

Taylor Swift is a Genius. Even About Legal Ethics.
Written Materials

Everyone knows that Taylor Swift is a musical genius. But she's made some pretty smart moves in the courtroom too. In this program we will discuss how the ethics rules are invoked in some of Taylor Swift's run-ins with the legal system. You don't have to be a Swiftie to enjoy this program...but you might end up one when you're done!

1. The Grand Troika, Taylor Swift Style

A. Being awesome at what you do and competence (Rule 1.1)

I never really knew much about Taylor Swift before I did this program. I mean, I certainly knew her, but there wasn't any depth to that knowledge. I have been absolutely fascinated by what an all around genius she is. And I don't use that phrase lightly.

In the baseball world, great players are called "five-tool players." That refers to a player who can run, throw, field, hit for average, and hit for power. If there is a five-tool player equivalent in the world of pop music Taylor Swift would be one, because she can do it all. She's a gifted performer, songwriter, marketer, she continues to grow, and she is authentic.

Before I explain all of that, let me make the ethics connection. Taylor Swift's entire persona is an example of the Grand Troika at work. I'm a firm believer that the ethics Rules create a wonderful guide for attorneys. The Rules aren't merely a listing of prohibited activities, rather they can be used as a road map that leads us in our practice and helps us hone our skills so we can become highly effective attorneys. A great illustration of that idea is a group of three

ethics rules that I call the “Grand Troika,” specifically, Rule 1.1, “Competence,” 1.3 “Diligence” and 1.4 “Communication.”

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

If you break down the Rules you can see that the basic elements are: legal knowledge, skill, thoroughness, preparation, diligence, promptness and the need to inform and consult the client. A wise counselor would take the elements that are set forth in the “Grand Troika” of Rule 1.1, 1.3 and 1.4 and formulate a checklist. If you do so, you’ll see that the contents of these Rules don’t just serve as a list of minimum standards for “acceptable” representation, rather, they provide direction for attorneys to give “complete” representation to clients as well. Follow these rules like a roadmap and you will be on the way to becoming an expert in some part of the law.

Taylor takes every idea in the Grand Troika and she uses it to make herself the best pop star she can be:

1. Performer — whether it's in videos and or live performances, Taylor excels. This is competence, Rule 1.1
2. Songwriter — She's multi-relented within this element. Among other things, she creates catchy choruses and introspective lyrics that resonate with her fan base. She puts in the cork, continually, ant that's about diligence.
3. Marketer — created an awesome brand and she is an expert caretaker of that brand. This is about communication (Rule 1.4). In our case that would be with the client, but in her case it's with the audience. She's particularly adept when it comes to social media:

Taylor Swift has developed a significant following on social networking sites by employing clever marketing techniques. She regularly publishes content with her followers, providing them access to exclusive photos that are only ever posted online as well as behind-the-scenes shots and snippets. Taylor is a real pop singer who loves her fans' opinions and works to strengthen the bond between fan and artist. She has been known to develop hashtags for her followers to rally around, allowing herself to engage in meaningful conversations with many people at once.¹

She follows a plan. The importance of planning is set forth in the Rule on Diligence, in Comment [5].

Rule 1.3, Comment [5]: To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

As far as managing her brand is concerned, consider what the New York Times had to say:

Swift, one of the most renowned songwriters and hitmakers of her generation, has also been a meticulous manager of her brand and an unparalleled marketer on a mass scale. During a recent period of productivity, which has included five album releases in just over two years, she has expanded her merchandise operation to include everything from picture frames and sticky notes to cassette tapes and vinyl LPs in various limited-edition colors.²

¹ <https://www.reeditionmagazine.com/to-the-minute/why-taylor-swift-is-the-best#:~:text=Swift has a unique musical,catchy choruses and smart bridges, last checked 6/1/2023.>

² New York Times article, "Ticketmaster Cancels Sale of Taylor Swift Tiockets After Snages," By [Ben Sisario](#) and [Madison Malone Kircher](#), Published Nov. 17, 2022, updated January 2023.

