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DECEMBER 2, 2020

Ethics: Normal Accident Theory

Dalton Mott and Jamie Thompson

SHOOK
HARDY & BACON

Introduction

**MISTAKES
HAPPEN.**



- Malpractice/professional negligence
- Duty to report
- Disciplinary action



Overview

01 **An Overview of the Theory**

02 ***Scenario* – Failure to File**

03 ***Scenario* – Missing the Questionable Case**

04 ***Scenario* – Accidental Defamation**

05 ***Scenario* – Please Disregard**



1

An Overview of the Normal Accident Theory

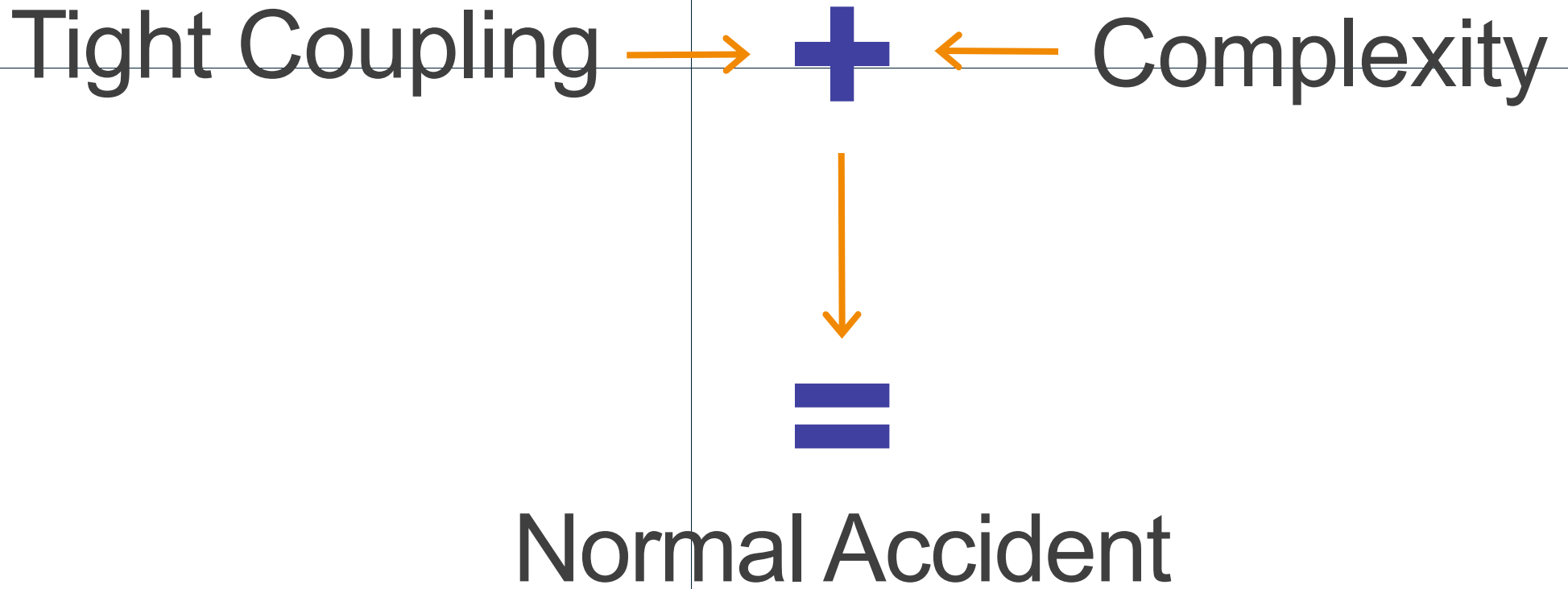
What is a Normal Accident?

“A normal accident is where everyone tries very hard to play safe, but unexpected interaction of two or more failures (because of interactive complexity) cause a cascade of failures (because of tight coupling).”

