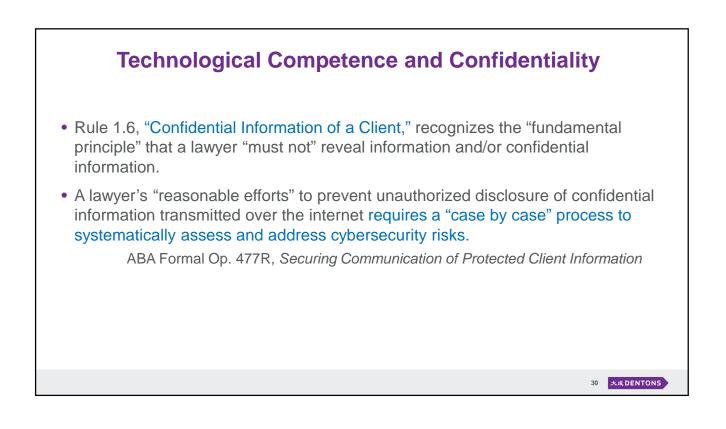


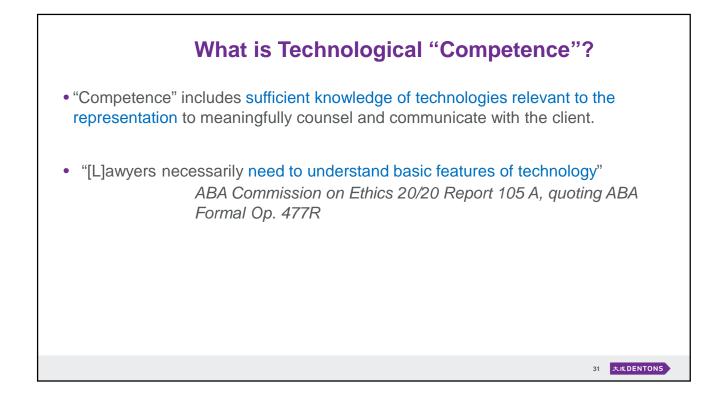
Increased Attacks on Information Security Have Increased Our Ethical Obligations

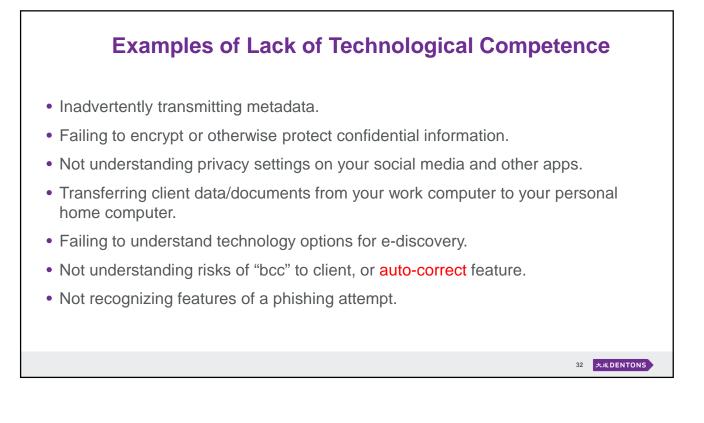
"Compliance requires attorneys to understand limitations in their knowledge and obtain sufficient information to protect client information, to get qualified assistance if necessary, or both. These obligations are minimum standards—failure to comply with them may constitute unethical or unlawful conduct. Attorneys should aim for security that goes beyond these minimums as a matter of sound professional practice and client service."

ABA TechReport, Cybersecurity (Jan, 28, 2019)

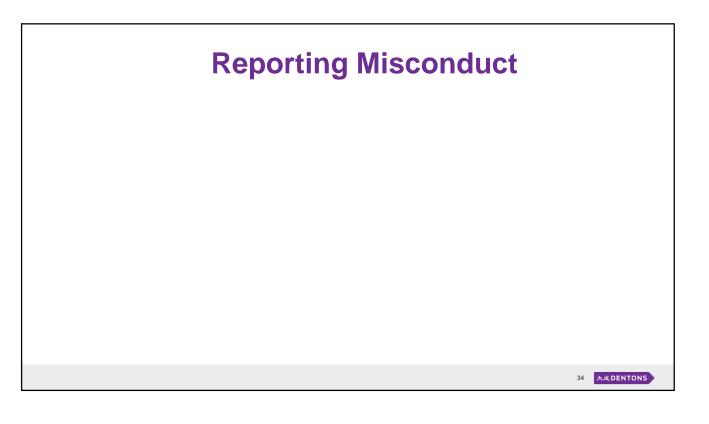


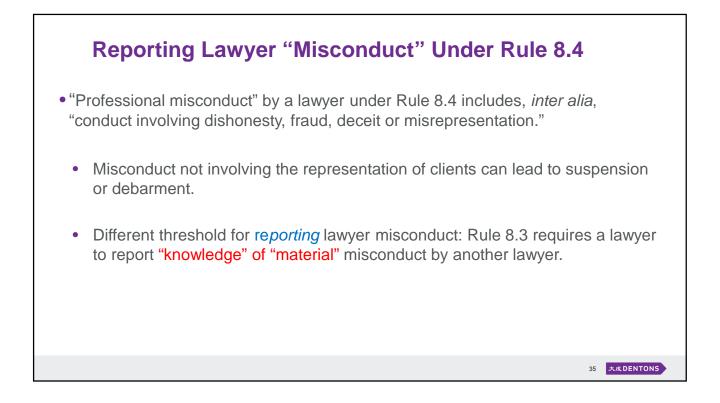


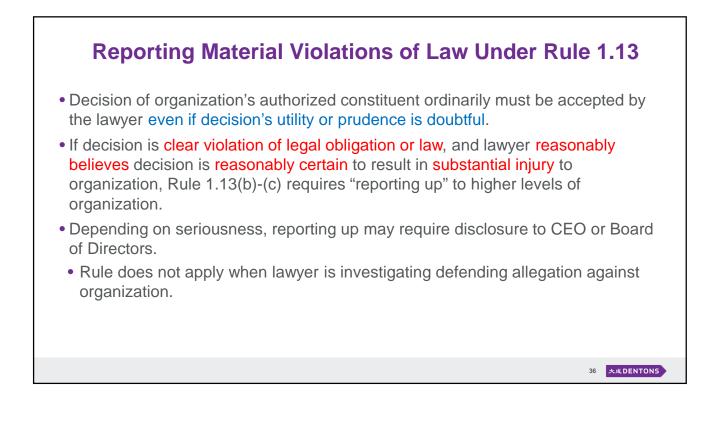












"Reporting Up" Under SOX

- Under Sarbanes-Oxley Act Section 307, attorney who "appears" or "practices" before SEC and who becomes aware of "material violation" by issuer, or director, officer, employee or agent of issuer, must report up to CEO or chief legal officer of organization
- If response is inadequate, attorney must report to Audit Committee or Board

