

LEGAL ETHICS IN THE AGE OF SOCIAL MEDIA

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AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW**

EXAMPLES OF SOCIAL MEDIA

Twitter

Pintrest

Google +

Facebook

Vine

My Space

Snap chat

Social gaming , e.g. Words with Friends

Reddit

Instagram

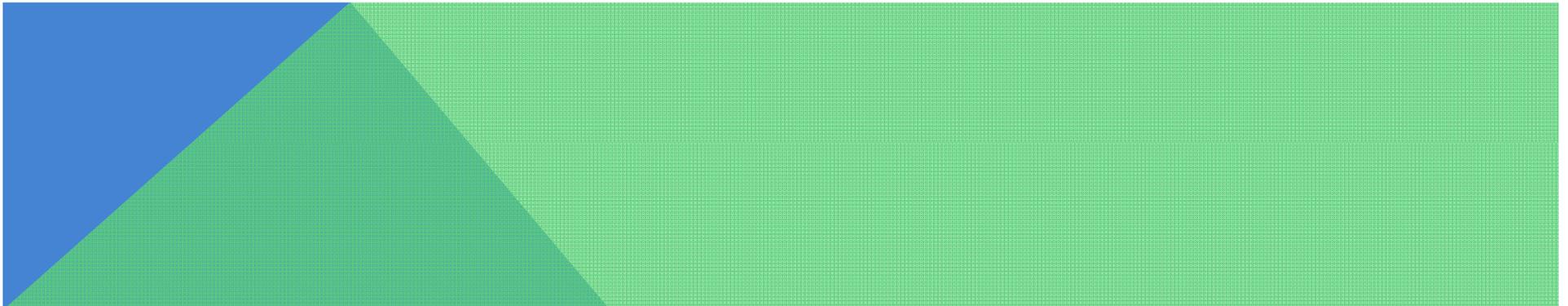
YouTube

AVVO

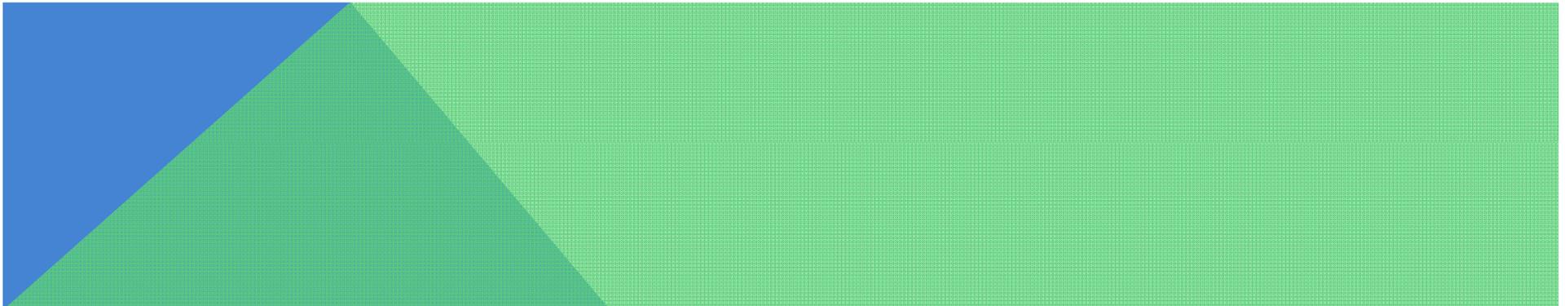
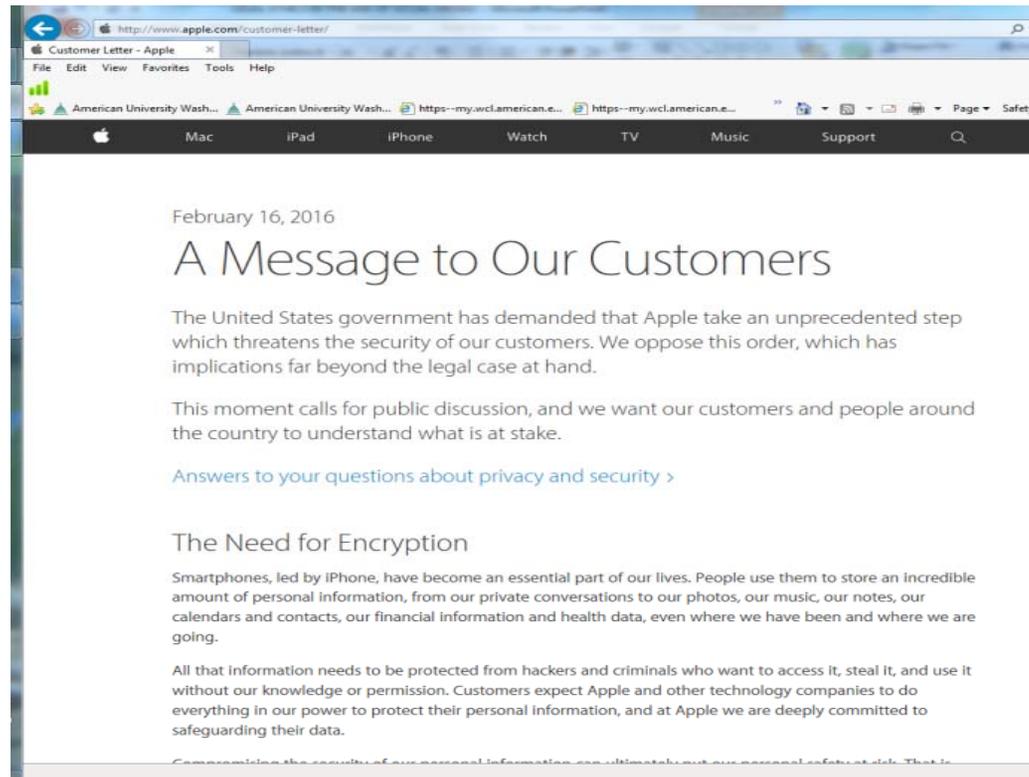
Personal blogs

Tumblr

4chan



LATEST EXAMPLE: APPLE COMPUTER'S POSITION IN SAN BERNARDINO CASE

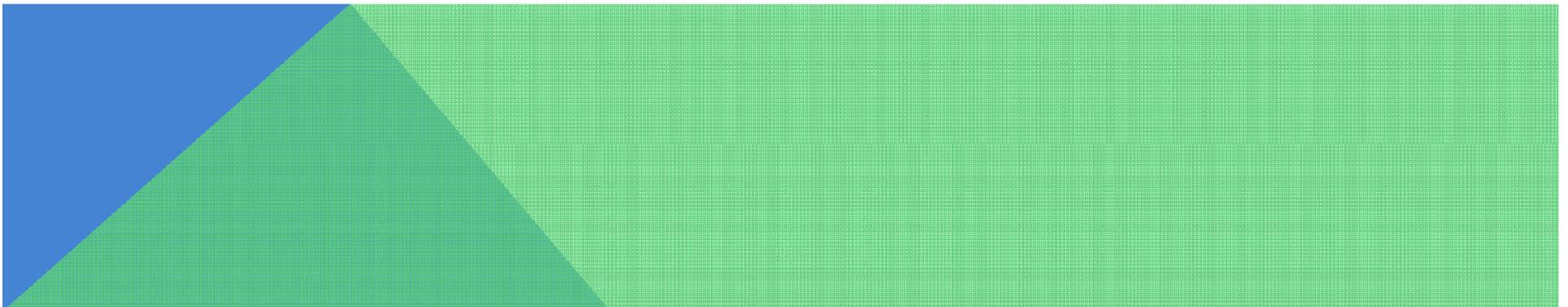


WHAT'S DIFFERENT ABOUT THE AGE OF SOCIAL MEDIA?