CHARLES PERROW



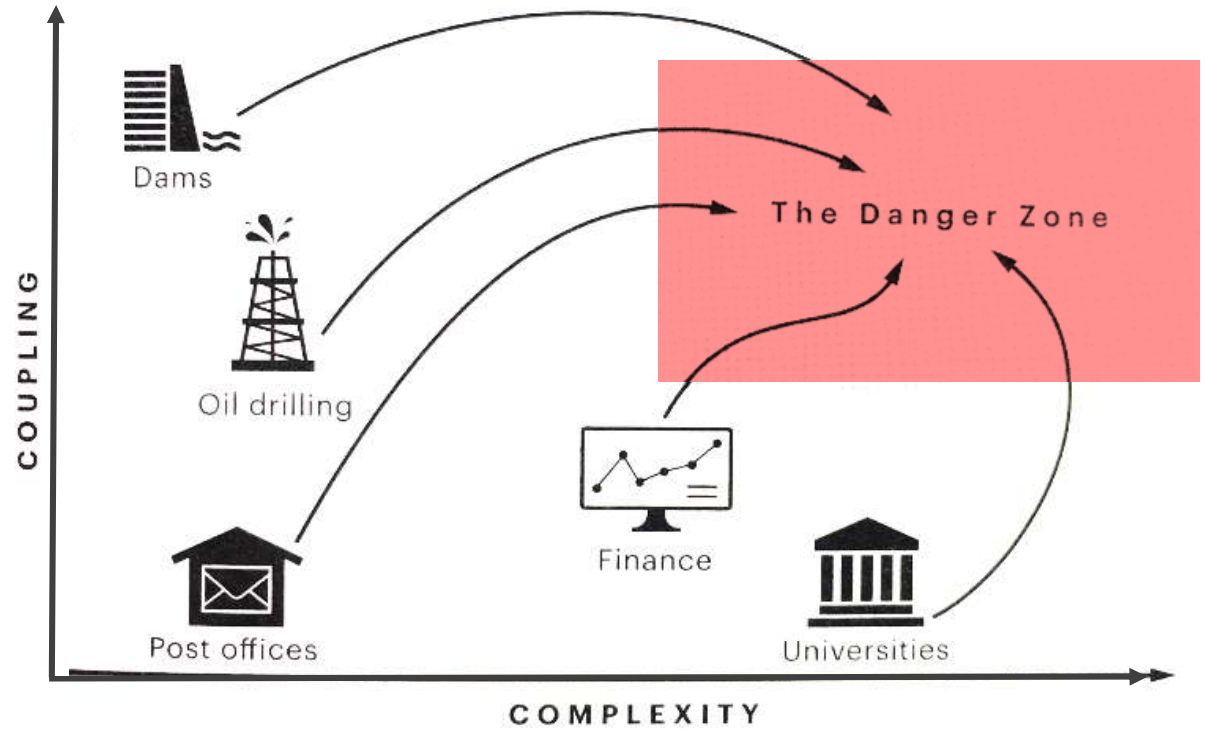
System Failures



Vulnerable Industries

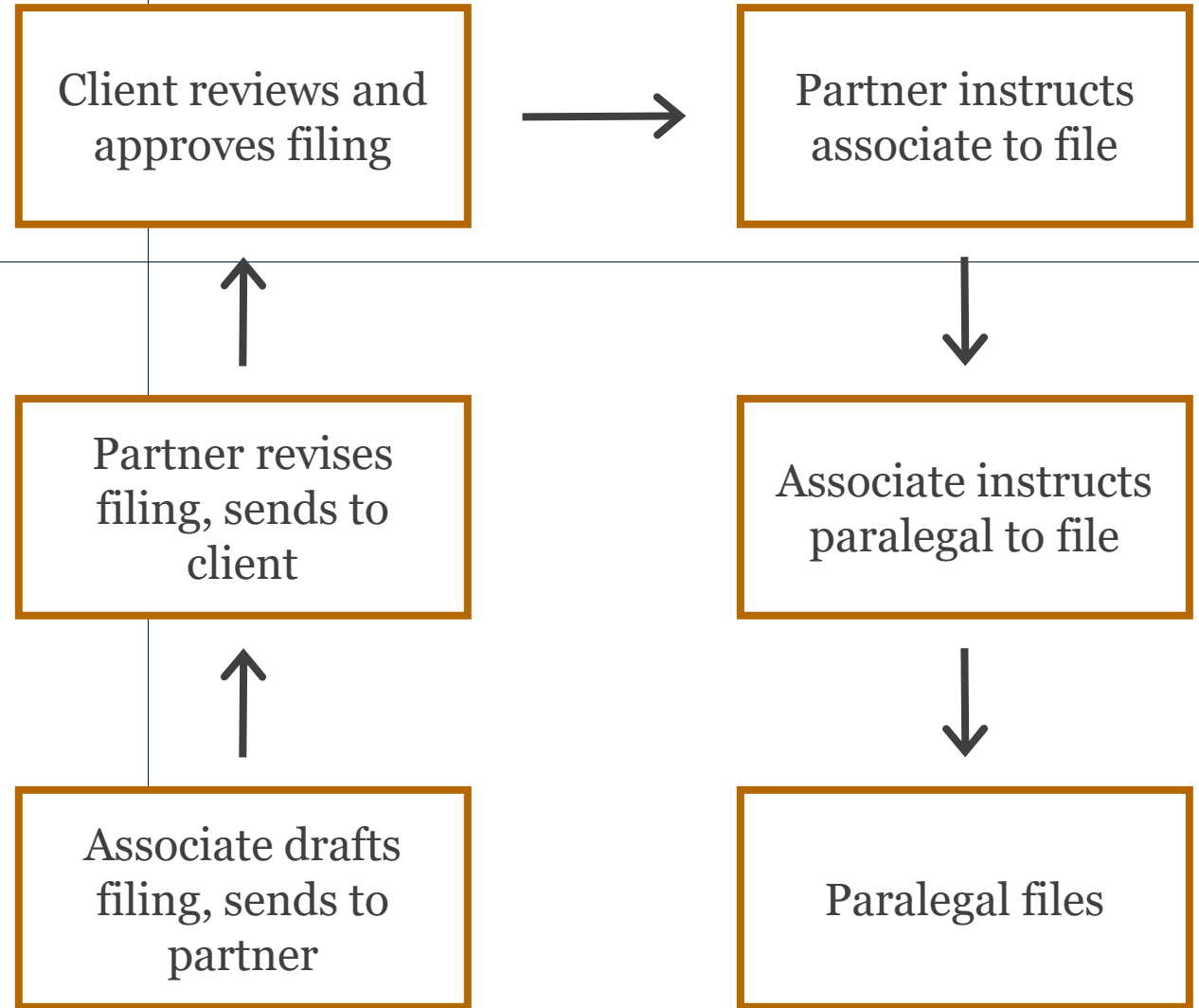