4. She continues to grow by constantly changing her sound. According to Distractify, “Taylor started as a country singer and has evolved into a pop singer. Her music and look are always changing so much so that each of her albums is officially considered a different era in her career. Fans never get bored as they never know what to expect next.”³

This element makes me think about accepting the ethical status quo. The question I have regarding competence is about the proper way to “maintain competence”, per the rules.

The commentary explains:

Rule 1.1, Commentary: Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

So here’s my question — is maintaining competence simply about staying up to date, or is it about aspiring to something more? This is a place where I think we can mix our notions of professionalism and ethics. The ethics rules establish the minimum requirements for lawyers. If you adhere to the rules, you’ll stay out of trouble. But concepts of professionalism ask us to aspire to something higher. Taylor Swift doesn’t just stay competent, she continues to grow. That’s what lawyers should be doing. That’s what “aspiring higher” is all about.

5. Authentic — like her or hate her, you know who she is. She emotionally connects with her fans.

Taylor talks about heartbreak, falling in love, personal growth, and more in her music. These are all topics that many people can relate to and connect with. And she doesn't just nod to these themes in her songs, she goes into great, painstaking detail. Taylor gets vulnerable and raw. Fans are always opening up about how her music has helped them.⁴

What this amounts to, is communication. Taylor communicates in a way that is meaningful to her fans. She hears them, and when she speaks, they hear her. It reminds me of the lawyer’s duty to advise.

³ <https://www.distractify.com/p/why-is-taylor-swift-so-popular> last checked 6/1/2023.

⁴ <https://www.distractify.com/p/why-is-taylor-swift-so-popular>, last checked 6/1/2023.

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

B. Foregoing an FTX deal by doing diligence (Rule 1.3)

Cryptocurrencies are a form of digital currency. What makes cryptocurrencies different from the other forms is that crypto is encrypted and uses blockchain technology. Do you not understand any of that? Well, it doesn't matter, because that has nothing to do with the relevant story. The reason it's being brought up at all is because of the company "FTX."

FTX was a company started by a guy named Sam Bankman-Fried. It was a digital trading platform, meaning that it was one of the places you went if you wanted to actually buy some cryptocurrency. Once you opened up an account with FTX you could buy crypto, trade one type for another, and turn your (hopefully) profits into cash. As Tech Target explained, FTX got real big, real fast:

FTX was one of the largest digital currency exchange platforms for buying and selling cryptocurrencies. As more people invested in cryptocurrencies, they turned to these platforms because they provided a digital wallet to store cryptocurrencies directly in a personal account. Customers could also store cryptocurrencies on their own by creating a [crypto wallet](#) either using software or hardware, which is not part of the platform...

Soon after its inception, FTX quickly rose to dominate its market through high-profile acquisitions of struggling competitors, such as Liquid Global, LedgerX and Blockfolio. FTX used aggressive marketing campaigns, such as Super Bowl ads, celebrity endorsements and naming rights to the Miami Heat's arena. These marketing campaigns promised that people could put their money in these accounts and earn higher yields than the average bank.⁵

That reference to celebrities is an important one for our purposes. According to Forbes, Sam Bankman Fried — known mostly by his initials, SBF — “became a celebrity in the crypto space as he became a kind of poster boy for crypto.”⁶ SBF became a media darling as well, and eventually,

...he hired celebrities to endorse FTX, with prominent figures like Tom Brady, Stephen Curry, Shaquille O’Neal and Larry David becoming ambassadors for the exchange. Kevin O’Leary recently admitted that he was paid \$15 million to be a spokesperson for the exchange. In a round of funding in January of this year, FTX raised a whopping \$400 million to bring the total funding up all the way to \$2 billion and the valuation to \$32 billion.⁷

FTX, however, collapsed. In 2022, an article was published in the crypto news outlet CoinDesk which claimed that FTX was not properly diversified (they said they held too much of something called their FTT Token), and that it was uncomfortably intertwined with a related company called Alameda Research. That’s when all heck broke loose. According to Forbes:

