

Legal advice is often highly dependent on the facts unique to each situation. As such, the content of this presentation is not legal advice and is provided for general information purposes only. No attormey-client relationship is created by the use of this content. Any opinions that we express herein are our own and do not necessarily represent the opinions of Baird Holm LLP.





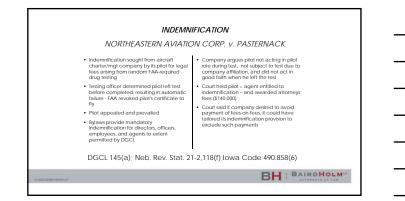


TAKEAWAY: Full Disclosure, Business Justification

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- Excessive Compensation
- Political Contributions



# Board followed good process; Negotiated with both parties, fairness opinion, other non-price factors GP merger had value range > all-cash offer, but Bd. obtained opinion that cash offer was fair Board made business decision that office supply industry would face challenging headwinds that made cash offer more attractive; Antitrust concerns Cash offer = 51% premium to stock price prior to GP merger announcement BH BAIRDHOLM





Prior to sp. comm. conflicted dir. expressed value range that might be acceptable, and expressed interest in rolling over stock

 Loeb Holdings owned 42% of Interse person board Two methods (absent a controlling stockholder) to revive business judgment review Board included Loeb's managing director, co-founder of Loeb predecessor who owned 9% of Intersections stock and another director owned 5% Informed, un-coerced vote of majority of shares held by those free of conflict (Corwin); or Intersections board formed special committee of 3 independent directors to explore capital raising
 After sp. comm. disbanded, iSubscribed makes offer and meets with Intersection reps, including conflicted directors Unconflicted board comm. w/full scope to negotiate and enter transaction (Trados II) Sp. comm. did not cleanse merger - not constituted and authorized <u>ab initio</u>

#### CONFLICTED BOARD SALLADAY v. LEV





TAKEAWAY: Don't just focus on minutes – look to qualifications, frequency and length of meetings, reporting lines. Implement effective annual review. Consider educating board and Audit committee – e.g. yearly memo

CAREMARK CLAIM HUGHES V. XIAOMING HU

# SIGN SCIENTIFIC CORPORATION Aborts a deflect therebids in a purchase agreement. Delaware court have found that an devene effect a markeling if a "hold potential of the target in a durationally-significant manner. Explanation of the target in a durationally-significant anner. Explanation and quantitative factors. Explanation and quantitative factors. ESC 4 cain that line a clarkary and expect a byper with this concern to lake With respect to quantitative factors. The court fuel state scalary and and explanation and the concerns and the scalary and the spectra byper with this concern to lake With respect to quantitative factors. The court one tradise suggests a decrements and that and check equate to 21% of equily value. CHAINNEL MEDSYSTEMS, INC. V. CHAINNEL MEDSYSTEMS, INC. V. Booton Scientific Dopontion IIGS 'Jennisated metger agreement with Channel Medystem, Inc., an early sage medical device company with one product seeling FDA approval. After signing the merger agreement, Channel discovered is VP of Caulify had fisikled apprese approximately \$25 million from the company and approximately \$25 million from the company the corporate the Complicated build on of signific anity delay, the FDA approval poces, the corporate the Complicated build on of signific anity delay, the FDA approval poces, the corporate the Complicated build on of signific anity delay, the FDA approval poces, the corporate that Complicated build on of signific anity delay, the FDA approval poce in accurate and (g) such fraccuracy has or reasonably would be expected to have a "Material Advances IEC-1 on Channel.

#### MATERIAL ADVERSE EFFECT CHANNEL MEDSYSTEMS, INC. V. BOSTON SCIENTIFIC CORPORATION

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Construction of the state of

#### THIRD PARTY BENEFICIARY CONTRACT AMBIGUITY CHS/COMMUNITY HEALTH SYSTEMS. INC. V. STEWARD HEALTH CARE SYSTEM LLC

PRIVILEGE RELATED TO TRANSACTION COMMUNICATIONS

- Claim for indemnilication under an asset purchase agreement, where Steward Health Care System (Buyer) agreed to assume and pay all future obligations under certain "assumed contracts" and to indemnity CAIS (Seller) and II: Affiliates (as defined in the Purchase Agreement).