The Sliding Scale of Danger...



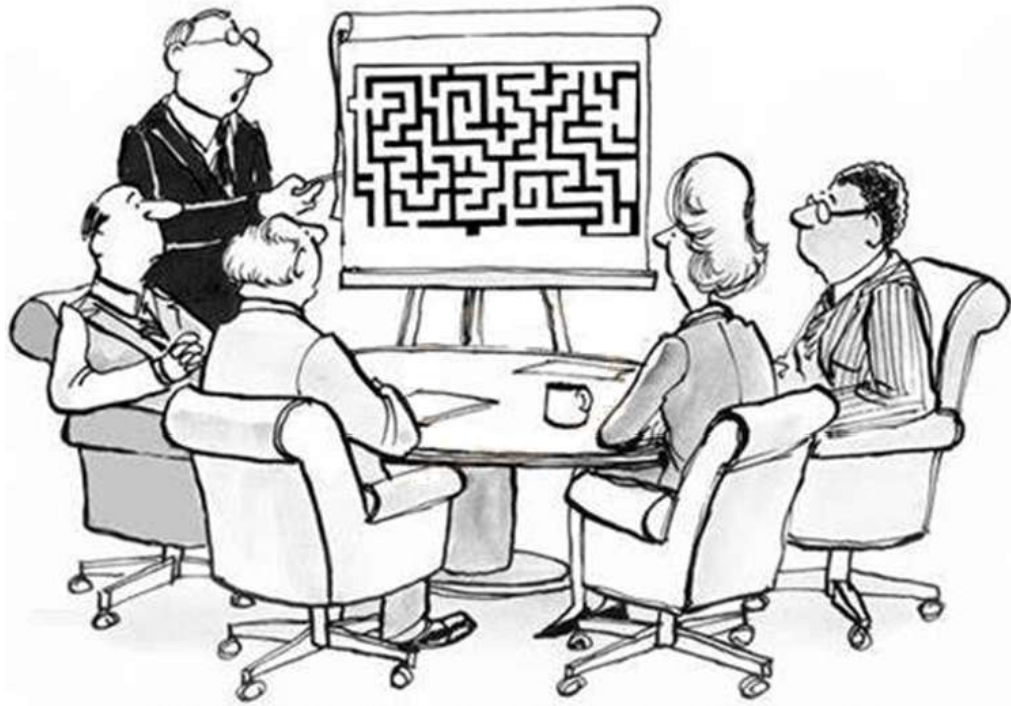
From *Meltdown* by Chris Clearfield and Andras Tilcsik (Penguin Press 2018)