Based on the Coindesk report, Binance, a rival exchange announced it was going to sell around \$530 million worth of FTT...This caused the price of FTT tokens to drop as investors rushed to take their money out of FTX, figuring that this would be the next crypto company to collapse. FTX then couldn’t process these withdrawal requests as they reached an estimated \$6 billion. This led to a liquidity crunch for FTX, which simply

⁵ <https://www.techtarget.com/whatis/feature/FTX-scam-explained-Everything-you-need-to-know#:~:text=FTX was one of the,directly in a personal account, last checked 6/1/2023.>

⁶ <https://www.forbes.com/sites/qai/2022/12/13/what-happened-to-crypto-giant-ftx-a-detailed-summary-of-what-we-actually-know-here/?sh=5daf624860fa, last checked 6/1/2023.>

⁷ <https://www.forbes.com/sites/qai/2022/12/13/what-happened-to-crypto-giant-ftx-a-detailed-summary-of-what-we-actually-know-here/?sh=5daf624860fa, last checked 6/1/2023.>

means they didn't have the funds to fulfill the withdrawal requests. The \$6 billion in withdrawals in 72 hours was enough for FTX to pause withdrawals. SBF tried to calm investors down by assuring everything was fine in a tweet that has since been deleted.⁸

After looking into FTX's books, the government officials believe they saw something fishy, to say the least. As a result, prosecutors charged SBF with "stealing billions of dollars in FTX customer funds to plug losses at Alameda Research, and making tens of millions of dollars in illegal political donations to buy influence in Washington, D.C."⁹

After everything went into the toilet, a class action lawsuit was filed against SBF and a bunch of the celebrities that endorsed his company. Tom Brady, and Larry David, for instance, were names in the suit. "The [complaint](#) argues that the celebrities, in lending their credibility to the failed cryptocurrency exchange, were "responsible for the many billions of dollars in damages they caused."¹⁰ But when you review the names of the celebrities contained in that complaint, there is one name you will most definitely not see. That would be Ms. Taylor Swift.

According to reports, "Taylor Swift was one of the only celebrities who did their due diligence on crypto exchange FTX, according to the lawyer suing the now-bankrupt company's celebrity promoters."¹¹ During an episode of The Scoop podcast, the lawyer who filed the suit claimed that the celebrities who touted FTX's "didn't do their due diligence to check whether they may be breaking the law before cutting TV and digital ads..."¹² But, he explained,

⁸ <https://www.forbes.com/sites/qai/2022/12/13/what-happened-to-crypto-giant-ftx-a-detailed-summary-of-what-we-actually-know-here/?sh=5daf624860fa>, last checked 6/1/2023.

⁹ <https://www.reuters.com/legal/ftx-celebrity-promoters-say-crypto-investors-cannot-sue-over-accounts-2023-04-17/> last checked 6/1/2023.

¹⁰ <https://www.forbes.com/sites/ariredbord/2023/02/01/tom-brady-and-other-a-listers-fumble-ftx-endorsements-but-will-they-be-held-liable/?sh=1b44b8b07d8c>, last checked 6/1/2023.

¹¹ <https://www.theblock.co/post/226981/taylor-swift-ftx-shaquille-oneal-lawsuit>, last checked 6/1/2023.

¹² <https://www.theblock.co/post/226981/taylor-swift-ftx-shaquille-oneal-lawsuit>, last checked 6/1/2023.

The one person I found that did that was Taylor Swift. In our discovery, Taylor Swift actually asked them, 'Can you tell me that these are not unregistered securities?'” Moskowitz said. [Swift reportedly](#) came close to inking a \$100 million sponsorship deal with FTX, but the partnership never materialized.¹³

The connection to diligence is made in two ways. The first, I think, is pretty obvious. First, being diligent is about staying on top of things. It’s about making a continual effort throughout the representation. There’s an intersection with competence there. In order to stay competent, we must be diligent. That also leads us to the second connection.

Taylor Swift’s father is a former stock broker. It’s likely that she relied on his counsel when it came to the FTX matter. The reason I think that’s important is because of one of the commentary sections to the rule on diligence:

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.3, Diligence, Comment [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer

Taylor Swift relied on someone with knowledge in the FTX matter. For her, it was her father. But you can see how the ethical concept is transferable to the practice of law. We can do the same thing when maintaining our legal competence.

