

Office of Inspector General Legal & Ethics Conference

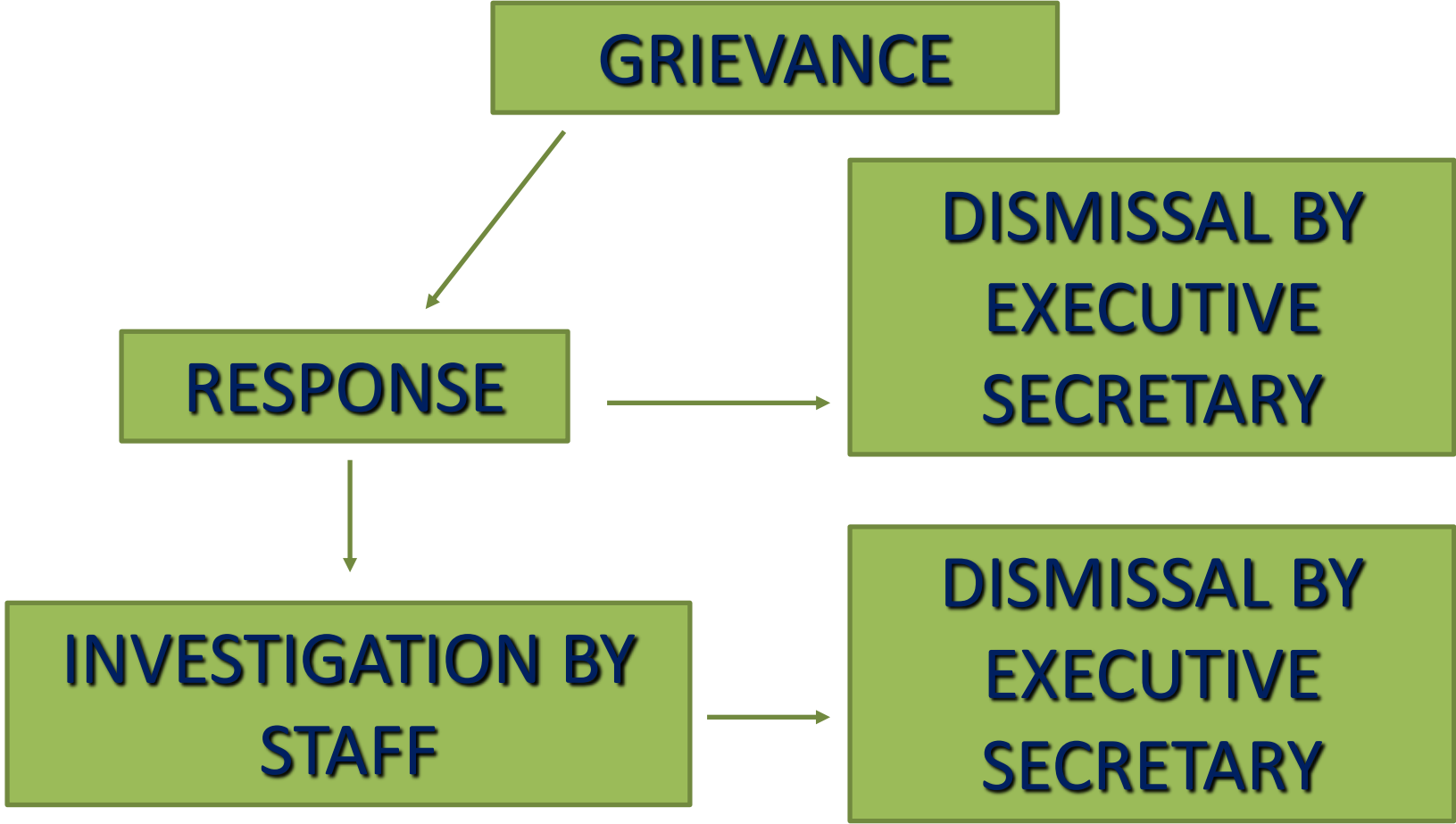
Meg Christensen, Partner

November 14, 2017

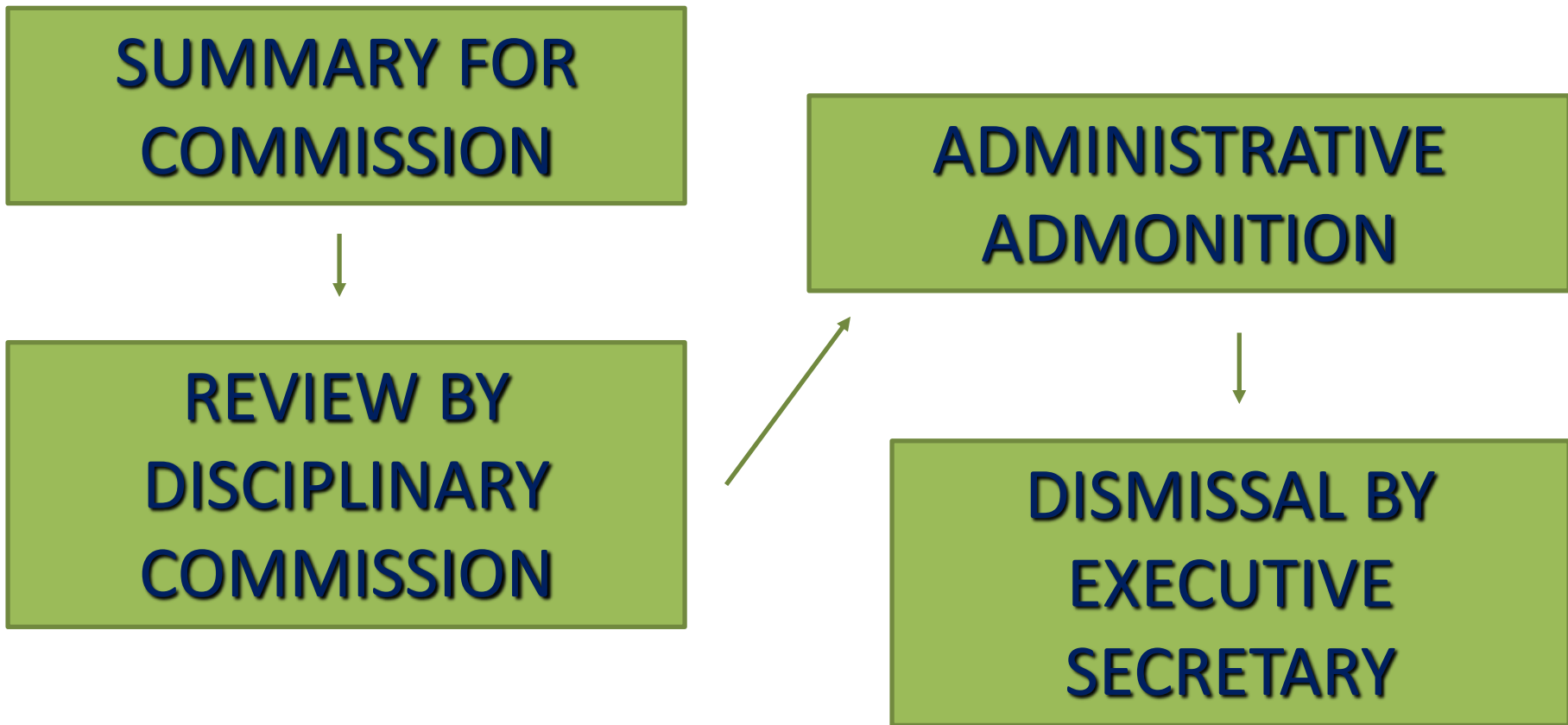


ATTORNEY DISCIPLINE PROCESS

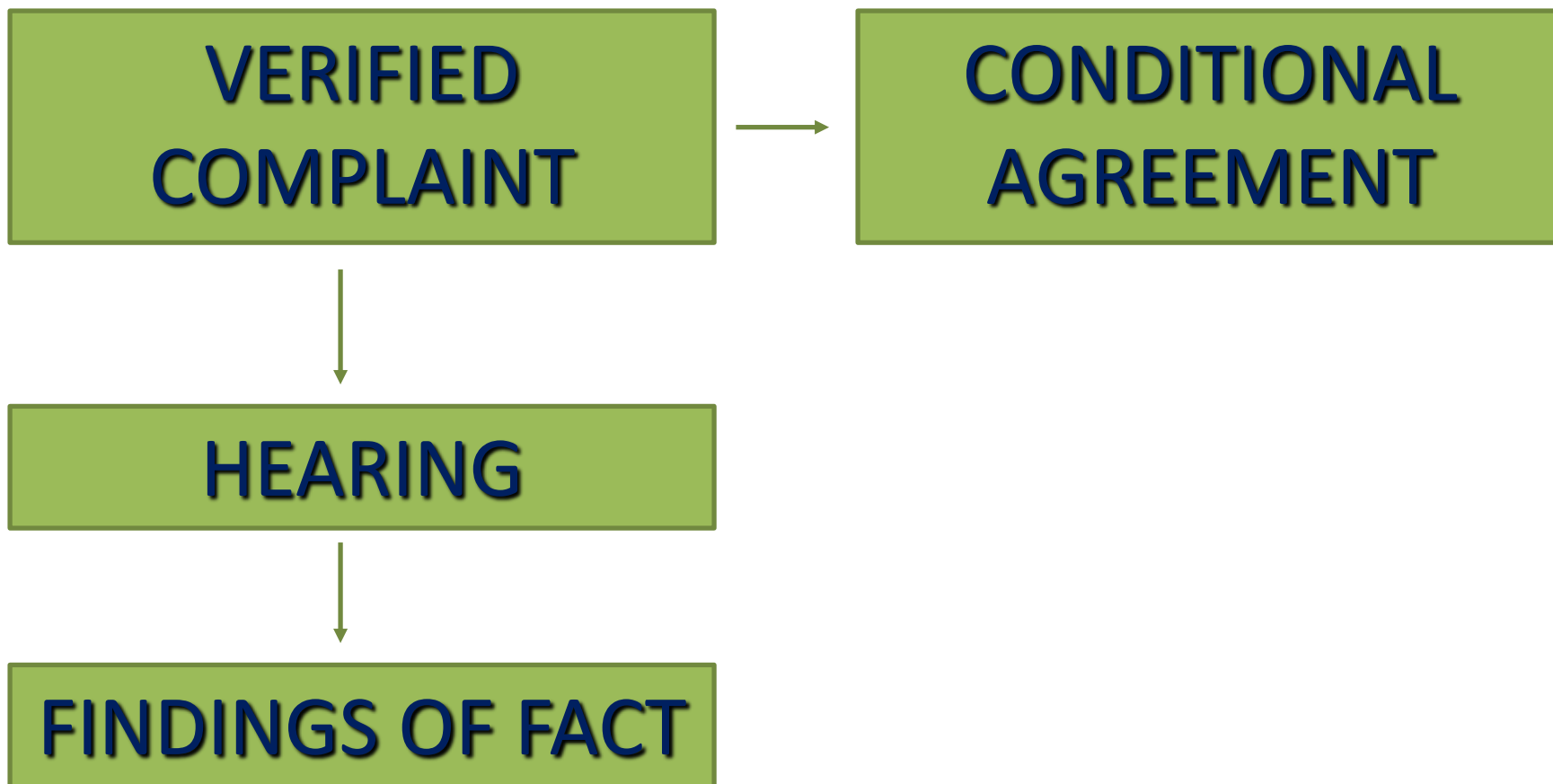
ATTORNEY DISCIPLINE PROCESS



OPTION 1: Dismissal



OPTION 2: Verified Complaint



SUPREME COURT REVIEW

PETITION FOR
REVIEW



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graph TD; A[PETITION FOR REVIEW] --> B[SUPREME COURT OPINION]
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SUPREME COURT
OPINION

MULTIPLE REPRESENTATION

MULTIPLE REPRESENTATION

“There is nothing inherently wrong in representing multiple clients where their interests are aligned.”