A Simple Filing Flow Chart



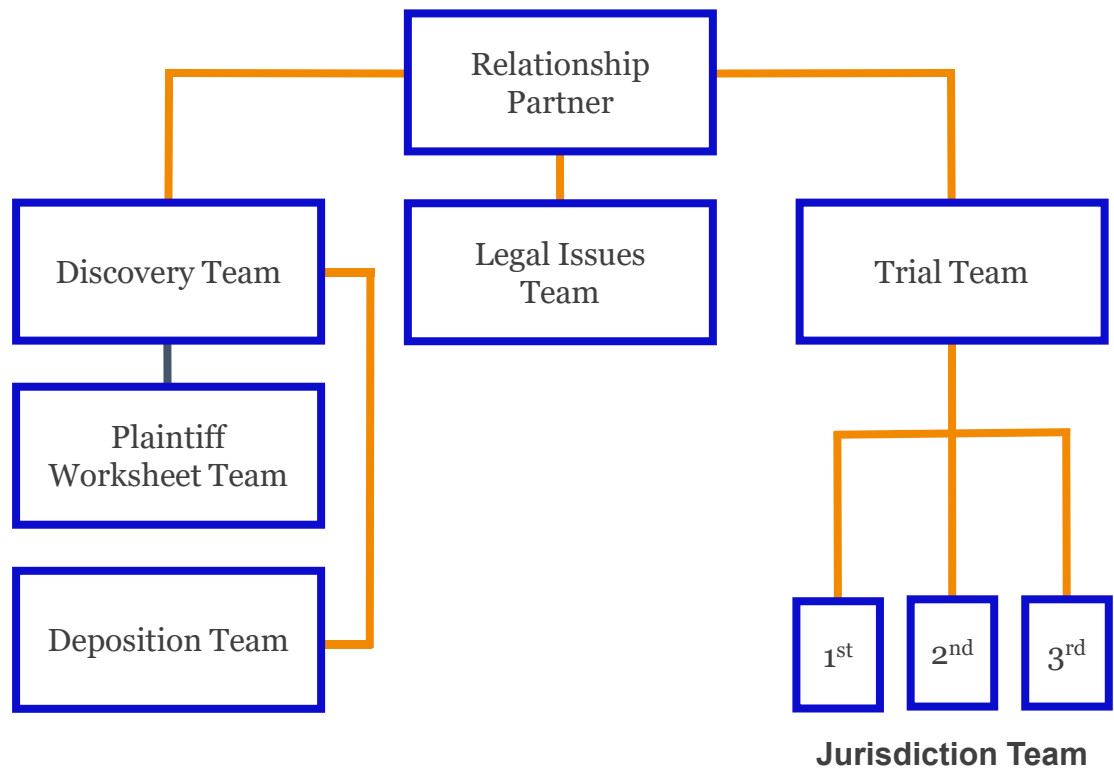
An Increasingly Complex Legal World

PAST



“What we’ve done is make it dramatically easier to navigate the corporate hierarchy.”

PRESENT



MPR 1.4 - 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. ”

Comment 8 to MPR 1.4

“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.”





Taking Action to Stop System Failures

01 | Identifying Potential Failures


By identifying complex and tightly coupled situations, we can proactively watch out for system failures.

02 | Learning from Failures

In a complex system, system failures will happen, but we should use those failures to learn to prevent future failures.

03 | Adopting Preventive Measures

Adopting preventive measures can reduce both complexity and tight coupling, which will reduce the risk of system failures.



Why should non-lawyers care?

- 01 | If you work with attorneys, understanding lawyer ethics may help you understand their decision making process.
- 02 | Your own position/area of expertise may be equally vulnerable to system failures.
- 03 | There is a pandemic outside, what else are you going to do?

Is EHS vulnerable?



Complexity

- Overlapping framework of constantly changing laws/regulations
- Difficult subject matter



Tightly Coupled

- Health risks
- Potentials for chain reactions
- Fines for even small violations

2

Scenario – Failure to File

Scenario – Failure to File

CM  ECF

Two-Way Media, LLC v. AT&T Operations, Inc., No. 5:09-cv-00476
(W.D. Tex. Feb. 6, 2014)



Two-Way Media, LLC v. AT&T Operations, Inc., No. 5:09-cv-00476 (W.D. Tex. Feb. 6, 2014)

The Court . . . finds it very troubling that for almost 52 days after the entry of orders, the Defendant at least eighteen counsel that received the EOs on behalf of the Defendants . . . have not read the orders by the Court, check the docket for activity, or check on the status of the case. Such an omission is particularly alarming in this case where a \$40 million judgment has been entered against Defendants



Two-Way Media, LLC v. AT&T Operations, Inc., No. 5:09-cv-00476 (W.D. Tex. Feb. 6, 2014)

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By [Ryan Davis](#)

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6 IP Malpractice Cases Attorneys Need To Know

By [Erin Coe](#)

Law360, San Diego (October 5, 2015, 6:59 PM EDT) -- Intellectual property attorneys have long

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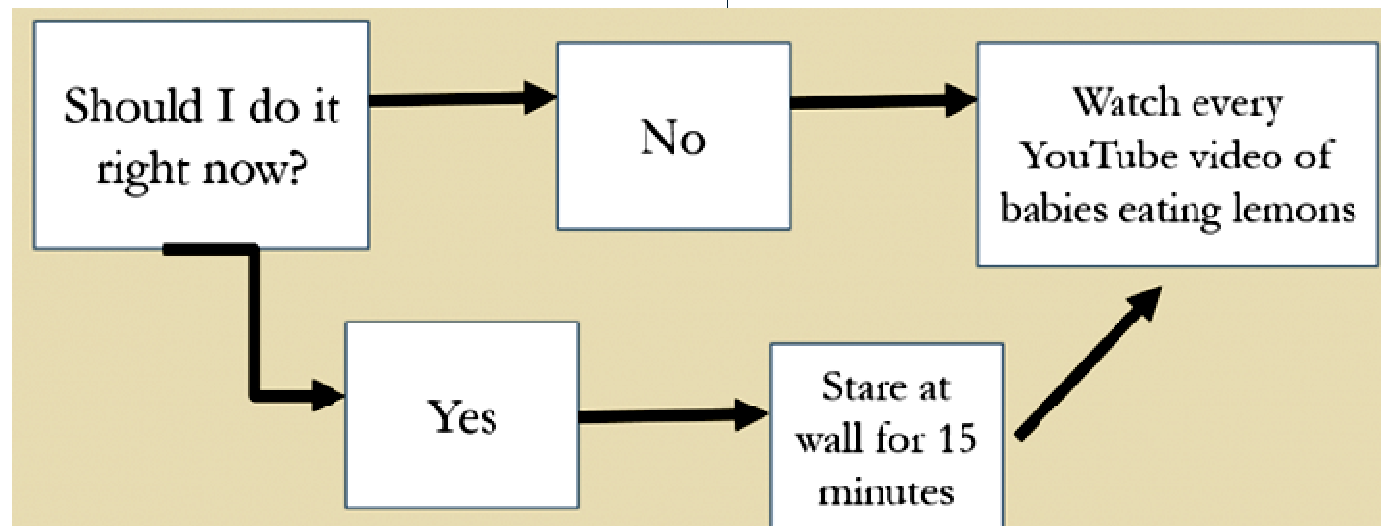
Diligence