¹³ <https://www.theblock.co/post/226981/taylor-swift-ftx-shaquille-oneal-lawsuit>, last checked 6/1/2023.

2. A responsibility to the greater music community

Big Machine Label Group signed Taylor Swift to a recording contract when she was 15 years old.¹⁴ Apparently the deal she made with Big Machine gave the label the right to own the master recordings of her music. That's a big deal to an artist because those rights are valuable — “ they dictate who controls music—both in terms of distribution and actual physical safekeeping. Taylor Swift, in particular, has been strategic throughout her career with regards to what platforms she allows to house her music.”¹⁵ Taylor decided to leave Big Machine in 2018 for Republic Records and Universal Music Group. Part of the deal with the new label was that she would own her own recordings.¹⁶

When she made that move, however, her “worst case scenario” occurred. Big Machine records sold her catalog to Ithaca Holdings, a company owned by a man named Scooter Braun. Swift does not like Scooter Braun. According to GQ:

Swift's antipathy towards Braun stems from the super manager's ties to Kanye West and Justin Bieber. Her feud with West, of course, dates back to the 2009 Video Music Awards, when the rapper stormed the stage during Swift's acceptance speech for the Best Female Video award, infamously protesting that Beyoncé's “Single Ladies (Put a Ring On It)” video should've beat out Swift's “You Belong With Me” video.¹⁷

¹⁴ <https://www.theguardian.com/music/2019/jul/03/taylor-swift-lawyer-masters-scott-borchetta>, last checked 6/1/2023.

¹⁵ <https://www.gq.com/story/taylor-swift-and-scooter-braun-bad-blood-explained#:~:text=Swift's%20antipathy%20towards%20Braun%20stems%20from%20the%20super%20manager's%20ties%20to%20Kanye%20West%20and%20Justin%20Bieber>, last checked 6/1/2023.

¹⁶ <https://www.theguardian.com/music/2019/jul/03/taylor-swift-lawyer-masters-scott-borchetta>, last checked 6/1/2023.

¹⁷ <https://www.gq.com/story/taylor-swift-and-scooter-braun-bad-blood-explained#:~:text=Swift's%20antipathy%20towards%20Braun%20stems%20from%20the%20super%20manager's%20ties%20to%20Kanye%20West%20and%20Justin%20Bieber>, last checked 6/1/2023.

The beef between Swift and Kanye intensified when he released the video to his song “Famous” which seemed to include a Taylor Swift look-a-like in the video as well as a reference to her in the lyrics.¹⁸

What amounted next was a he-said-she-said back and forth in the media. Swift claimed that she wanted to buy the masters back but wasn’t given the chance. Big Machine claims that she had the chance but chose not to avail herself of that opportunity. For our purposes, however, that doesn’t matter.

What matters is something Swift said to The Guardian. According to the outlet, “Swift... was glad to be “signed to a label that believes I should own anything I create”. She also advocated for artist ownership of songs and hoped that the next generation of singers and songwriters will “read this and learn about how to better protect themselves in a negotiation.”¹⁹ In other words, Taylor Swift was thinking about the larger community of song writers, nit just herself.

Lawyers, likewise, have a responsibility to our larger community. It’s something that’s painted throughout the Preamble, particularly in paragraph [6]:

Preamble, paragraph [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social

¹⁸ <https://www.gq.com/story/taylor-swift-and-scooter-braun-bad-blood-explained#:~:text=Swift's%20antipathy%20towards%20Braun%20stems%20from%20the%20super%20manager's%20ties%20to%20Kanye%20West%20and%20Justin%20Bieber,> last checked 6/1/2023.