The APA listed a series of "Seller Entities" that would 'sell to [Buyer] ... substantially all of [their] assets ... which are ... used in connection with ... [a] 'Healthcare Business."

Business." Following close of the transaction, an Affiliate of the Seller incurred \$3M in contractual liabilities under the assumed contracts, and sought to recover those costs from the buyer.

- DLO ENTERPRISES, INC. V. INNOVATIVE CHEMICAL PRODUCTS GROUP, LLC Category One Documents: Buyers contend they purchased the right to waive privilege over Selles' deal negotiations via the Purchase Agreement. – Court disagreed: default for asset purchase is that such rights do not transfer unless expressly contemplated. Buyers acquired substantially all of the assets of Saller contemplated. – Seller was saved saved by definition of "Excluded Asset", which included "the [Sellest] rights under or pursuant to this Agreement and agreements entered into pursuant to this Agreement." Contemport Two Documents Buyes contend Seller's — process ou an agreement and agreements extended into pursuant to the Agreement's ar-context wave dampendege when they standards before small accounts (and continued to use such accounts point-control). — for emails certain (and continued to use such accounts point-control). — for emails certain (and continued to expectation of phracy over emails. — For emails entry for to closing court spatial may be whether Seles thareholder dielecately claim of phrage when they sampleed the email accounts to Bayes and remanded for further consideration.

  - - - BH BAIRDHOLM"

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# Litigation in the Time of COVID-19 Starts at 12:50 p.m.

Krista M. Eckhoff

#### Lawsuits of All Kinds

- Healthcare
- Force MajeureInsurance Coverage
- Contract
- Employment
- Paycheck Protection Program
- Premises liability

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#### Healthcare

- Failure to provide personal protective equipment (PPE)
- Retaliation re: PPE
- Malpractice/liability
  - Sending patient home
  - Failing to isolate patient

# Force Majeure

- Clause in a contract that may excuse contractual performance
- Relationship with doctrine of impossibility/impracticability
- Is COVID-19 a triggering event?
  - It depends...

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#### Insurance Coverage

- Business coverage for COVID?
- Lawsuits filed to obtain coverage

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#### Other Contract Disputes

- Failure to deliver under contract
- Leases, Foreclosures

### Employment

- Payment for time to go through health check
- Safety for meat processing employees

   Nebraska
- Termination after contracting
- Retaliation for raising safety concerns

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#### Paycheck Protection Program

- Banking / financial institution defendants
- Agent percentage owed

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#### **Premises Liability**

- Cruise ships
- Nursing homes
- Contracting COVID-19 on premises
  - Public
  - Employees

# Other Litigation

- Deceptive practices
- Securities lawsuits
- Constitutional claims
  - Prisoner litigation
  - Freedom of religion

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#### Considerations

- Liability for certain cases will be difficult—causation issue
- Effect of various governmental actions
- Dependent on state law (esp. force majeure)
- Statutes limiting liability re: COVID-19
  - PREP Act
  - State statutes

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#### Questions?

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### Wage and Hour Updates

- Fluctuating Workweek Salaries
- Incentives and Base Rate

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#### Privacy Interests

- Privacy Interests
- Video Feeds
- Optical Recognition
- Keyboard Tracking
- Productivity Tracking
- Hubstaff
- Teremind

#### **Biometrics and Al**

- Biometrics
- Artificial Intelligence and Candidate selection

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#### Union Organizing

- National Labor Relations Board
- Coworker.org
- Unit.work
- Getfrank.com

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#### Harassment Prevention

- Policy Updates related to EEOC Guidance
- PBS recovery on morals clause

#### Diversity and Inclusion

- Affirmative Action versus Quotas
- Race and Stereotyping Order
- Department of Justice Actions
- Culture and candidate pool based not blame and discrimination