MPR 1.3

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

COMMENT 3

“Perhaps no professional shortcoming is more widely resented than procrastination.”



System Failure?



Complexity

- Large team
- Multiple firms
- Complicated procedural situation
- Reliance on technology



Tight Coupling

- Other requirements for appeal dependent on knowing the deadline
- Less time is still risky
- High stakes

Defeating Complexity

01 | Daylighting

Transparency is one of the best means of reducing the ill effects of complexity. Developing methods of effective communication will ensure issues don't slip through the cracks.

02 | Removing Uncertainty

Larger teams are necessary, but often dangerous if people do not know their roles. Clearly defined roles and positions is essential to ensure each mistakes do not lead to system failures.



3

Scenario – Missing the Questionable Case

Scenario – Missing the Questionable Case

A large case team is representing a chemical company in a state air enforcement action. A junior associate is assigned the task of finalizing a motion based on preemption. While she is double checking the motion, she comes across a case that she thinks is bad for their position but is not cited in the motion. She raises the issue at a team meeting the day before the filing. As soon as she raises the case, a senior associate quickly disagrees with her and reminds her the client has already approved the motion. The case is not included in the motion.

MPR 3.3

“A lawyer shall not knowingly:
... fail to disclose to the
tribunal legal authority in the
controlling jurisdiction known
to the lawyer to be directly
adverse to the position of the
client and not disclosed by
opposing counsel.”



Real World Example

“The Magistrate Judge here finds the failure to cite the prior cases a disappointing lack of candor and cautions against its repetition. To properly fulfill its judicial function, the Court needs to be in dialogue with recent opinions of other judges on the same topic, whether those opinions are binding or merely persuasive.”

Chinn v. Jenkins, No. 3:02-CV-512, 2018 WL 488159, at *4–5
(S.D. Ohio Jan. 19, 2018)

System Failure?