¹⁹ [https://www.theguardian.com/music/2019/jul/03/taylor-swift-lawyer-masters-scott-borchetta,](https://www.theguardian.com/music/2019/jul/03/taylor-swift-lawyer-masters-scott-borchetta) last checked 6/1/2023.

barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

3. The Ticketmaster debacle and the idea of pro bono work

According to the New York Times,²⁰ in late 2022 tickets were set to go on sale for Taylor Swift's first tour in five years. Ticketmaster was going to have several tiers of "pre sales" through its Verified Fan program. The idea was to avoid selling tickets to the bots and speculators and, instead, get them into the hands of actual fans. Unfortunately, millions of fans were locked out of the system. The Ticketmaster website received some 3.5 billion "system requests," and it seems the sheer volume of the requests was too much for it to handle. Things didn't get any better when Ticketmaster planned a subsequent public sale of the tickets that were not sold during the "presale." At that next attempted sale the fans came out in droves again, and Ticketmaster was unable to handle it, again. The sale was cancelled.

Fans were, expectedly, furious, and some sued. The theory of recovery is anti-trust.

According to CNN:

The lawsuit alleges Ticketmaster and its parent company were anti-competitive, imposing higher prices on fans in the presale, sale and resale market. It claims Ticketmaster forces concertgoers to exclusively use its site and controlled all registration and access to Swift's "The Eras Tour."

"It has nothing to do with the money. It has everything to do with TicketMaster is the only venue in town. It's the only place to get tickets," Swift fan Penny Harrison told CNN. "The hope is that in 10 years from now that they'll look back and say this was the turning point. This was when competition branched out and ticket prices came down."

In today's hearing, Swifties are seeking a penalty of \$2,500 for each violation, which could add up quickly, based on the millions of angered fans who did not receive tickets.

The December lawsuit also claimed that since Ticketmaster has agreements with the large stadiums in the tour, Swift "has no choice" but to work with Ticketmaster due to the

²⁰ This information from New York Times article, "Ticketmaster Cancels Sale of Taylor Swift Tickets After Snags," By [Ben Sisario](#) and [Madison Malone Kircher](#), Published Nov. 17, 2022, updated January 2023.

size of her fan base. It also alleges that Ticketmaster profits off the resale of tickets in the secondary market by adding a service fee to its fan-to-fan exchange.

“Ticketmaster is a monopoly that is only interested in taking every dollar it can from a captive public,” according to the lawsuit.²¹

One story struck me as particularly unfortunate was a woman who, “tried 41 times to put tickets in her basket...At the end of her experience, she had \$14,000 charged on her credit card and no tickets.”²²

One of the lawyers who sued is a Dallas attorney who is also a Taylor Swift fan and ran into trouble getting tickets.²³ She appears to be damaged herself, but she’s also instituted a class action suit on behalf of many similarly aggrieved parties.

Let’s create a hypo from this case. This isn’t what the lawyers involved are doing, rather, I’m changing the facts to create a teachable moment. What we assume, for the purposes of our discussion, that a lawyer is representing the allegedly damaged Swifties did it for free. Let’s say that she didn’t have any personal damages, but she felt strongly about the people who were damaged and she wanted to represent them without charging them. That would be consistent with our obligation to do pro bono work, right? Or maybe not?

There are two rules that address pro bono activities:

Rule 6.1. Voluntary pro bono publico service.

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

²¹ <https://www.cnn.com/2023/03/27/media/taylor-swift-ticketmaster-court/index.html>, last checked 6/2/2023.

²² <https://www.cnn.com/2023/03/27/media/taylor-swift-ticketmaster-court/index.html>, last checked 6/2/2023.

²³ <https://www.dmagazine.com/frontburner/2022/12/after-the-taylor-swift-ticket-debacle-two-dallas-lawyers-file-a-lawsuit-against-ticketmaster/#:~:text=Arts & Entertainment-,After the Taylor Swift Ticket Debacle, Two Dallas Lawyers File,Taylor Swift tour ticket sale.> Last checked 6/2/2023.

Rule 6.2. Accepting appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

[2] Appointed Counsel. — For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust. [3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

But here's something for lawyers to consider: Is representing someone for free, by definition, pro bono? I think the answer is no. The question we have to ask ourselves is whether those plaintiffs would be the type of plaintiffs that are the focus of pro bono activities. Are they underserved or underprivileged?