- Some analogies to older technologies still work, but some do not because social media is in some ways a brand new beast

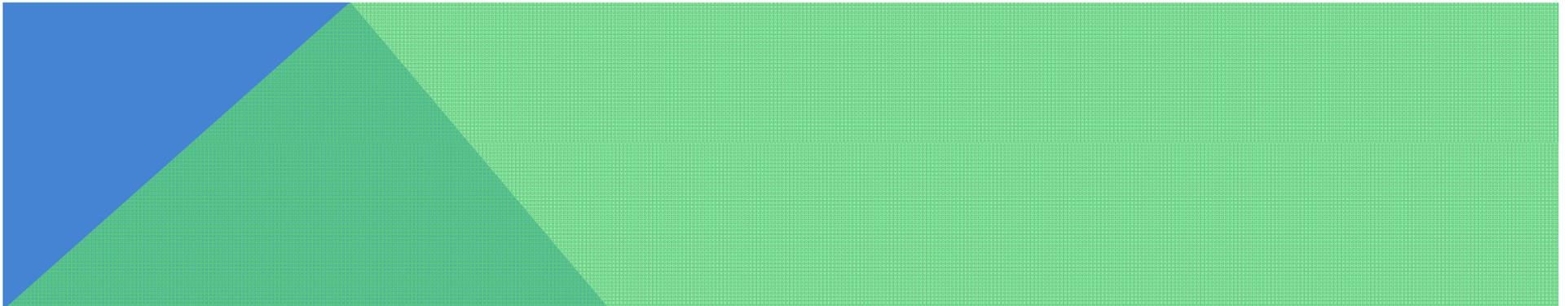


*Electronic pulses
like “tiny
trespassers”*



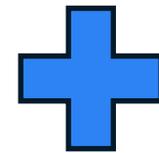
ISSUES WE WILL COVER

- Lawyers' "New" Duty of Competence
- Use of Twitter and other Social Media Communications/ Attorney Duty to Supervise
- Use of Facebook in Law Practice and for Investigation/Discovery
- Lawyer Blogs
- Lawyer Social Media Advertising, Participation in other Nontraditional Practices
- Others you would like to discuss?

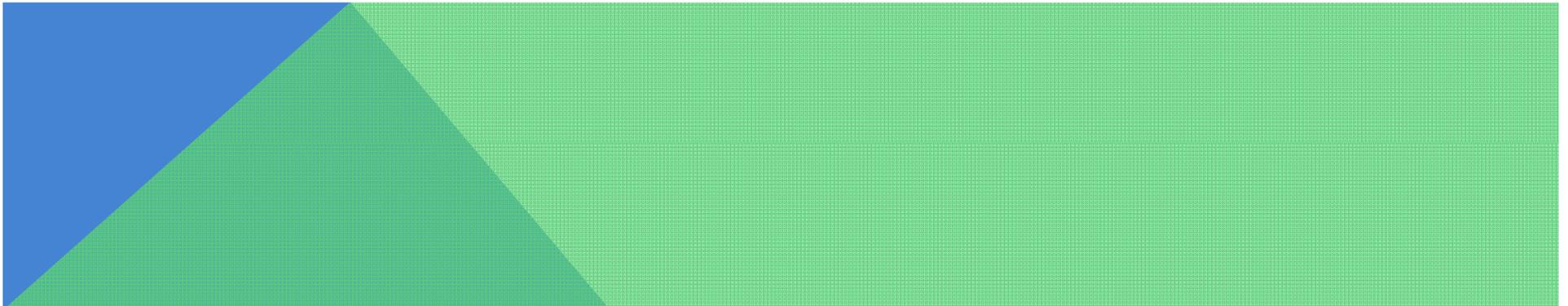


WHAT'S DIFFERENT ABOUT THE AGE OF SOCIAL MEDIA?

- Personal, private, intimate and ethereal conversations can also be highly public, widely disseminated, permanent and searchable.
 - This is not like other media; it really is new and different



pg0297 www.fotosearch.com

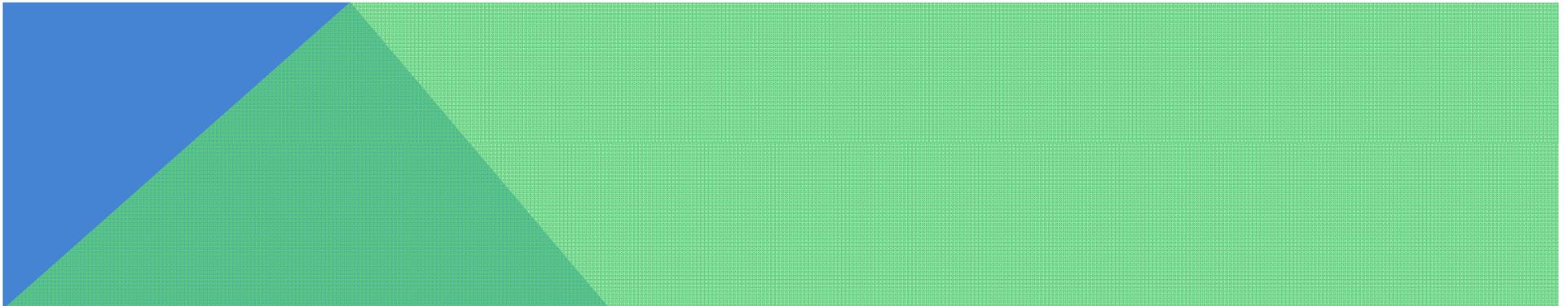


WHAT'S DIFFERENT ABOUT THE AGE OF SOCIAL MEDIA?

There can be a huge generation gap in mores and assumptions

- Younger generations do not interpret privacy and confidentiality the same way as do older generations who grew up before the advent of social media do

THE
GENERATION
G A P



WHAT'S DIFFERENT ABOUT THE AGE OF SOCIAL MEDIA?

- Rules/norms of communication in social media forums can be very different
 - Use of aliases, avatars; fantasy, make-believe, “pretend” realm
 - Some people tend to think what you say and do on the Internet doesn't really “count”
- But it does . . .

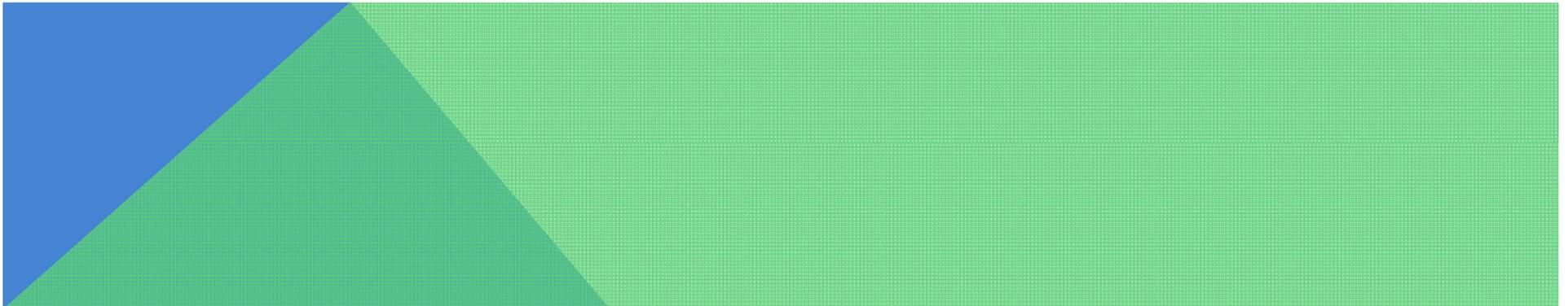


A “NEW” ABA RULES OF PROFESSIONAL CONDUCT MANDATE

MR 1.1 – Comment added by Ethics 20/20 Commission

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.



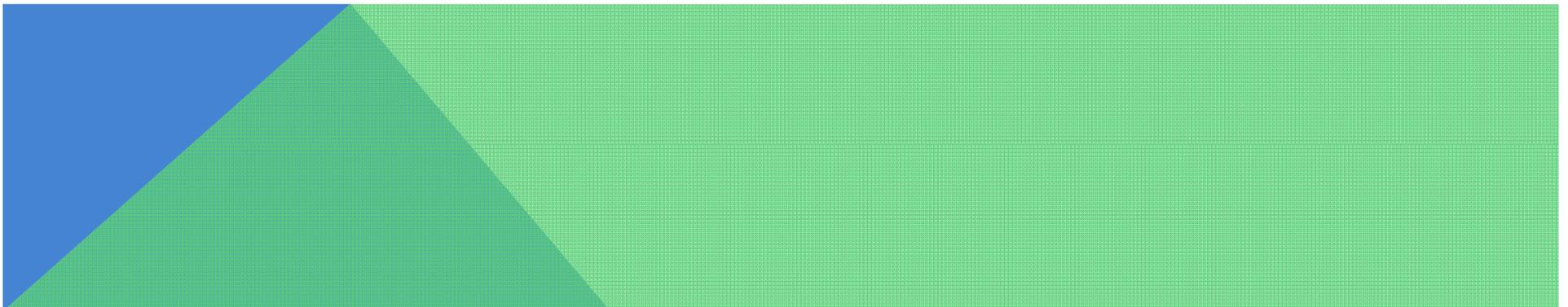
WHAT IS ENCOMPASSED BY THIS RULE?