Cincinnati Ins. Co. v. Wills,
717 N.E.2d 151, 161 (Ind. 1999)

RULE 1.13 ORGANIZATIONAL CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

RULE 1.13 ORGANIZATIONAL CLIENT

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, **a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.**

RULE 1.13 ORGANIZATIONAL CLIENT

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.

- If the organization's **consent** to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization **other than the individual who is to be represented**, or by the shareholders.

RULES OF MULTIPLE REPRESENTATION

- I.D. Client, Lawyer and Matter
- I.D. Client's Expectation (Truth)
- Confidence belongs to Company; Can Disclose
- Confidential Outside Organization; not within
- I do/do not represent you
- Separate counsel?

SUPERVISION OF ATTORNEYS AND ASSISTANTS

RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANTS

Rule 5.3

- With respect to a non-lawyer employed or retained by or associated with a lawyer:
 - (a) a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
 - (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
 - (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

Rule 5.1:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RESPONSIBILITIES OF A SUBORDINATE LAWYER

Rule 5.2.:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

TRUTHFULNESS IN STATEMENTS TO OTHERS

RULE 4.1

In the course of representing a client a lawyer shall not knowingly:

- a) make a false statement of material fact or law to a third person; or
- b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

MATTER OF COLEMAN, 67 N.E.3D 629

- False claims regarding firm affiliation
- Lack of diligence and competence
- Used wife in an attempted deception in subsequent fee litigation (deposed wife in the litigation and concealed their relationship from the former client)

***2-YEAR SUSPENSION,
without automatic reinstatement***

SPEAKING WITH REPRESENTED PEOPLE

RULE 4.2

In representing the client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.

MATTER OF S.L., 55S00-0706-DI-241

- Deponent was represented
- Attorney for deponent could not attend deposition
- Deponent nevertheless appeared in spite of attorney's advice
- Deponent was advised of her Miranda rights and was advised not to proceed without counsel being present

MATTER OF S.L., 55S00-0706-DI-241

- Incriminating statements were elicited from deponent
- Violation Rule 4.2
- Sanction: Public reprimand

MATTER OF UTTERMÖHLEN

- “The Rule applies even though the represented person initiates or consents to the communication.”

DEALING WITH UNREPRESENTED PERSONS

RULE 4.3

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
- When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

RESPECT FOR RIGHTS OF THIRD PERSONS

RULE 4.4

- a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.**

IND. R. TR. PROC. 26(B)(5)(B) – USING PRIVILEGED INFORMATION

- A receiving party may promptly present the information to the court under seal for a determination of the claim.
- If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.
- The producing party must preserve the information until the claim is resolved.

MCDERMOTT WILL & EMERY LLP V. HAUSMAN

- Law firm received privileged e-mail between opposing party and his lawyer
- Opposing party claimed disclosure was inadvertent
- Law firm used the e-mail at a deposition
- Law firm ultimately disqualified
 - The privilege was in tact because it was sent inadvertently to non-party
 - Subsequent disclosure was without consent of the party
 - The law firm's failure to return the e-mail and follow the resolution process resulted in disqualification

10 Cal. App. 5th 1083 (Cal. Ct. App. 2017)

SOCIAL MEDIA

RELEVANCE: DON'T USE SM TO HARASS

- Indiana Rule of Professional Conduct 4.4(a) prohibits a lawyer from using the means that have no substantial purpose other than to embarrass, delay, or burden.
- A lawyer may be limited in how they use what is found as the result of an online investigation.
- Just because its juicy doesn't mean it's ethical to use or relevant to the case.