Complexity

- Tricky substantive law
- Large case team
- Client concerns



Tight Coupling

- No fallback
- High potential impacts on case strategy
- Creditability issues



Creating a Culture of Dissent

01 | Softening Power Cues

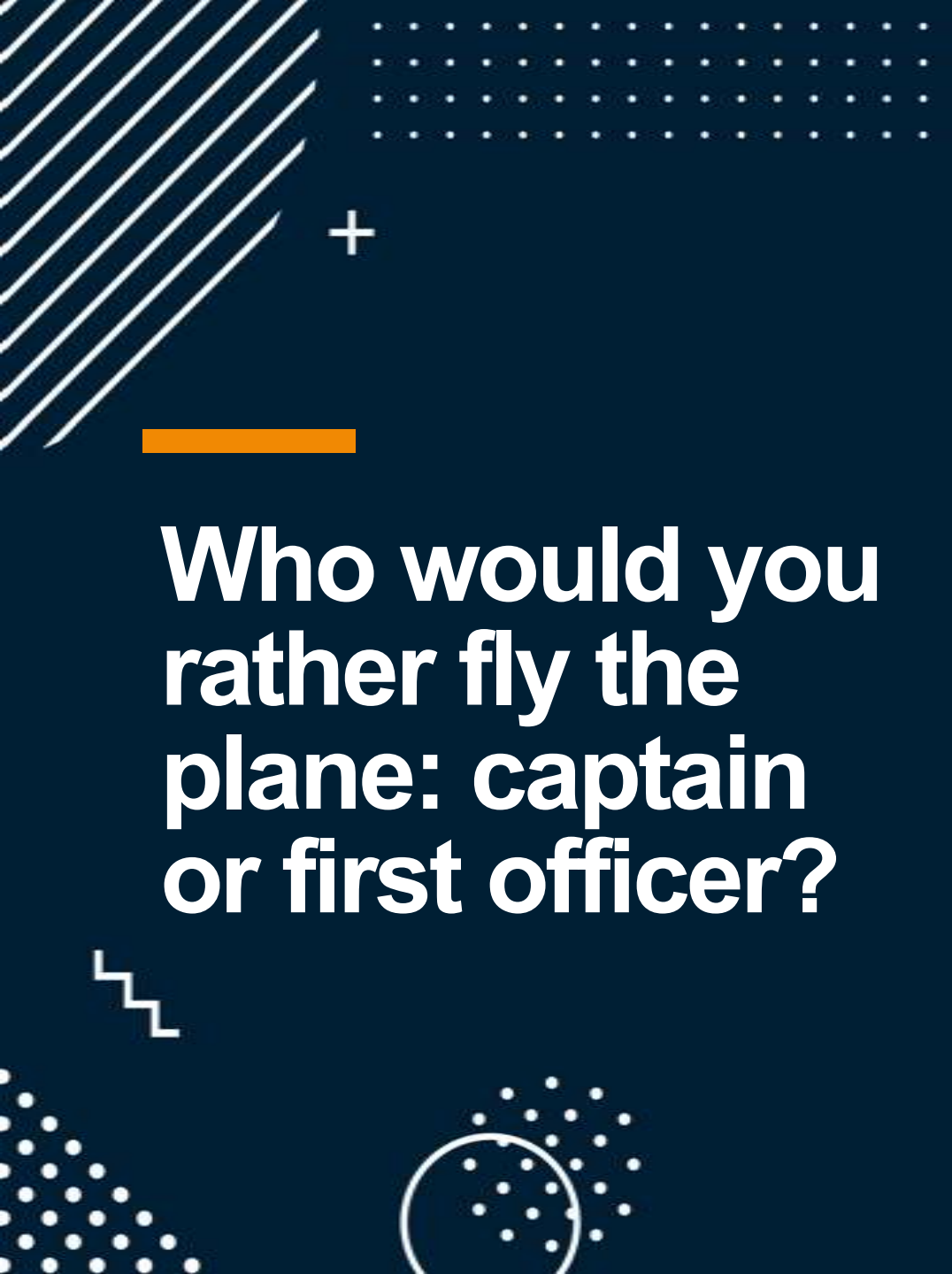
Team leaders may need to actively soften their power cues if they want subordinates to point out mistakes to them. Having an open door helps, but going to a subordinate's office might help more.

02 | Leading from Behind

Getting others' opinions first may lead to more open and frank conversations. On the other hand, giving your opinion first may make others feel like there is no reason to speak up.

03 | The Importance of Diversity

More diverse teams brings more perspectives and experiences. As a result, more diverse teams are more likely to catch errors.



**Who would you
rather fly the
plane: captain
or first officer?**

- Captains and first officers take turns flying the plane.
- However, a study from the NTSB in 1994 found that nearly three-quarters of accidents happen when the captain flies the plane.
- In response, the airline industry went through a fundamental culture shift to create a culture of dissent.

4

Scenario – Accidental Defamation

Emhart Industries v. U.S.

Case 1:11-cv-00023-WES-LDA Document 761 Filed 05/01/20 Page 1 of 4 PageID #: 23044

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

EMHART INDUSTRIES, INC.,

Plaintiff, Cross-Plaintiff, Third-Party
Plaintiff, and Counter-Defendant,

Civil Action No. 06-218-S

v.

NEW ENGLAND CONTAINER
COMPANY, INC., ET AL.

Defendants, Counter-Plaintiffs, and Third-
Party Plaintiffs,

EMHART INDUSTRIES, INC.,

Plaintiff, Cross-Plaintiff, Third-Party
Plaintiff, and Counter-Defendant,

Civil Action No. 11-023-S

v.

UNITED STATES DEPARTMENT OF THE
AIR FORCE, ET AL.

Defendants, Counter-Plaintiffs, Cross-
Plaintiffs, and Third-Party Plaintiffs,

v.

BLACK & DECKER INC.

Counter-Plaintiffs, Cross-Plaintiffs,
Third-Party Plaintiffs, and Third-Party
Defendant,

v.

A. HARRISON & CO., INC.; AKZO NOBEL
N.V.; EASTERN COLOR & CHEMICAL CO.
EASTERN RESINS CORP.; HENKEL CORP
HEXAGON METROLOGY, INC.; INDUSOL,
INC.; INGREDION INC.; IVAX LLC; OLIN

- \$150 million Superfund cleanup in North Providence, RI
- Three consolidated lawsuits
- Multiple Consent Decree settlement proceedings, phased litigation, and appeals



Emhart Industries v. U.S.



Of course, you will recall that at the status conference on October 16, 2019, you specifically requested that I not issue my Memorandum of Decision. As I told you then, a considerable amount of work had gone into that explanatory memorandum, and it was nearly ready to be filed; but to accommodate you, we put it away, never to see the light of day.