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#### Other Issues

- Predictive Scheduling Laws
- Non Competition Agreements
- Salary Hiring Bans
- Email, Confidentiality, Workplace Investigation, Moonlighting, Photos, Video, Audio Recording
- Standards of Conduct

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#### What's Coming

- Marijuana and Work
- COVID Liability Act Protection
- Paid Family Leave

#### Questions?

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#### The California Privacy Rights Act: What You Need to Know

Grayson J. Derrick

#### **CPRA** Basics

- How did the CPRA become law?
- What are the effects of the CPRA's passage?
- When does the CPRA become effective?

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#### New Criteria For Businesses

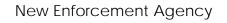
CCPA	CPRA
(1) Has \$25+ million in annual revenue; (2) buys or sells, OR receives or shares for business's commercial purpose, PI of \$9,000+ consumers, households or devices; or (3) derives at least 50% of annual revenue from selling consumer PI.	(1) Has \$25 million in annual revenue; (2) buys, sells or shares PI of 100,000+ consumers or households; or (3) derives at least 50% of annual revenue from selling or sharing consumer PL.

# Sensitive Personal Information

- Government identifiers (such as Social Security numbers and driver's licenses)
- Financial account and login information (such as credit or debit card number together with login credentials)
- Precise geolocation
- Race, ethnicity, religious or philosophical beliefs, or union membership Content of nonpublic communications (mail, email
- and text messages)
- · Genetic data; biometric or health information
- Sex life or sexual orientation information

What's (	Changed?
CCPA	CPRA
Implicitly includes sensitive PI in broader regulated dataset, but does not impose separate requirements and prohibitions for sensitive PI (other flux increased ventification requirements).	Impose separate requirements and restrictions or sensitive Pt: • Disclosure requirements • Opt-out requirements for use and disclosure • Opt-in consent standard for use and disclosure • Purpose limitation requirements.





- Establishes the California Privacy Protection Agency (CPPA)
- Grants the agency investigative,
   opforcement and rulemaking pay
- enforcement and rulemaking powersRemoves the 30-day cure period
- Triples the maximum penalties to
- \$7,500 for violations concerning minors

### Exemptions

- The employee and business-to-business (B2B) exemptions are extended through January 1, 2023
- Allows two years for the California Legislature to address employee and B2B privacy questions in a separate bill

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#### Questions?

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#### Paying Workers in the Gig Economy

Eli A. Rosenberg

#### Gig Workers and How They're Paid

- Many Fintech platforms rely on third party contractors to provide their services
- Example: courier services like door dash that require delivery drivers
- Taxi services like Uber and Lyft that require drivers
- When people refer to the "gig economy" or "gig workers" they mean these types of contractors

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# Gig Workers and How They're Paid

- Fint ch's commonly pay gig workers via prepaid debit cards (if they don't use another form of direct deposit)
- As with other aspects of the relationship between the gig worker and the Fintech, the legal issues around how they are paid turn on whether the gig worker is classified as an "independent contractor" or as an "employee" Matters for purposes of paying gig workers because, if they are employees, the fintech (and the fintech's bank) must ensure that the payment method offered to the workers -
- Complies with federal consumer protection laws (Regulation E, EFTA) Complies with state wage and hour laws, including those laws applicable to "Payroll cards"
- s like Uber and Lyft take a firm position that workers are independent contractors and not employees. Among other things, do not have to comply with state wage and hour laws in the method of payment (i.e., not mailing a check)
- But there is a strong push from states, advocacy groups, and the workers themselves to characterize them as employees, qualifying them for additional benefits and protections under the law

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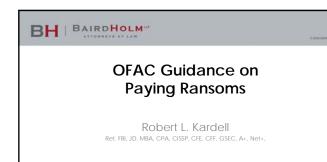
#### Gig Workers Re-Characterized?

