

2014 WCLA
Professional Conduct Seminar
February 12, 2014

James R. Thompson Center
Presented by Thomas W. Dillon
Konicek & Dillon, P.C.

Fact Scenario Discussion

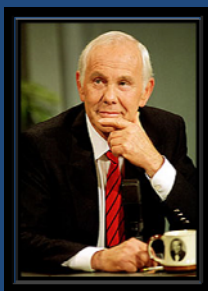
- Similar format to prior years
- Violations of RPC
- Elements of malpractice
- Questions, answers, audience participation

Refresher on Malpractice

- Standards for establishing malpractice
- Interplay with RPC
- Pertinent rules

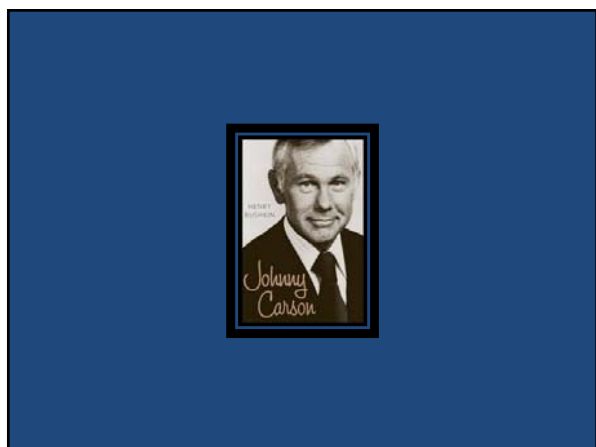
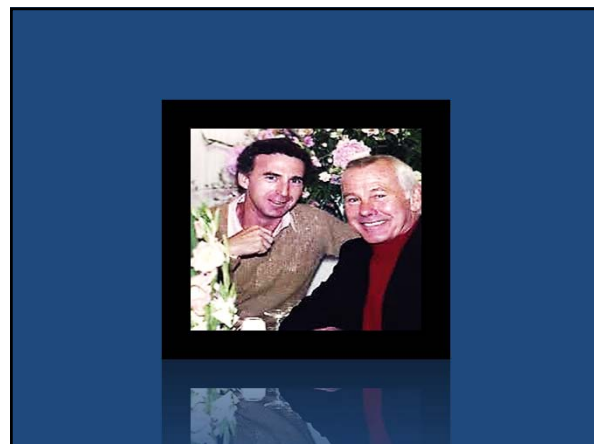
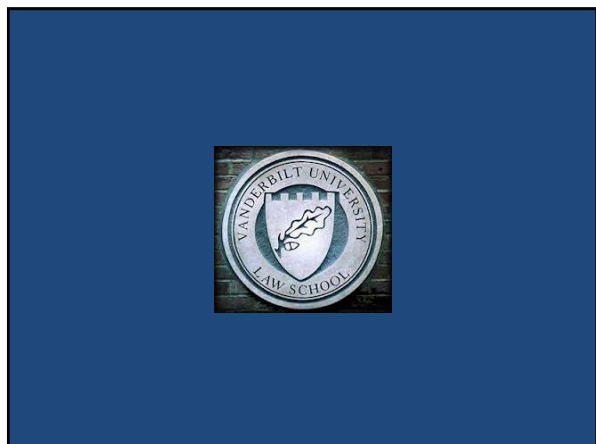
....but before we begin.....

“Heeeeeeeerrreeee’s Johnny!”



1960's

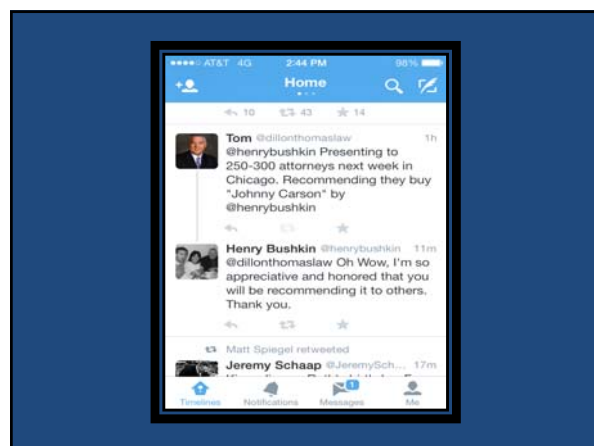




Disputes/Brushes

A collage of three images: a black and white photo of a football player in a jersey with the number 16, a photo of a man in a suit and sunglasses, and a color photo of a man in a suit smiling.