ALL ASPECTS OF TECHNOLOGY USE INCLUDING :

- E-discovery
- Confidentiality/encryption/passcodes/anti-hacking measures
- Meta data
- Etc. etc. . . .

See *generally* Andrew Perlman, “The 21st Century Lawyer’s Evolving Ethical Duty of Competence,” *22 ABA Professional Lawyer* (2014) (in materials)

This training will focus on social media only, although we can expand our discussion in the Q & A if there is time

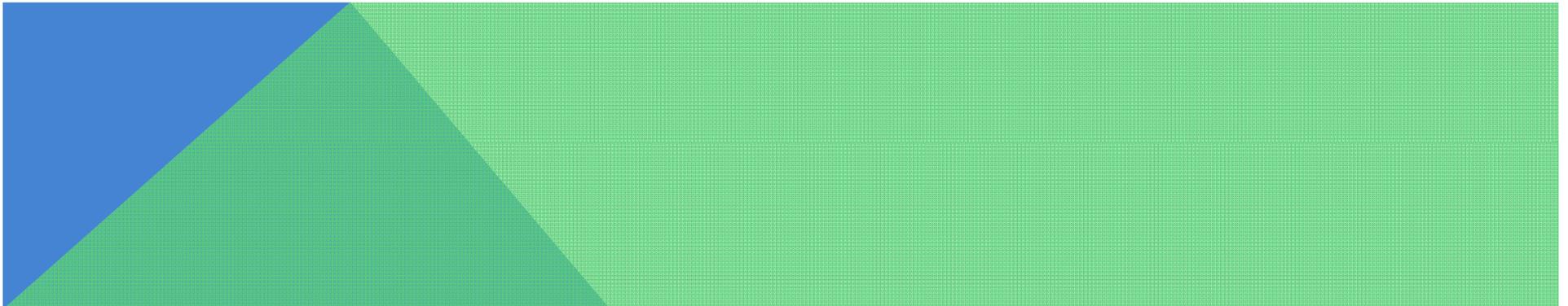


**SOME CLASSIC PROBLEMS IN
THE INTERSECTION OF LAW
PRACTICE AND SOCIAL MEDIA**



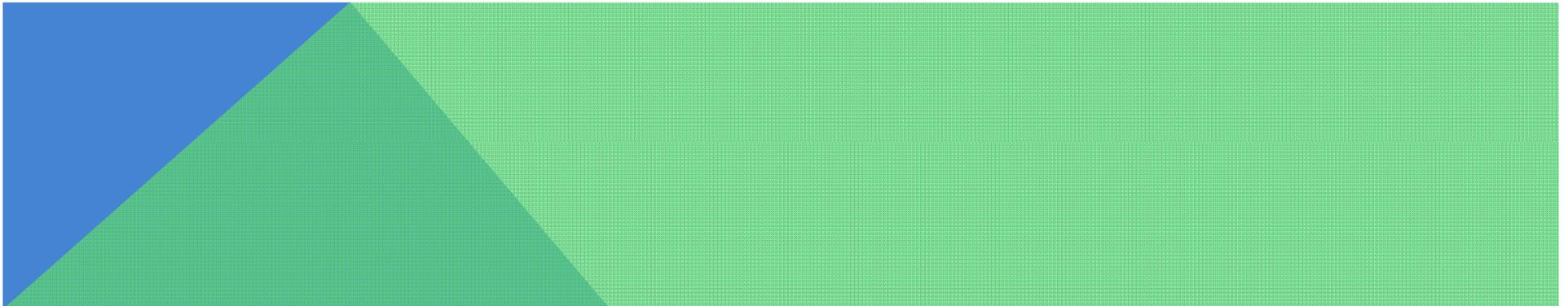
HYPOTHETICAL ONE

Enthusiastic legal interns in your office “tweet” about interesting matters they are working on in your office.



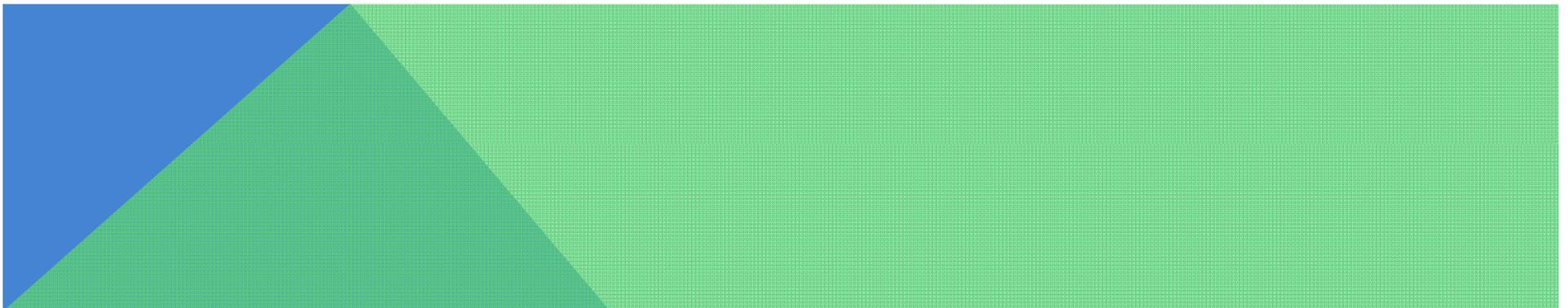
QUESTIONS/DISCUSSION ISSUES

- Ethics Issues
- Potential Problems
- Responses
- Solutions
- Best Practices



ISSUES

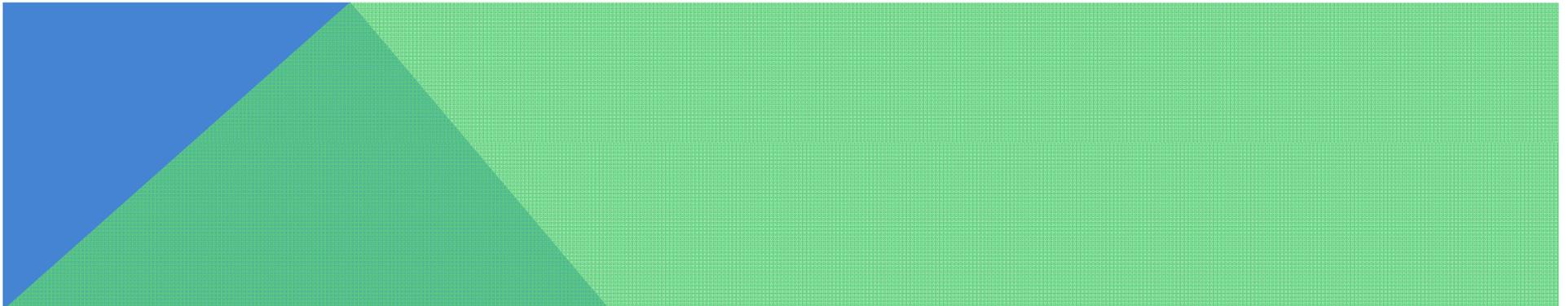
- Duty to Supervise Non-lawyers MR 5.3
- Confidentiality MR 1.6(a)
- Potential Privilege Waiver FRE 502(a)
- Attorney Liability for Acts of Agents MR 8.4(c)