- Two recent actions in California underscore the current friction and maybe predict future action in other states
  California Court of Appeals orders Uber and Lyft to treat workers as employees under the current law (Oct. 22, 2020)
  Prop 22 ballot initiative passes in California two weeks later and changes the law to exempt gig workers from the definition of \*employee\*
  Prop 22 was supported and funded by Uber and Lyft. The companies have already indicated they want similar initiatives in other states to codify the \*contractor\* status of workers
  Very likely we will see this play out in other jurisdictions soon

#### Questions?

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#### OFAC - Ransomware Guidance

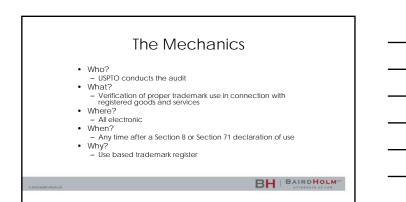
- Issued on October 1, 2020
- Directed at banks and any other companies involved in addressing cyberattacks: Insurance firms, digital forensics, incidence response companies
- Broadly states that facilitating ransomware payments on behalf of a victim to anyone on the SDN list or to an embargoed country violates OFAC regulations
- OFAC expects security programs to account for the risk that a ransomware attack
  may require engaging in transactions with an OFAC sanctions nexus
- Take-aways: if a ransomware attack may involve OFAC regulations Everyone involved in a payment to the attacker (hospital, bank, insurance carrier etc.) Likely, a vertient "financial institution would retieve to conduct a transaction on behalf of a vectim to pay the attacker (e.g., there's no way to 'pay the ransom') Attack may no longer be covered by insurance policy

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Questions?

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#### The Process

- Audit initiation via Office Action from post registration examiner

   Registrant Response
- Second Office Action or Notice of Acceptance
- Consequences

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#### Audit Preparation

• Best defense is a good offense

- Careful attention to Section 8 declarations of use
- Proper documentation
- Open communication with product teams

#### Questions?

AriAnna C. Goldstein agoldstein@bairdholm.com 402.636.8236







#### "White Collar" Exemptions

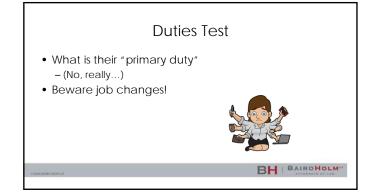
• To qualify for the Executive, Administrative, and Professional exemptions, *most* employees must

meet all 3 tests: – Salary basis test

- Salary threshold test

– Duties test

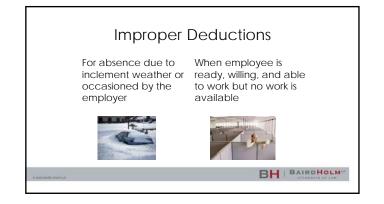






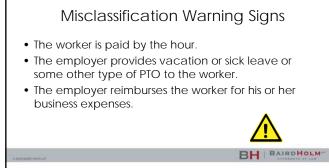
• No reductions because of quality/quantity









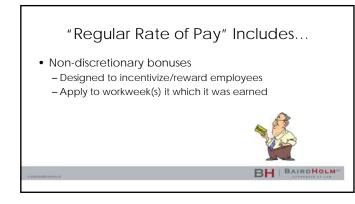


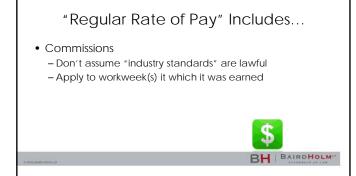


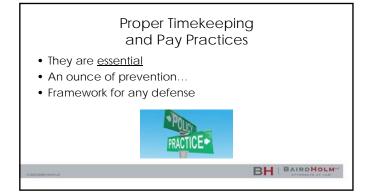




 "Unless specifically exempted, employees covered by the Act must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay."