Bought the book thinking it was about a great entertainer
Only to realize it was a book about great lawyering with a semi-tragic outcome



The "Bombastic Bushkin"

- Negotiated record-breaking television contracts
- Negotiated ownership of *The Tonight Show*, including all reruns, videos, characters & music
- Created a successful production company
- Created a clothing line paying Carson \$1,000,000 annually for one day of work and use of his name and image (in the 1970's!)
- Recommended prenuptial agreements
- Traveled, socialized, competed



\$450,000,000.00



NEVER
ENOUGH

Legal Malpractice

- *Carson v. Bushkin*
 - Breach of Fiduciary Duty claim
 - Conflict of Interest claim
 - Self-dealing claim



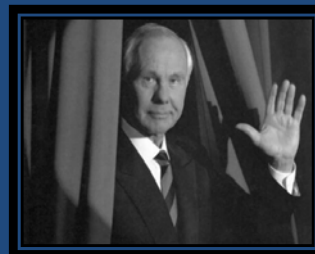
Lessons Learned from the "Bombastic Bushkin" and "Johnny Carson"

- Serve your clients well
- Make your clients' interests paramount
- Watch for conflicts of interest
- No good deed goes unpunished
- Personality traits transcend dollars
- Law is a great profession
- Even lawyers who get great results for clients are sued
- Helping a client go from living paycheck to paycheck to being one of the most successful and "powerful" men in entertainment not enough to immunize Bushkin from suit

ASAYUCCSY

- Carry insurance and notify your carrier ASAYUCCSY
- "As soon as your ungrateful crazy client sues you"
- (If not earlier!)

Beware of the man behind the curtain



Elements of Cause of Action for Legal Malpractice

- Attorney client relationship
- Duties from the relationship
- Breach of the duties
- Damages proximately caused by the breach

Jury Instruction

105. 01 Professional Negligence – Duty

- A lawyer must possess and use the knowledge, skill, and care ordinarily used by a reasonably careful lawyer. The failure to do something that a reasonably careful lawyer [practicing in the same or similar localities] would do, or the doing of something that a reasonably careful lawyer would not do, under circumstances similar to those shown by the evidence, is "professional negligence". The phrase "deviation from the standard of [care][practice]" means the same thing as "professional negligence".
- The law does not say how a reasonably careful lawyer would act under these circumstances. That is for you to decide. In reaching your decision, you must rely upon opinion testimony from qualified witnesses [and] [evidence of professional standards] [evidence of by-laws / rules / regulations / policies / procedures] [or similar evidence]. You must not attempt to determine how a reasonably careful lawyer would act from any personal knowledge you may have.
- *Instruction and Notes on Use revised September 2011.*

The Reasonably Careful Lawyer

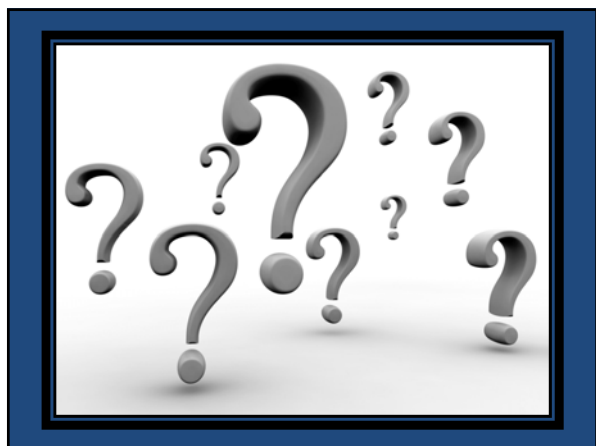
- All of you
- The collective wisdom, knowledge and experience of the bar
- Established by expert testimony
- Using law, knowledge and information known (or knowable) at the time of the representation

Rules of Professional Conduct

- Interplay with malpractice
- Not an "independent font" of liability
- Not an automatic inference of breach of duty
- "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."
– Preamble to RPC

Rules of Professional Conduct

- "The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. **They are not designed to be a basis for civil liability.**"
- "Nevertheless, since the Rules do establish standards of conduct by lawyers, **a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.**"



A Train Wreck



Fact Scenario 1

- Rules Implicated:
- 1.1 Competence
- 1.2 Scope of Representation
- 1.3 Diligence
- 1.4 Communication
- 2.1 Advisor



Fact Scenario 1-A

- 1.6 Confidentiality
- 1.7 Conflict of Interest



Fact Scenario 1-B

- 1.2 Scope of representation/Allocation of authority
- 3.3 Candor toward the tribunal
- 4.1 Truthfulness in statements to others
- 8.4 Misconduct (a, c, d)



Fact Scenario 1-C

- 1.2 Scope
- 1.4 Communication
- 1.7 Conflict of interest



Fact Scenario 1-D

- 1.1 Competence
- 1.3 Diligence
- 1.4 Communication
- 2.3 Evaluation for use by third persons



Fact Scenario 2

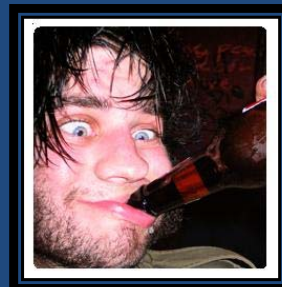
- Rules not necessarily implicated on these facts
- 1.1 Competence- knowing the law and knowing alternatives
- Know when to send a client to someone else



Fact Scenario 3

- 1.4 Communication
- 1.5 Fees
- 1.6 Confidentiality
- 1.14 Client with diminished capacity

Incapacity Comes in Different Varieties



Fact Scenario 4

- 4.2 Communication with Person Represented by Counsel
- 1.8(a)(1) Business transaction
- 1.8(b) Using information against client



Fact Scenario 4

- Assume investigator listened to conversations Petitioner had with his attorney via speakerphone
- Obligations of Respondent's attorney?

Update: Legal Malpractice

- Developments
- Decisions of note