RULE 5.3 RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

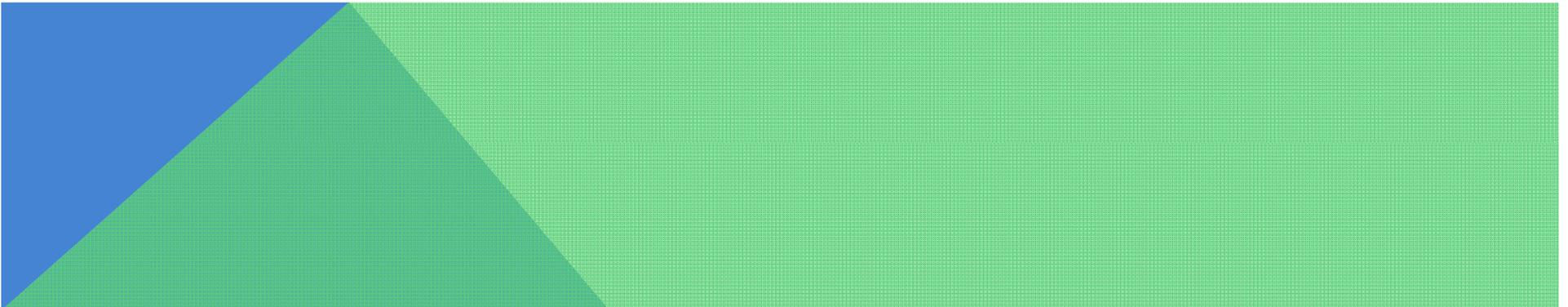
- (a) a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm **shall make reasonable efforts to ensure that the firm has in effect measures** giving reasonable assurance that the person's conduct is compatible with the professional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



MR 5.3, COMMENT 2

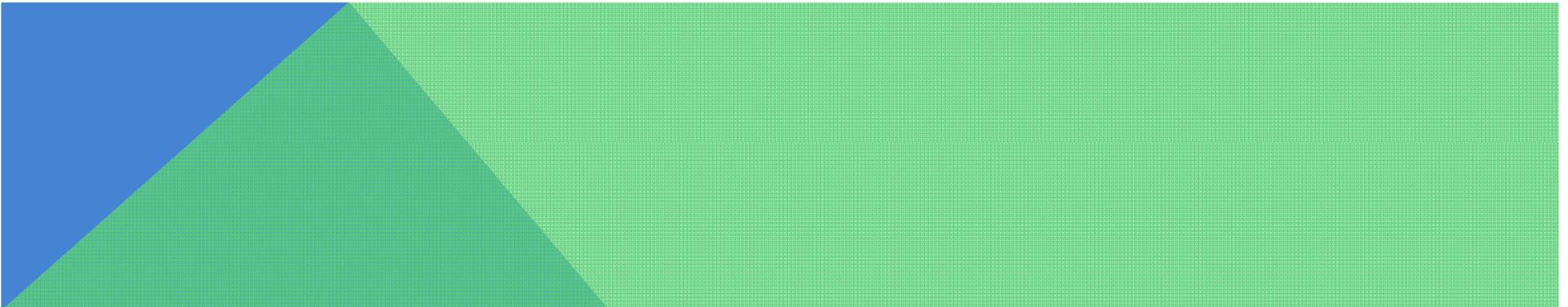
Nonlawyers Within the Firm

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. **A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client,** and should be responsible for their work product. **The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training** and are not subject to professional discipline.



MR 1.6 (A), DUTY OF CONFIDENTIALITY

(a) **A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**

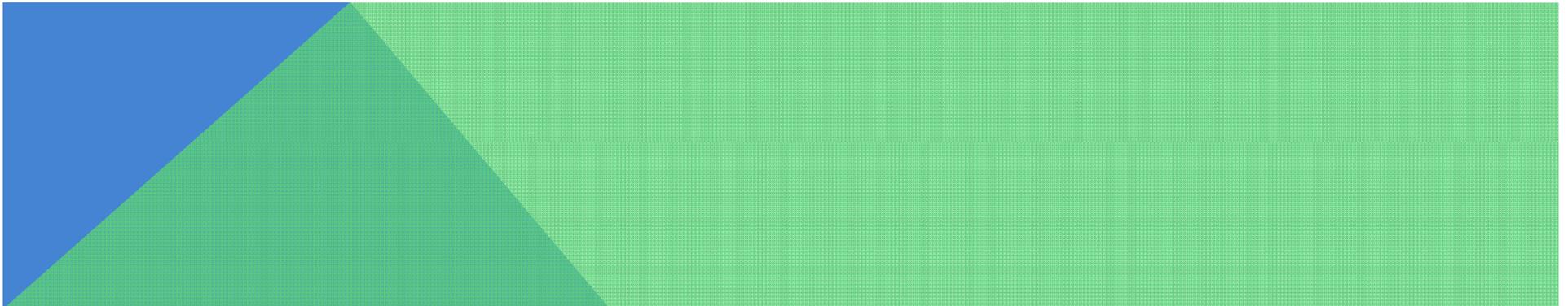


MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.4(A) MISCONDUCT

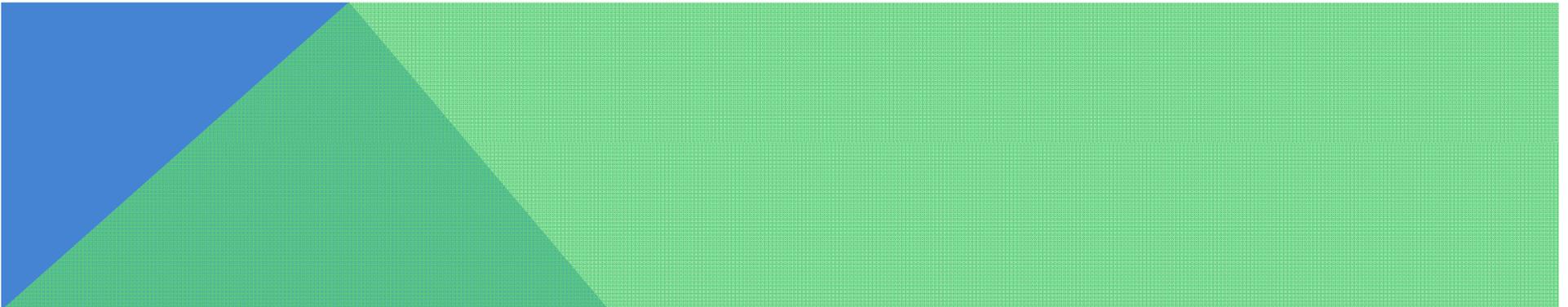
It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, **or do so through the acts of another;**