#### Timekeeping/Pay Best Practices

- Train employees (not just supervisors) on what is compensable and how they are paid
- Have reporting mechanisms in place for employees to report off-the-clock work

#### Timekeeping/Pay Best Practices

- Publicize complaint mechanisms for when employees believe they have been underpaid
- Require employees to sign off on each week's time record and pay record

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#### Timekeeping/Pay Best Practices

- Discipline employees for violating pay and timekeeping policies
- Discipline supervisors for not paying employees correctly or encouraging off-the-clock work

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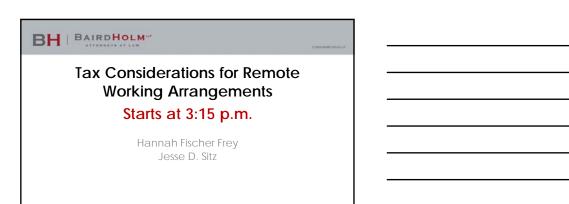
#### Timekeeping/Pay Best Practices

- Communicate in writing that salaries are intended to pay for all hours worked and the limited circumstances under which deductions may be made
- Regularly monitor/audit to ensure accuracy

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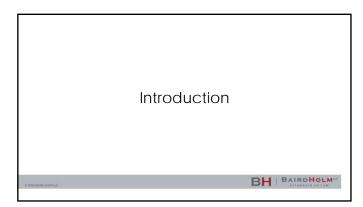
#### Questions?

Allison D. Balus abalus@bairdholm.com 402.636.8254









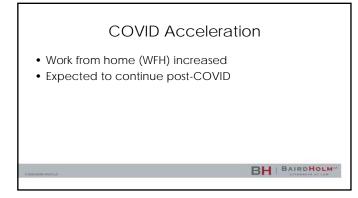
### Multistate Taxation

- Nexus
- Double Taxation
- Challenges
- Due Process Clause
- Commerce Clause

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#### **Remote Workers**

- Home office in one state, workers remote from another state
- Workers that travel to multiple states to perform services
- Services performed completely online (e.g., remote teaching)



# Topic Overview

- Individual Income Tax Withholding
- Business Income Tax
- Related Issues
  - Registering To Do Business
  - Workers Compensation Insurance
  - Unemployment Insurance

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Individual Income Tax

### Imposition of Tax

- Nebraska taxes the entire income of every resident, irrespective of source
- Many states have a similar income tax structure

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#### **Double Taxation**

• For example, California taxes the wages paid to a nonresident individual working in California

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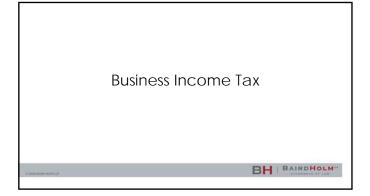
#### Withholding

- Employee should consult their accountant as to payment of tax
- In some situations, employers may be technically required to withhold in two states
- Practical approaches

#### **COVID** Relief

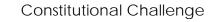
- 17 states, including Nebraska, have temporary relief for employees that do not normally work in the state but are doing so due to COVID-19
- Other states have provided penalty relief or delayed due dates

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#### Multistate Operations

- Selling products or services in multiple states
- "engaging" or "doing business" or "deriving income from sources" in the state



- Commerce Clause
   Substantial Nexus
- Due Process Clause
   Minimum Contacts
- P.L. 86-272
- Physical presence

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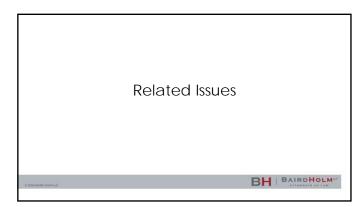
### Apportionment

- Single-sales factor
- Three-factor, sales, payroll, and property
- Weighted factor formulas
- Market based
- All or nothing

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#### Relief

- State-enacted nexus thresholds based on sales or number of transactions
- Work directly with State to agree on an apportionment
- COVID-19 has caused some states to provide nexus waives for teleworking employees



#### Registering to Do Business

- Register with Secretary of State or similar agency
- Relief in some states where Company has limited employees or sales in state

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#### Workers Compensation

- State-by-state determination and definition
- Some states have thresholds, such as a number of employees before the Company is covered

#### Unemployment Insurance

- Department of Labor has issued guidance to determine where services are performed
- Depending on State, part-time workers may be treated differently
- COVID-19 relief

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#### Practical Considerations

- As a Company expands across state lines, seek
   analysis of considerations and obligations
- Be cognizant of state thresholds
- Work closely with HR or payroll provider

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#### Questions?