The lawyer's duty to help the poor has been long established. Actually, it's not just the "poor" because the category also includes the "disadvantaged" and the "underserved." What the issue is really about is helping people obtain access to justice. The category thus includes

those people who have a barrier to access to justice and usually that barrier is a financial one. This obligation has been accepted in the practice for some time now.

We see a reference to this duty as far back as 1965 in the now outdated disciplinary rules, the Model Code of Professional Responsibility (that Code was eventually scrapped in its entirety and our existing disciplinary rules are based on the Model Rules of Professional Responsibility which were promulgated by the ABA in 1983). The Code stated, “As a society increases in size, sophistication and technology, the body of laws which is required to control that society also increases in size, scope and complexity. With this growth, the law directly affects more and more facets of individual behavior, creating an expanding need for legal services on the part of the individual members of the society.” In other words, as society advances, the obstacles to access to justice increase. That only enhances the need for lawyers to help the disadvantaged. Over the years, scholars have expanded upon that idea.

Professor Deborah L. Rhode (who’s since passed away, but was of Stanford Law School) set forth a variety of justifications for the pro bono duty in an article she wrote back in 1999 in the Fordham Law Review. She explained that, “Lawyers have a monopoly on legal services, thus creating the duty to help provide them for the poor.” Additionally, lawyers are a key guardian of justice and for that reason we have the obligation to provide legal services for those who can’t afford them. Professor Rhode pointed to a more practical justification as well: “the benefit that such work confers upon the lawyers themselves,” which includes the, “intrinsic satisfactions that accompany public service.” She continued, “The primary rationale for pro bono contributions rests on two premises: first, that access to legal services is a fundamental need, and second, that lawyers have some responsibility to help make those services available. The first claim is widely acknowledged.” Proof that it continues to be is widely acknowledged comes from the State of New York where recently Chief Judge Jonathan Lippman of the New York Court of Appeals acknowledged that “lawyers have a professional responsibility to promote

greater access to justice.” He explained that, “as far back as judges and lawyers have existed, the pursuit of equal justice for all, rich and poor alike, has been the hallmark of our profession.” And the responsibility doesn’t stop with practicing attorneys. He continued, “each attorney has an obligation to foster the values of justice, equality, and the rule of law, and it is imperative that law students gain a recognition of this obligation as part of their legal training.”

My point is that I’m not so sure helping Swifties get damages for their ticket debacle would qualify for pro bono work. Now, I want to be clear, the lawyers in this case didn’t seem to believe so either. I’m just posing a question for education’s sake. I’m using this hypothetical for educational purposes to make one point only — not all free representation is pro bono representation.

4. Improper behavior and Rule 8.4(g)

Taylor Swift was involved in a civil case against a Colorado DJ.²⁴ Swift alleged that the DJ touched her bare buttocks during a photo op. One of the key pieces of evidence is the photo from the moment when the assault is alleged to have happened. In that photo, the DJ appears to be placing his hand on Swift’s behind. Swift claimed that he had groped her. The DJ countered that he didn’t touch Swift. The jury did not agree. It took the jury less than 4 hours to make the decision in Swift’s favor.

Swift was awarded the amount she sought in damages — a symbolic judgment of only one dollar. After it was awarded, Taylor pledged to make future donations to help victims of sexual assault.

Let’s change the facts so we could talk about some ethics rules. What if the DJ was a lawyer? And let’s say, for the purposes of this made-up example, that we know, for sure, that the lawyer did it. It’s a hypothetical, of course, but let’s talk about it for the purposes of this

²⁴ All information about the lawsuit is from the video report by Good Morning America which can be found here: <https://youtu.be/jPEhZF49cg>, last checked 6/2/2023.

program. If that were the case, then the lawyer might violate The rule on misconduct. There are two subsections, in particular.