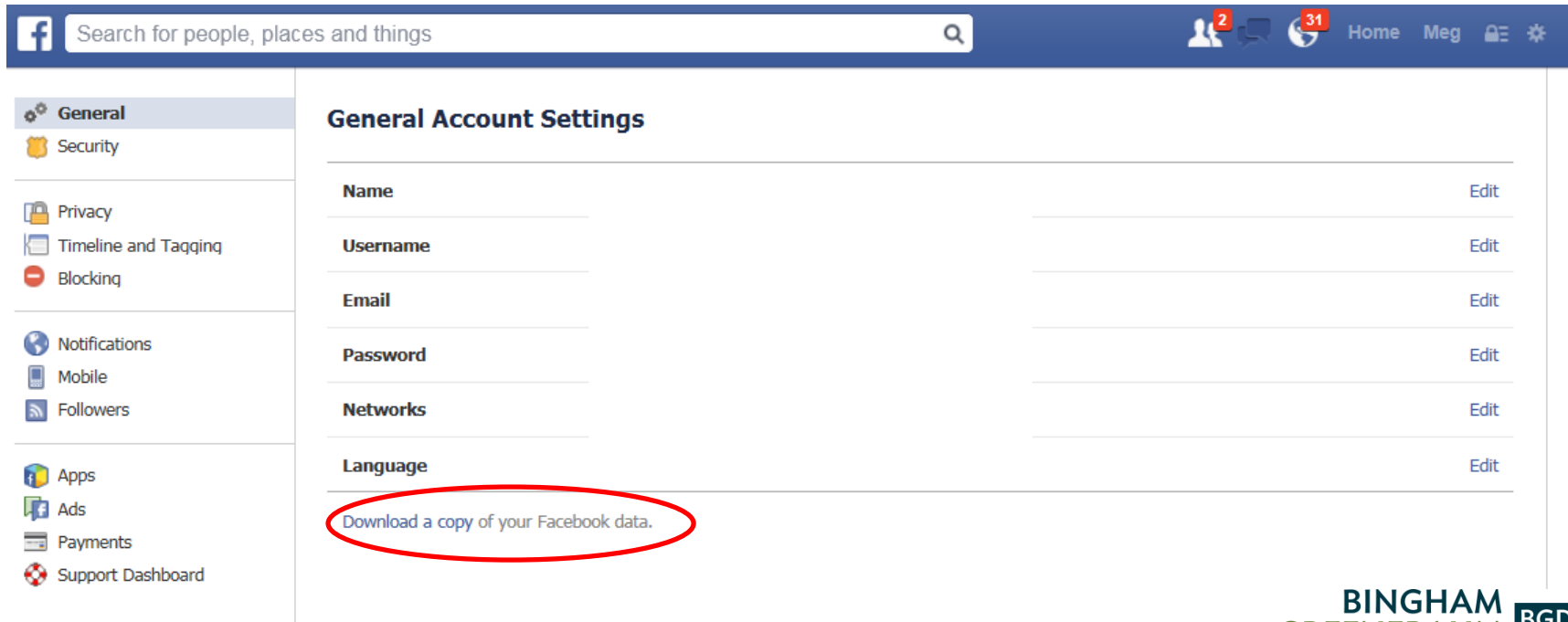
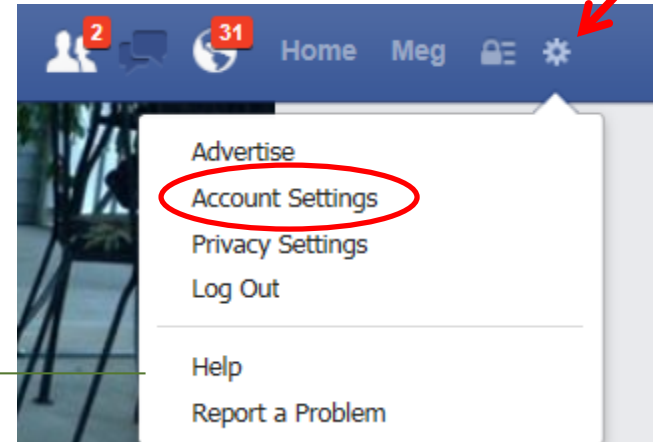
WHAT TO DO WITH SOCIAL MEDIA EVIDENCE?