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### Legal Ethics 2020 – Back to Basics Starts at 3:50 p.m.

Jonathan R. Breuning

Nebraska Rules of Professional Conduct

Cited as Neb. Ct. R. of Prof. Cond. §3-501.0 to 3-508.5

Topic 1: Professionalism

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#### Preamble: A lawyer's responsibilities.

 A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.

#### § 3-503.1. Meritorious claims and contentions.

COMMENT [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.

#### § 3-503.4. Fairness to opposing party and counsel. A lawyer shall not:

(d) in pretraining bracking (d) in pretrain procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party:

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#### Dumb Lawyer Stories

#### Facebook Follies

"Senior Counsel" acting like a sophomore: "you're fired"

Forget you're a lawyer, not a pundit: "you're suspended"

#### At Least Hire a Driver

Chronic naked driving: indefinite suspension

Chronic drunk driving: 180 day suspension

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#### **Overly Aggressive Litigation**

#### LaSalle v. Vogel, Cal Ct. App. 2019

- \$1 million default judgment in legal malpractice case reversed
- Court found that the lawyer moving for judgment was far too quick to jump on the opportunity
- \* "[L]awyers who know how to think but have not learned how to behave are a menace and a liability . . . . "



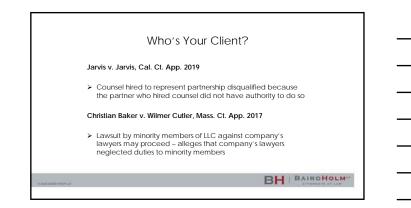
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#### Who's Your Client?

#### 3-501.13. Organization as client

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

(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.



#### Back to More Basics

State of Nebraska ex. Rel. Counsel for Discipline v. Chvala 304 Neb. 511, 11-22-19

#### The Players

- ➤ "Experienced, well-respected lawyer" licensed for 35 years

- Experienced, wennespected lawyer incented to as years
   Two brothers and their business entities were long-time clients for various corporate, agricultural and real estate matters
   Real estate lease-purchase agreement entered into between (1) lawyer and her husband and (2) clients
   Subsequent dispute over eventual purchase of land, resulting in litigation and ethics charges

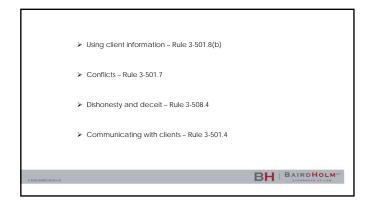
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#### The Discipline

- > Disbarred "despite and otherwise unblemished legal career"
- May not reapply for reinstatement for at least 5 years, and then only after successfully completing the Multistate Professional Responsibility Examination

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# The Lessons ➤ Supervising staff – Rule 3-505.3 ➢ Who's your client Disclaiming responsibility Doing business with clients – Rule 3-501.8(a) BH BAIRDHOLM"



Settlement Agreement Tricks and Traps

"Approved as to Form and Content"

Monster Energy Company v. Schechter, Cal Sup. Ct. 2019

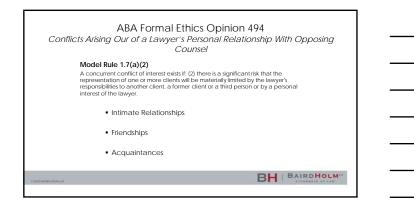
RSUI Indemnity Company v. Bacon, 810 N.W. 2d 666 (Neb. 2011)

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#### Rules Affecting Settlement Agreements

3-505.6. Restrictions on right to practice. A lawyer shall not participate in offering or making:

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.



Questions?

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#### Thank You!

Thank you for attending Baird Holm's In-House Counsel & Ethics CLE Webinar. Look for an email from us tomorrow with the event survey and continuing education information.