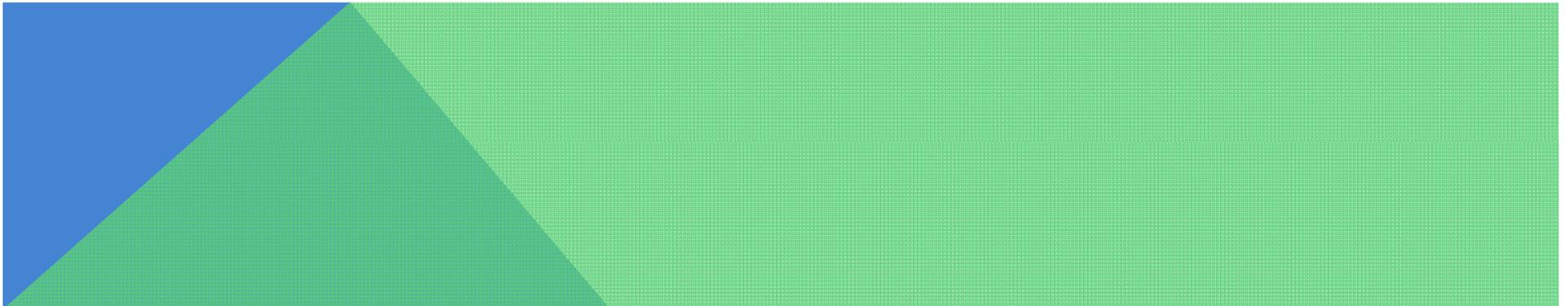
BEST PRACTICES

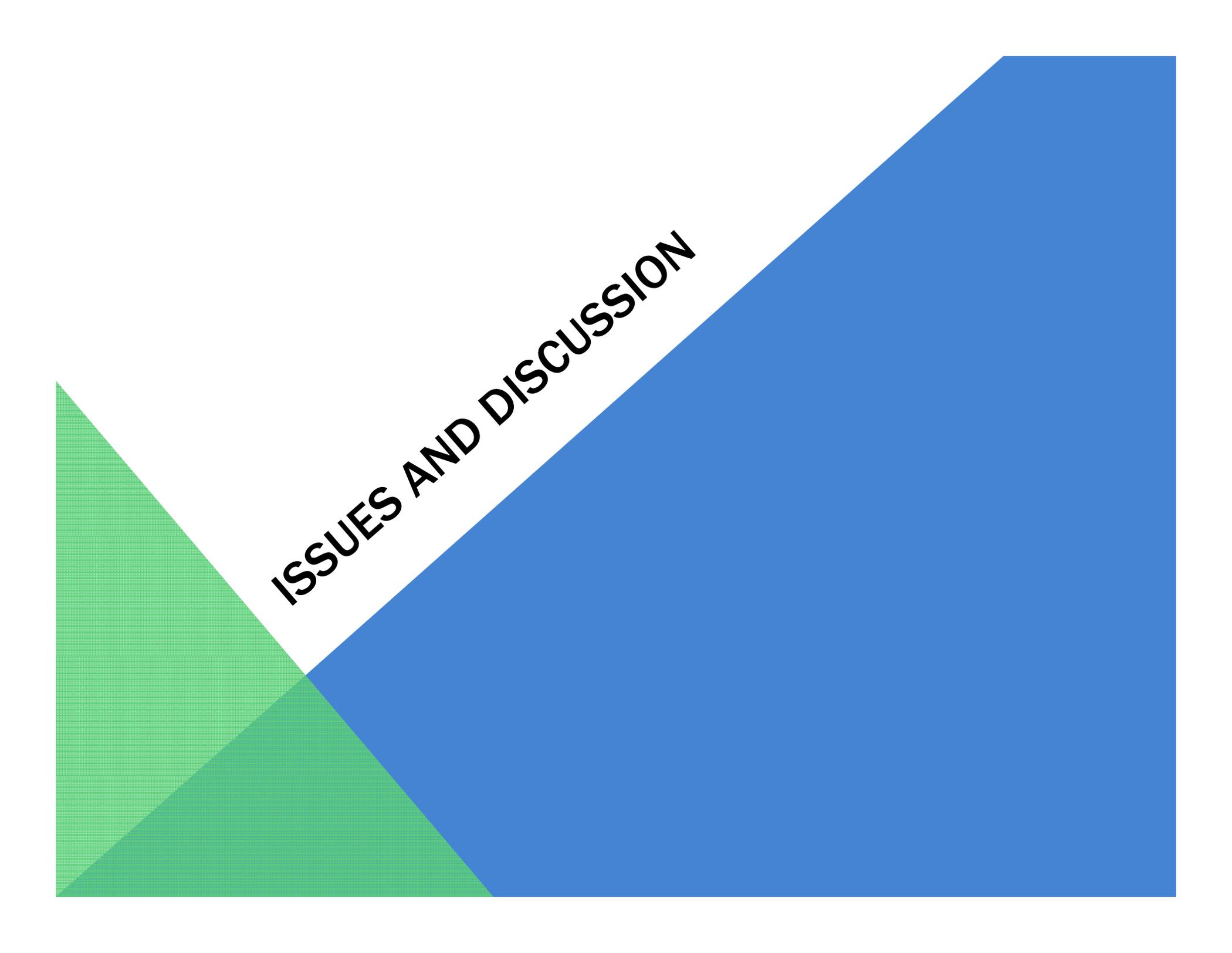
- Well-Articulated, Disseminated Office Policies
- Training
 - Supervising attorneys *and*
 - Non-lawyer assistants
- Direct, hands-on supervision of non-lawyers
- More?



HYPOTHETICAL TWO

A paralegal assigned to investigate the conduct of a potential witness decides to send an appealing “friend” request via Facebook in order to circumvent the privacy settings the individual has set to shield Facebook postings from public view. He uses his real name and photograph but does not disclose that he works for your law firm.





ISSUES AND DISCUSSION

ISSUES

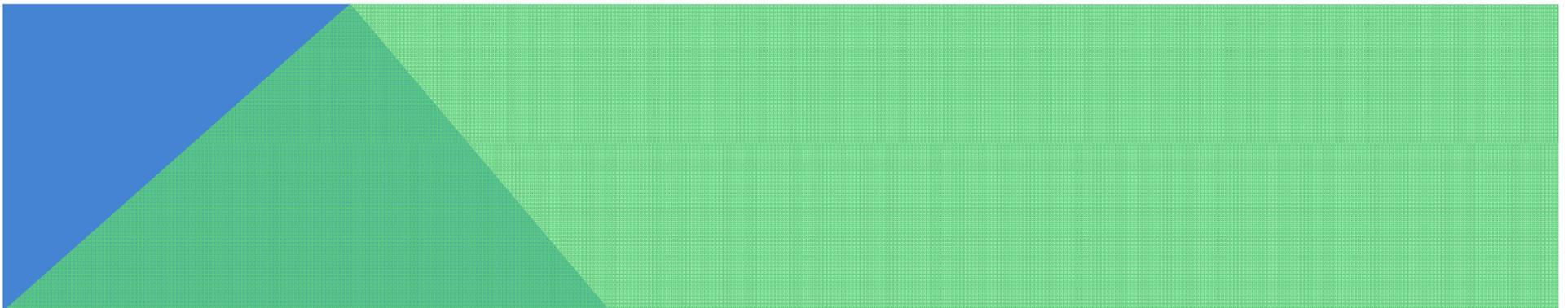
Dishonesty, misrepresentation, MR 8.4(c)

Attorney liability for acts of non-lawyer agents,
MR 8.4(a)

Truthfulness in Statements to Others, MR 4.1

Communications with represented persons, MR
4.2

Or Communications with unrepresented persons
on the matter, MR 4.3

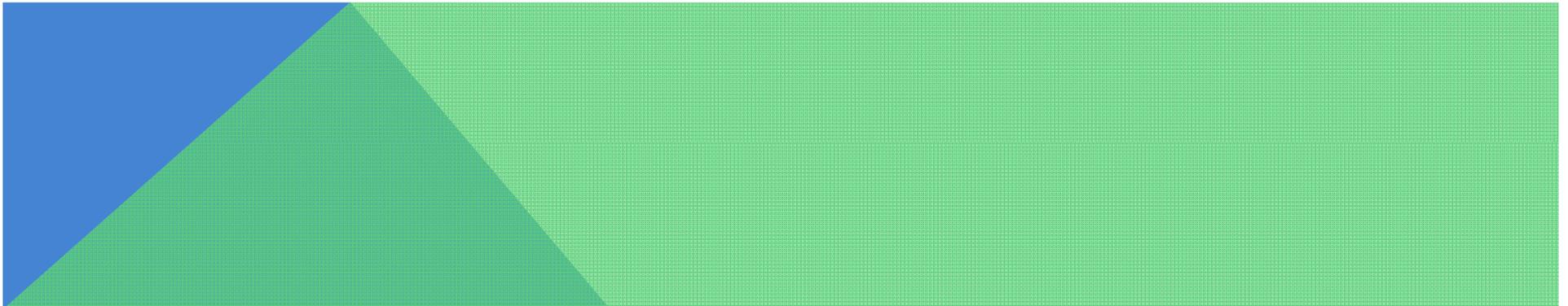


MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) **engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**

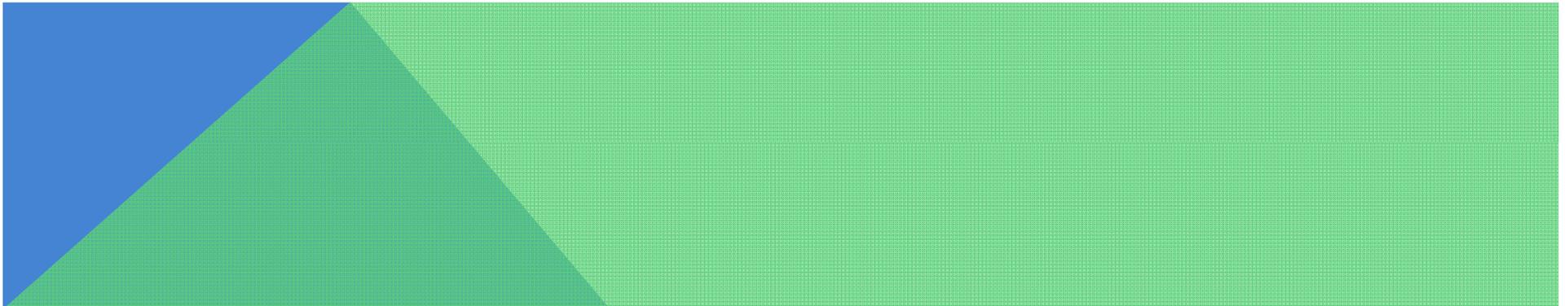


TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

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

- (a) make a false statement of material fact or law to a third person;