- Once you find the evidence, immediately preserve it as if you were a police detective because the author might remove it from the Internet or block you from seeing it.
- **Discovery!**
 - Facebook records all content that has ever appeared on a user's page. The user can obtain a log of this information from his or her own account. A request directly to Facebook will be met with the unduly burdensome objection, as the information belongs to the user and can be easily accessed by the user.

DISCOVERY OF SOCIAL MEDIA EVIDENCE:

- Facebook records all content that has ever appeared on a user's page. The user can obtain a log of this information from his or her own account. A request directly to Facebook will be met with the unduly burdensome objection, as the information belongs to the user and can be easily accessed by the user.
- "For each Facebook account maintained by you, please produce your account data for the period of February 1, 2008 through present. You may download and print your Facebook data by logging onto your Facebook account, selecting "Account Settings" under the "Account" tab on your homepage, clicking on the "learn more" link beside the "Download Your Information" tab, and following the directions on the "Download Your Information" page."

PRODUCING FACEBOOK DATA



PRETEXTING

WHAT IS PRETEXTING?

Pretexting is the practice of lying about one's identity in order to obtain information

- Computer
- Telephone
- Claim to represent an entity
- Claim to be a consumer

WHAT'S THE *DANGER* IN THAT?

Indiana Rule of Professional Conduct 4.1 requires TRUTHFULNESS in statements to others.

- In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Indiana Rule of Professional Conduct 8.4(c) PROHIBITS dishonesty, fraud, deceit or misrepresentation.

SO I CAN'T LIE ABOUT MY IDENTITY IN THE COURSE OF INVESTIGATING A CASE?

NO.

And you can't:

- Create a fake Facebook Profile
- Participate in a social media conversation using someone else's account or login information

“THAT’S FINE, I’LL JUST ASK MY CLERK TO DO MY PRETEXTING FOR ME”

No, that’s a terrible idea.

- Rule 5.1(b) requires a supervising lawyer to make reasonable efforts to ensure subordinate lawyers follow the ethics rules.
- Rule 5.1(c) holds a lawyer responsible for another lawyer’s conduct if:
 - (1) the lawyer orders or ratifies the conduct; or
 - (2) the lawyer has direct supervisory authority over the other lawyer, but fails to stop the conduct

“OKAY, MY ASSISTANT CAN DO IT THEN. . .”

Wrong Again.

- Rule 5.3 holds a lawyer responsible for a non-lawyer employee’s conduct if the lawyer:
 - Orders the conduct
 - Ratifies the conduct
 - Knows of and fails to mitigate the conduct

In the Matter of Paulter, 47 P.3d 1175 (Colo. 2002)

- District attorney represented himself to be a public defender to negotiate the surrender of a murderer.
- 3-months suspension, stayed during 12-month probation
- “This sanction reaffirms for all attorneys, as well as the public, that purposeful deception by lawyers is unethical and will not go unpunished.”

D.C. Bar Opinion 321

- Opines that attorney may send investigator to interview domestic violence victim
- The investigator must disclose the identity of her employer
 - It was insufficient to disclose that she worked for “court-appointed counsel” because it gave the victim the impression that the investigator was from the court.
 - Lawyers (and their investigators) should “take affirmative steps to avoid misunderstandings and ensure that the unrepresented person correctly understands the lawyer’s role in the matter.”

“OKAY, SO WHAT CAN I DO?”

- **The duty not to deceive extends to social media**
- Access publicly available Facebook and Myspace pages
 - But “friending,” even as yourself may be a pretext because it insinuates that you are communicating for the purpose of friendship.
 - Also, friending someone can be considered a communication with a represented person.
- If you do send a friend request, provide a full disclosure of your identity and the purpose for the communication. (Do this at your own risk, see Rules 4.2 and 4.3)
- Request the social media pages through formal discovery requests directed to the party.

CONTACT ME WITH QUESTIONS:

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