First, the action might be sexual assault, and, therefore a crime:

Rule 8.4. Misconduct (in part)

It is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

Also, the action might run afoul of the rule prohibiting discrimination and harassment:

Rule 8.4. Misconduct (in part)

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The interesting aspect of the rule, however, is that Rule 8.4(g) requires that the offending behavior it be done in the course of the practice. That will likely be interpreted broadly. Lawyers need to consider their local rules carefully in that regard. Almost all states have not adopted the Model Rule 8.4(g), but many states have some version of a similar rule of their own.

5. Copyright cases and frivolous claims (Rule 3.1)

Two songwriters, Sean Hall and Nathan Butler filed suit against Taylor Swift in 2017 alleging that the Sift plagiarized her solg “Shake it Off.” They claimed that their 2001 recoding off “Playas Gon’ Play” was the source of Swift’s lyrics. The recording by 3LW “includes the lyrics ‘Playas, they gonna play, and haters, they gonna hate.’”²⁵ During the litigation, both sides women some points. From thje Hollywood Reporter:

²⁵ <https://deadline.com/2022/12/taylor-swift-shake-it-off-copyright-lawsuit-can-proceed-1234570803/>, last checked 6/2/2023.

The case swung on whether the lyrics from Hall and Butler are protectable under federal copyright law. U.S. District Judge Michael Fitzgerald found they weren't, concluding that the allegedly infringing lines are "short phrases that lack the modicum of originality and creativity" required to allege copyright infringement. He dismissed the suit.

"[B]y 2001, American popular culture was heavily steeped in the concepts of players, haters, and player haters," Fitzgerald wrote. "The concept of actors acting in accordance with their essential nature is not at all creative; it is banal."

But a federal appeals court revived the case, concluding that the federal judge's dismissal was premature.

"By concluding that, 'for such short phrases to be protected under the Copyright Act, they must be more creative than the lyrics at issues here,' the district court constituted itself as the final judge of the worth of an expressive work," the three judge panel wrote. "Because the absence of originality is not established either on the face of the complaint or through the judicially noticed matters, we reverse the district court's dismissal."²⁶

However, it seems that the case was dropped a month before trial. Apparently, the sides settled, though the terms of the settlement weren't discussed.²⁷ Would the plaintiffs have eventually won the case? No one will ever know. The question for our purposes, however, is whether there was enough merit to avoid a frivolous lawsuit claim under Rule 3.1. There might have been an argument that Rule 3.1 should be considered, given the fact that the case was dismissed. However, that appeared to be rendered moot once the appeals court reinstated the matter.

Rule 3.1. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

²⁶ <https://deadline.com/2022/12/taylor-swift-shake-it-off-copyright-lawsuit-can-proceed-1234570803/>, last checked 6/2/2023.

²⁷ <https://www.hollywoodreporter.com/business/business-news/taylor-swift-shake-it-off-copyright-suit-settles-before-trial-1235280645/>, last checked 6/2/2023.

6. Shake it off is about resilience

The lyrics to Taylor Swift's song "Shake it Off" are all about resilience. We will talk about those lyrics in the program, but we'll also discuss how the topic manifests itself in the practice of law. In that regard, consider the following:

Being able to retain your composure in difficult situations makes you an effective leader. But being able to regain your composure is what makes you a superstar. That's the difference between weathering the proverbial storm, and being resilient.

Resilience is skill. Sometimes people refer to it as adaptability. Learning about key skills like competence is a directive straight out of our rules on competence, which states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, preparation reasonably necessary for the representation." Rule 1.1.

In large part, resilience is about adapting to changed circumstances. And that word "adapting" is critical, because there is a difference between *adapting* and *reacting*. In the former, you manage the circumstances. In the latter, the circumstances manage you.

Consider the following hypothetical situation:

You're in some sort of battle for a client. Maybe you're negotiating for your client's purchase of a business...or you're trying to get your client a reduced charge...or you're making arguments about tariff engineering to the Department of Commerce on your client's behalf. Whatever. You did your homework, you have a plan, and you have a strategy. And about 10 minutes into the conversation, it happens. The other side came up with a great point, and I mean a GREAT point and you don't know how to respond. The feelings rush through you at the same time, and in an instant you start to sweat. People are speaking around you and you see their mouths move, but you don't really hear what they're saying. Your mind races...WHAT DO I DO NOW? How do you beat back that panic and extricate yourself from this bad situation?