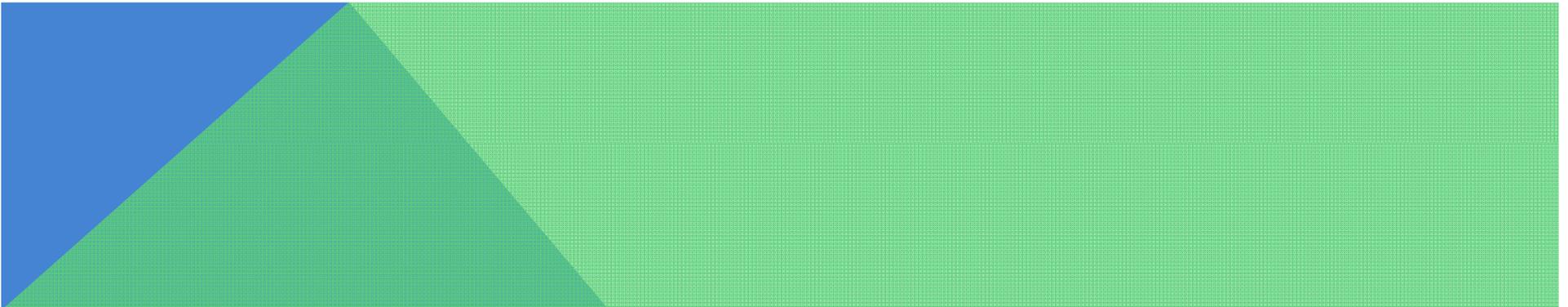


MR 4.1, COMMENT 1

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.



STATE BAR ADVISORY LEGAL ETHICS OPINIONS

CONFLICT

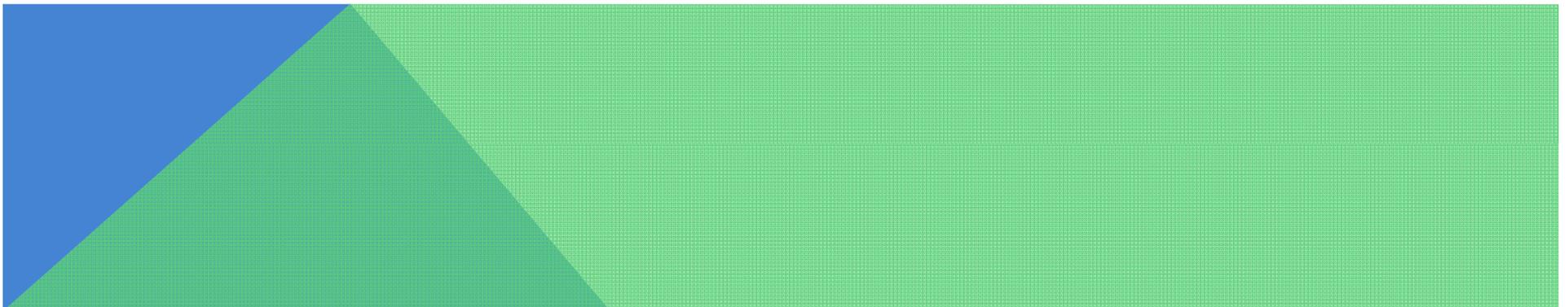
There is a difference of opinion about whether a “friend” request from a lawyer or lawyer’s agent that uses real names but does not disclose its litigation-related purpose is ethical

Compare Phila. Bar Assoc. Op. 2009-02 (in materials) and
New Hampshire Bar Assoc. Op 2012-13/05
San Diego Bar Assoc. Op. 2011-2
Pennsylvania Bar Op. 2014-300

All concluding that such a request is unethical, *with*
City of New York Committee Op. 2010-02

Concluding that such a request is ethical

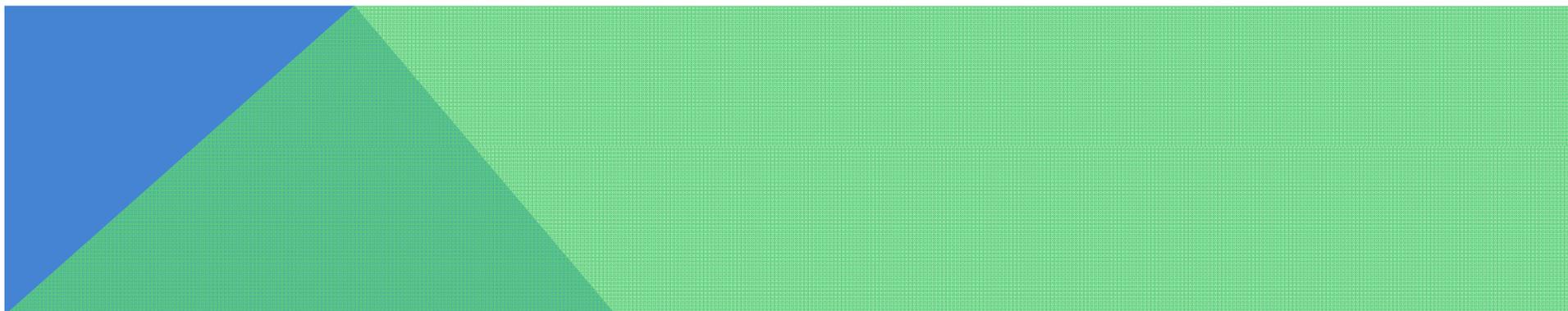
Bottom line: Weight of opinion is *against* the practice of friending without stating purpose



TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

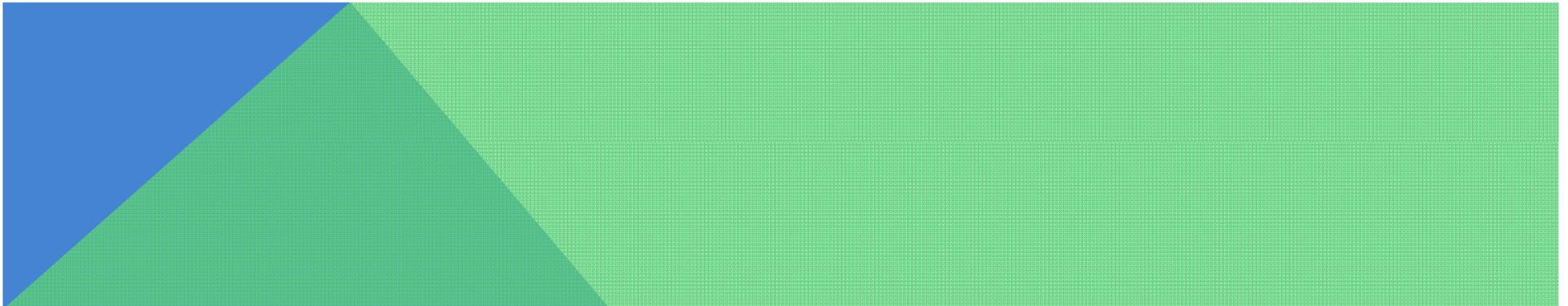
In representing a client, **a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter**, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.



TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

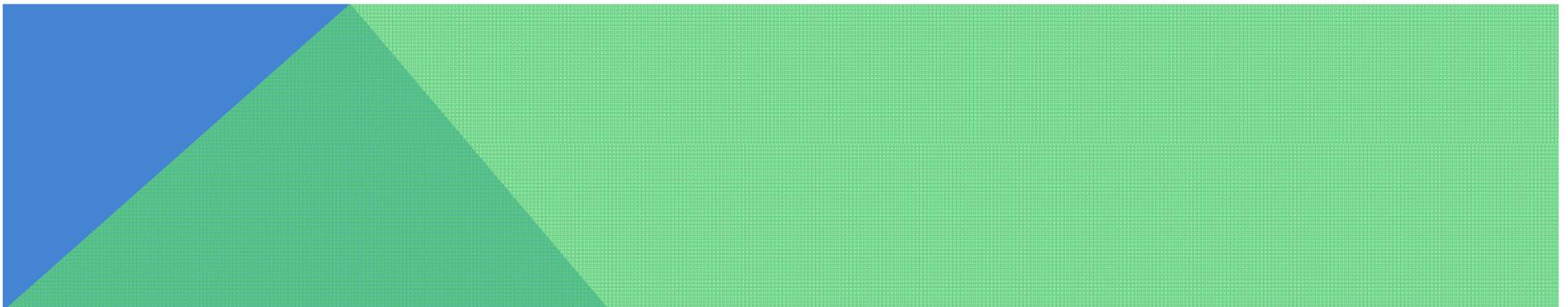
RULE 4.3 DEALING WITH UNREPRESENTED PERSON

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



HYPOTHETICAL THREE

This time your paralegal finds the individual's Facebook page and it does not have privacy settings on. Does this alter your analysis of the ethics issues involved?