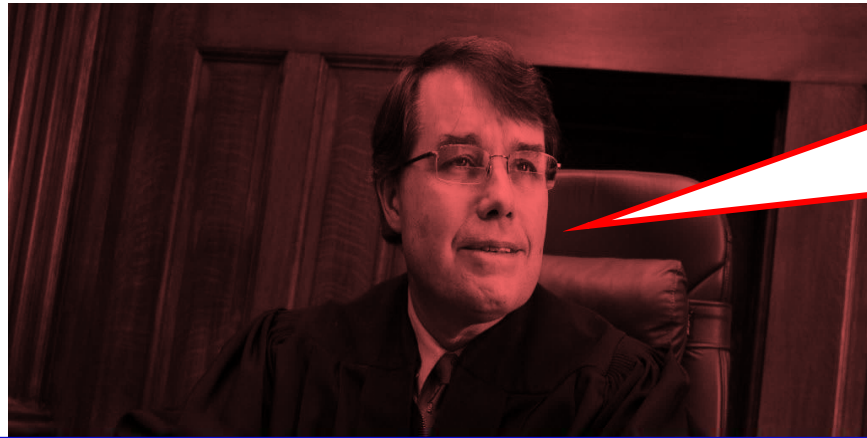
On April 8, 2019, the district court ... expressed the intention of preparing a Memorandum of Decision further explaining its reasoning. It has been over a year since then, however, and no such Memorandum has been filed, nor does it appear that one is forthcoming

"On February 6, 2019, this Court granted the United States' unopposed motion for expanded limited remand of the above-captioned appeal. This Court's Order authorized the district court to conduct 'proceedings connected to the proposed consent decree and any related matters.'

On April 8, 2019, the district court entered an order entering the Consent Decree. In that order, the district court expressed the intention of preparing a Memorandum of Decision further explaining its reasoning. It has been over a year since then, however, and no such

district judge not to issue his already written memorandum, or something similar, but alas, that is kind of hard to believe. Maybe it is that you don't think we check up from time to time on the things you say in your filings in the Court of Appeals. That would not be a very smart assumption. Or, perhaps, this is your way of secretly suggesting to me that you would like me to issue the Memorandum of Decision. Whatever it is, I suggest you be prepared to let me know at our conference May 20. So Ordered by District Judge William E. Smith on 5/1/2020.

Emhart Industries v. U.S.



Now, having worked with this evolving group of attorneys for nearly fifteen years on this case ..., I want to believe that you did not intend to suggest to the Court of Appeals that I simply did not do what I said I was going to do in my Order....

On April 8, 2019, the district court ... expressed the intention of preparing a Memorandum of Decision further explaining its reasoning. It has been over a year since then, however, and no such Memorandum has been filed, nor does it appear that one is forthcoming

Emhart Industries v. U.S.



Perhaps, for example, the person typing this motion inadvertently deleted a phrase after "... and it does not appear that one is forthcoming", such as "because we specifically asked the district judge not to issue his already written memorandum", or something similar. But alas, that is kind of hard to believe.

On April 8, 2019, the district court ... expressed the intention of preparing a Memorandum of Decision further explaining its reasoning. It has been over a year since then, however, and no such Memorandum has been filed, nor does it appear that one is forthcoming

Emhart Industries v. U.S.



Maybe it is that you don't think we check up from time to time on the things you say in your filings in the Court of Appeals. That would not be a smart assumption. Or, perhaps this is your way of secretly suggesting to me that you would like me to issue the Memorandum of Decision. Whatever it is, I suggest you be prepared to let me know at our conference May 20.

On April 8, 2019, the district court ... expressed the intention of preparing a Memorandum of Decision further explaining its reasoning. It has been over a year since then, however, and no such Memorandum has been filed, nor does it appear that one is forthcoming

The U.S.'s Apology

On reflection, [we] did not provide a full and complete description of the facts regarding this Court's proceedings

These errors were caused by a breakdown in communication between trial counsel for the United States and appellate counsel for the United States. No counsel for the United States intended to communicate anything less than the full facts to the First Circuit, but we filed to do so on this occasion.