The MPH Approach

I've long been a proponent of something I call the MPH Approach. I alluded to it briefly above, but I want to elaborate a bit here.

If you want to accomplish anything, you need to have the right *mindset*, follow some sort of *process*, and develop the right long term *habits*. It doesn't matter what you're trying to achieve or learn, all three stages are critical.

If your head isn't on straight, you can't achieve your goals, you can't learn a skill, nothing. If, for instance, your entire being is focused on making money, then there is no way you will ever truly be able to fully develop your craft. On the other hand, if you are solely focused on, say, being an artist without selling out, then you will never be able to turn your craft into something that is finally sustaining. There is a mindset balance that's required if you're going to get where you want to be.

But it's not enough to have the right philosophical approach. The theory needs to be combined with a tangible process. You need to have a step-by-step approach that you will utilize for achieving your goals. Sometimes that's a step-like plan, sometimes it's in the form of a checklist. but you employ a process when you do almost everything.

The third part of the MPH approach might be the most critical. Proper execution is all about the Habits. When you engage in a task, many times you're going one auto pilot. You're not often considering a step-by-step process as you engage in a series of tasks, you're just *doing*. That doesn't mean you're not following a process...it just means you're not thinking about it. That's because your process has been internalized as a habit.

Bad habits are often times the result of two things — either a warped process has been internalized, or no process has been internalized and the process is developed without thinking by executing poorly over and over again. That's why even when you think there is no process, there is a process. It's just that you unconsciously developed that process and it's been relegated to a habit. The key to being able to succeed is to consciously develop an effective process, combine it with the best mindset, and engage in that process over and over until it

becomes habit. That way, when you engage in a task you're not thinking about the process. but you are executing according to a beneficial one.

With that explanation out of the way, let's apply it to resilience and see how it would look in the context of the hypo above.

- Mindset: Resilient people find a way to stay on a healthy productive path.
 - When they get knocked off (as we all do) they can regain that direction.
 - As a supervisor, one needs to instill that ability to our people.
- Process:
 - Don't React — Reacting often creates more havoc than you started with.
 - Don't snap back, don't shout back, don't act out of anger. Taking a panicked response will create more havoc. You'll end up in an argument, and you'll have a client who gets upset. In such situations you'll end up being preoccupied with that havoc and you won't be able to find a beneficial way out of the situation.
 - Instead: Rest. Review. Reassess, Respond.
 - Rest. Take a beat. An instantaneous beat.
 - You have to develop some sort of defensive posture that you can go to immediately to take that rest...to buy yourself time to regroup. You need to think about this ahead of time— it's part of developing your lawyering skills.
 - Boxers do this in the ring when they put their hands to their face, and assume a defensive posture. They protect themselves while they regroup. The lawyer's version of putting up our hands in a defensive way is shuffling papers, and reading notes. (maybe you will develop some other tactic, but that's the one that I think works best).
 - Immediately go through your file. Make it look like you're searching for a paper. Of course there is no paper. But search for it, and find it. Find that paper. Stare at it as if you are reading it. You're not really reading it...you are just finding that moment to rest.
 - Practice this so it becomes habit. The habit lets you take an instantaneous beat.
 - While you are "resting" — while your eyes are glued to that paper — Review and Reassess.
 - Review: Ask yourself, what went wrong? Can I salvage this situation?
 - Reassess: Determine what needs to be said to you can get back on your plan. Or, in the alternative, do you need to change tactics somehow?
 - [By the way, sometimes boxers need to keep their hands over your head until the end of the round so they can regroup on their stool. You might need to do that also. The lawyer's version is to excuse yourself. Go to the bathroom, Go grab coffee. Go chat with the client. But I really don't think you'll need that. All you'll need is to shake your head after getting punched in the face, and you can do that when you're staring at a piece of paper.]
 - Take the time while you've got your hands over your ears to review, reassess and formulate a response. Then deliver your reassessed response...
 - Respond.
 - That's how you break the other side's momentum and reestablish control