RESOURCES

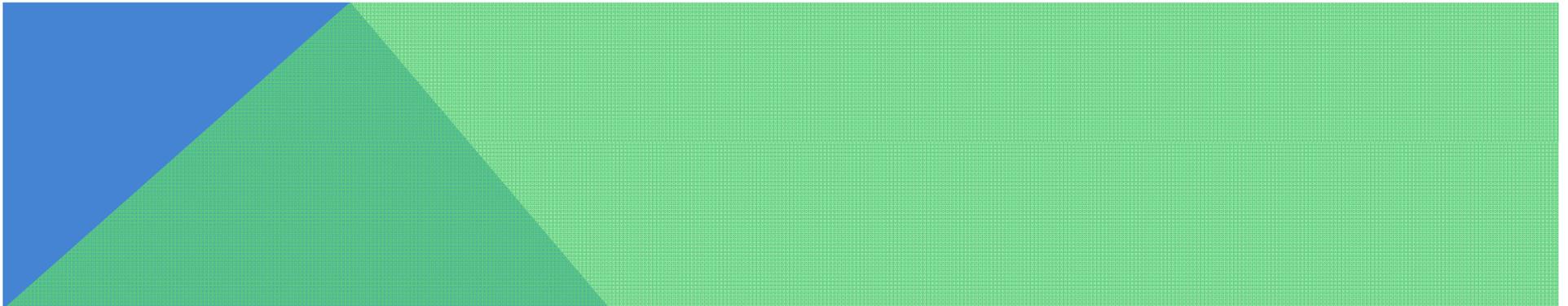
New York State Bar Association Op. 843 (in materials)

Yes, a lawyer *may* access public pages for discovery purposes

Opinions in Perlman article fns. 12 & 13

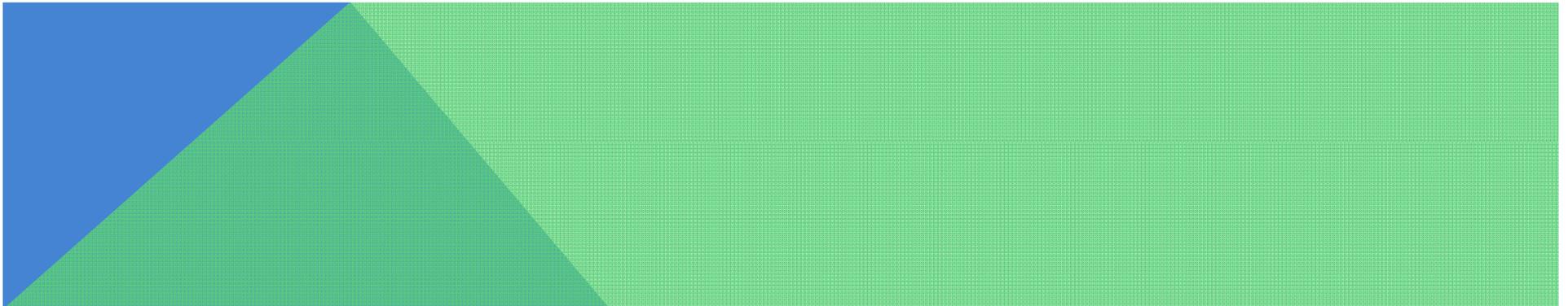
These suggest that lawyers *must* use reasonable efforts to find relevant information on the Internet as part of their evolving duty of competence

Competence re Internet -based investigation is far from settled law at this time but law is heading in this direction, see MR 1.1 comment [8]



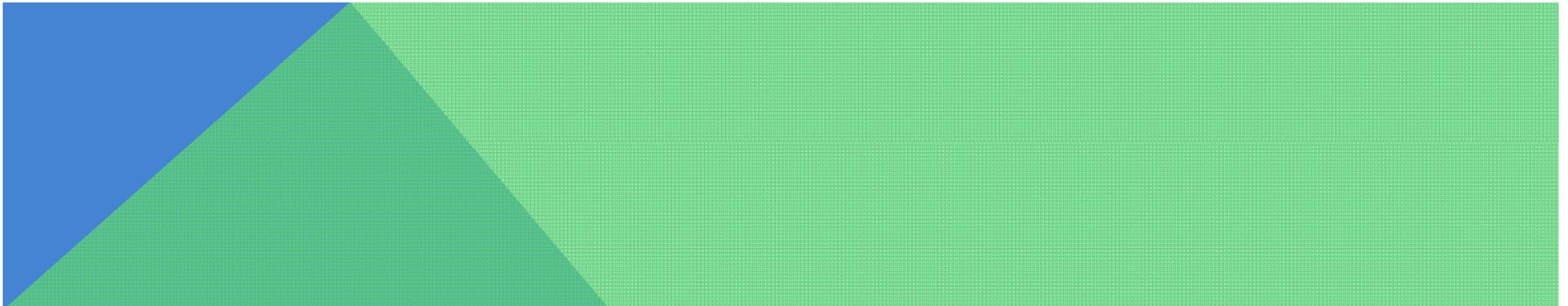
BEST PRACTICES

- Line between zealous advocacy and unethical practice can vary with the circumstances
- Trainings and policies must articulate this line without shutting down legitimate investigation techniques
- What can be viewed by any member of the public is probably fair game
- Key is to avoid “conduct involving dishonesty, fraud, deceit or misrepresentation” (MR 8.4 (c)



HYPOTHETICAL FOUR

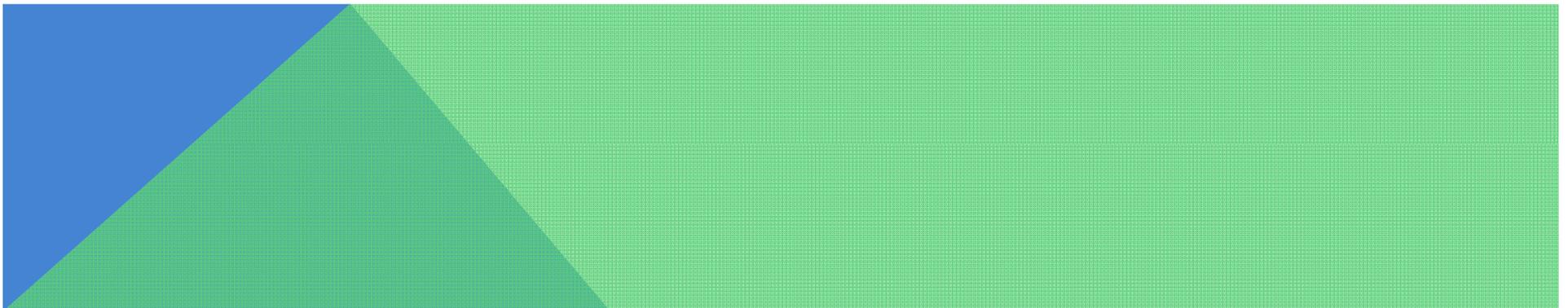
A client, worried about information contained on her Facebook page in light of a pending legal proceeding, asks you if she can and/or should deactivate her Facebook page



ISSUES

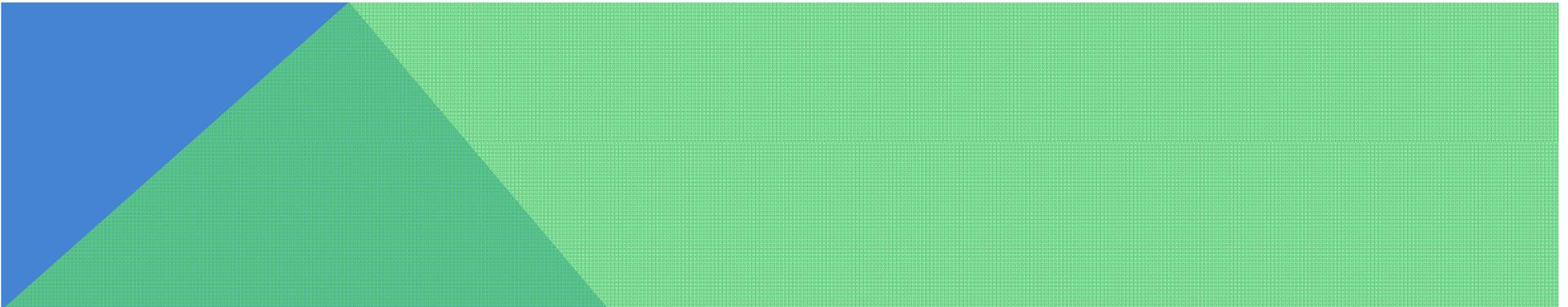
Spoliation of evidence

Obstructing access to evidence, MR 3.4



AS APPLIED TO FACEBOOK AND OTHER SOCIAL MEDIA ACCOUNTS

- Facebook policies about what happens when an account is deleted (versus turned off) are evolving, but it can be very hard to impossible to retrieve an account that has been deleted
- Deleting an account is different from resetting its privacy settings or putting it in dormancy
- Spoliation of evidence can lead sanctions including adverse inference instructions to a jury