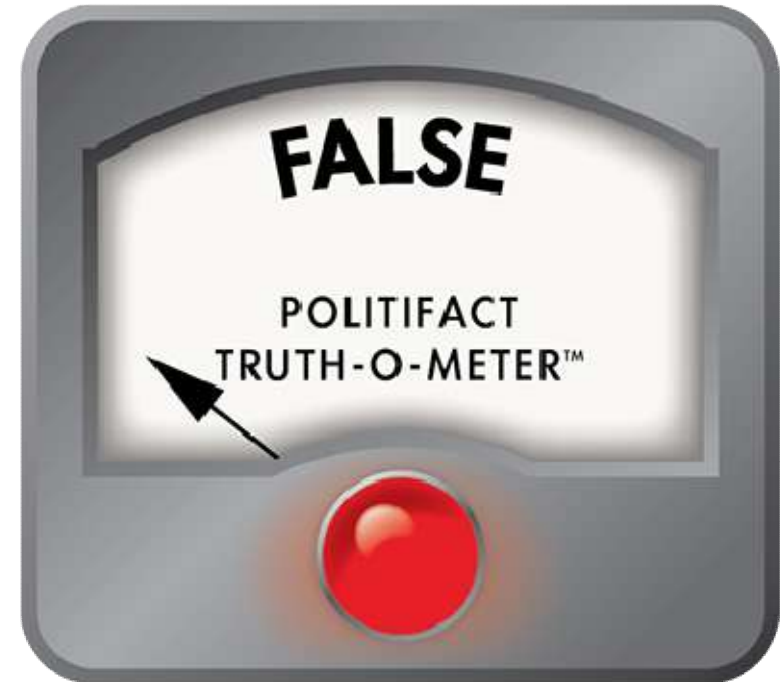
Emhart's Apology



[B]ecause Emhart ... assented to the [government's] motion, I want to apologize to the Court In all candor, we did not ask to review the motion before it was filed and ... did not review it as closely as we could have after it was filed.

MPR 3.3 (again...)

“ A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer ”



MPR 8.2



“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.”

System Failure?



Complexity

- Case with a long history
- Different teams to cover the same cases
- Not always clear how appeal and district court connect



Tight Coupling

- What happens in one proceeding affects the other
- Cannot fix the reputation loss

5

**Scenario – Please
Disregard**

Scenario – Please Disregard

You are an attorney representing a client at a large Superfund site with multiple joint defense groups. Late on a Friday night, you need to send an email with sensitive information to the joint defense group your client is a part of. Your paralegal normally sends such emails, but he has already gone home for the day. The joint defense group emails are located in an excel file that also includes tabs for the other joint defense groups and the EPA attorneys on the case. Not understanding how the excel file works, you copy the wrong list and accidentally send your email to every PRP involved at the Site.

MPR 1.6(c)

“A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”





In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

**ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY,
FORMAL OP. 477R (2017)**

System Failure?



Complexity

- Lots of parties
- Siloing of responsibility
- Technology issues

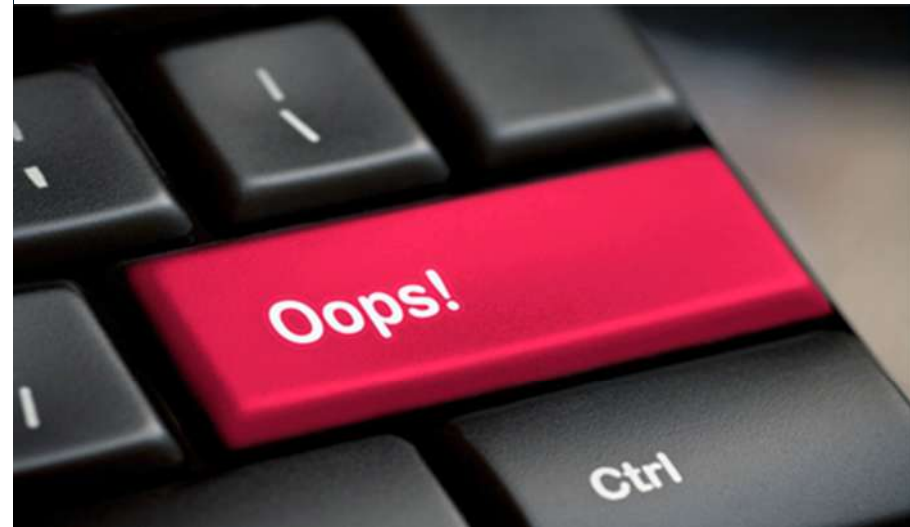


Tight Coupling

- No way to get it back or fix it
- Ethical complications?

MPR 4.4(b)

“A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”



Comment to ABA Model Rule 4.4

“Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law **beyond the scope of these Rules**, as is the question of whether the privileged status of a document or electronically stored information has been waived.”

Compare



Missouri

- Based on an attorney's independent judgment



DC

- Attorney only has to return the document if he knows it was inadvertently produced before examining it



Embracing the Mundane

01 | Small Obstacles Create Big Falls

It's human nature to worry more about the big obstacles such as whether our legal position is correct, but small obstacles such as sending an email or completing a filing are often just as important.

02 | Plan Continuance Bias

Plans often can be changed and changing a plan may make any process safer and smoother. Did this need to be filed on a Friday night?

03 | Relying on Safeguards

Safeguards, especially technological safeguards, may make us feel safer, but that does not mean we are actually safer.

ABOVE THE LAW

BIGLAW

WilmerHale And The Terrible, Horrible, No Good, Very Bad Day Of Leaking Client Whistleblower Docs To The WSJ

The one simple thing you can do right now to avoid ending up like the lawyers in this story.

By JOE PATRICE





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