ADVOCATE

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

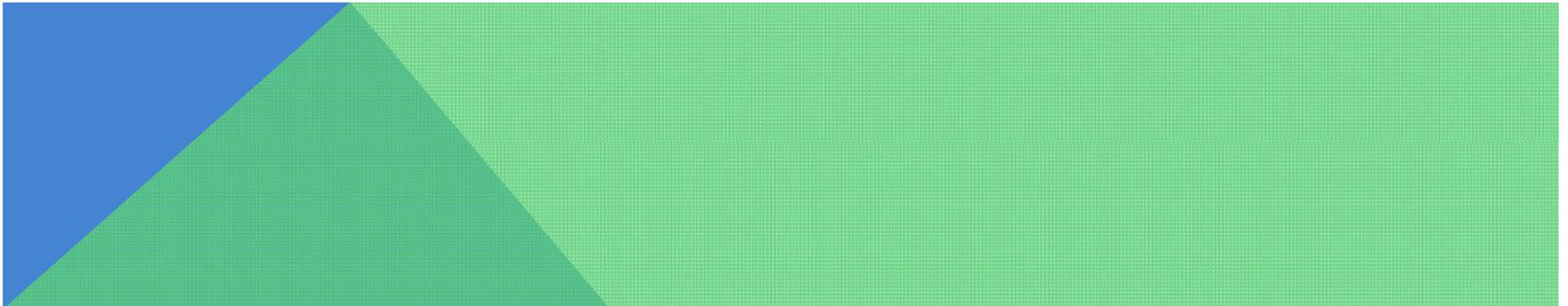
- (a) unlawfully obstruct another party's access to evidence or **unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;**



STATE BAR ADVISORY OPINIONS

Phila. Bar Assoc. Op. 2014-5:

- A lawyer may advise client to change privacy setting but not to delete a social media account
 - private materials are still accessible for discovery through request for production or subpoena
- If a lawyer is aware of materials on the Internet that are responsive to a discovery request (that is not overbroad) but have not been produced by the client, the lawyer must obtain the materials and produce them
- Opinion's General Conclusion: Materials in an electronic format are identical to hard copy materials with respect to lawyer's ethical duties in handling them

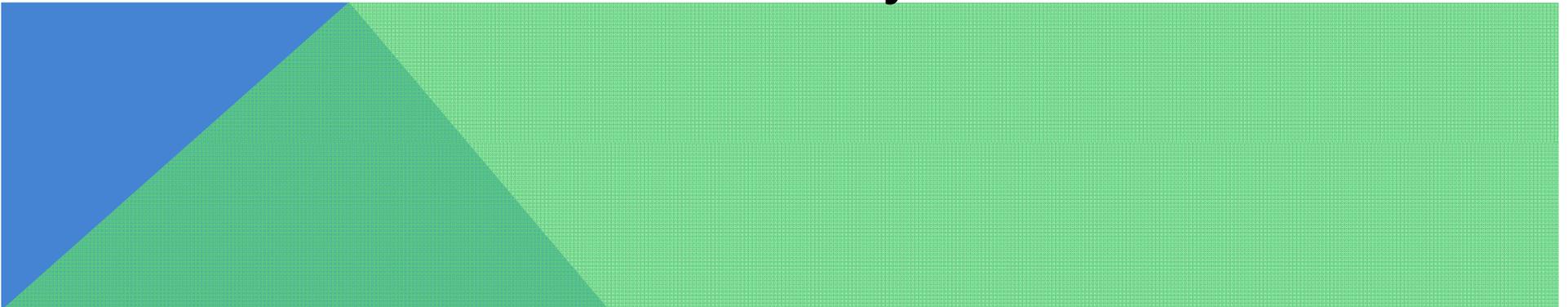


BEST PRACTICES

Best practice is to **avoid creating potentially embarrassing electronic records in the first place!**

Unlike a verbal communication between two people, these records can potentially last forever

They seem harmless and almost unreal, often created tongue-in-cheek, but our legal system does not see them this way



OTHER EXAMPLES OF ELECTRONIC RECORDS TO AVOID CREATING

Intra-office emails

remember the client owns the records you created about the matter

bankruptcy trustee examples

Sony hack

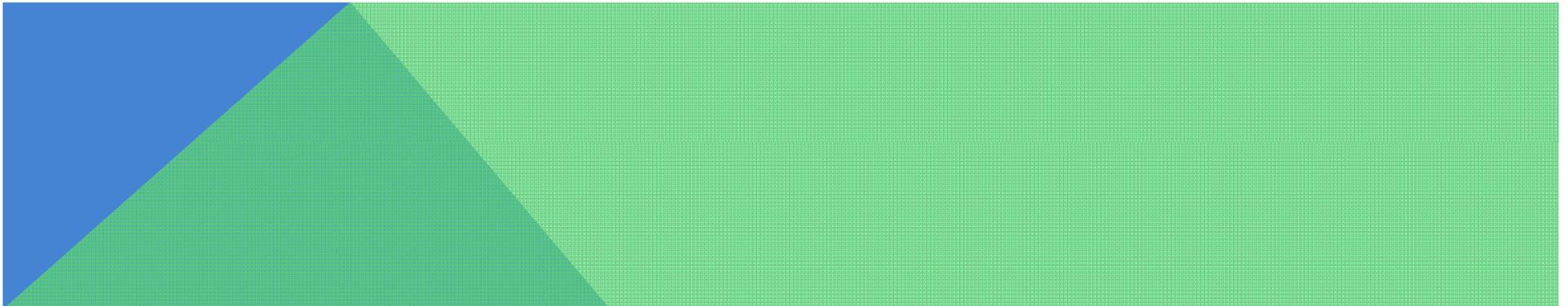
Prospective employers start with Google searches of candidates

Malicious, fraudulent headhunter postings

Stolen identities

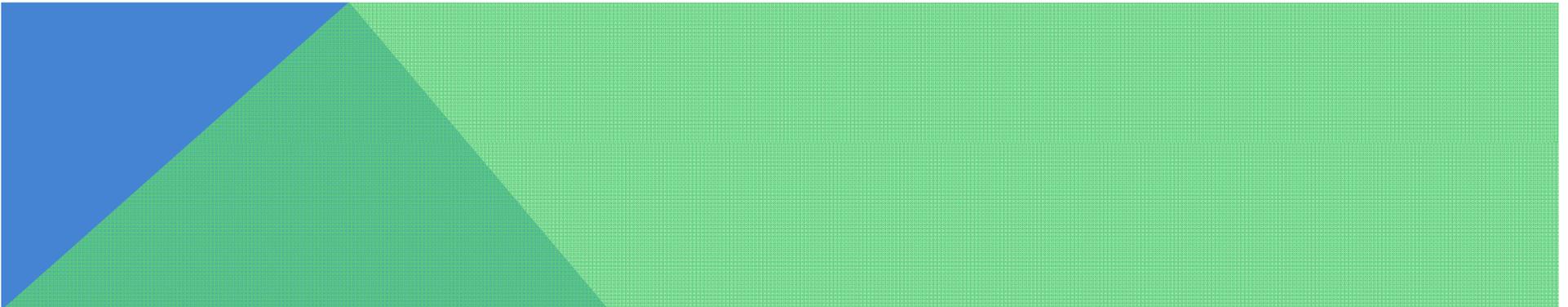
BEST PRACTICES: occasional Google searches to spot any problems

Internet truly is a new Wild West



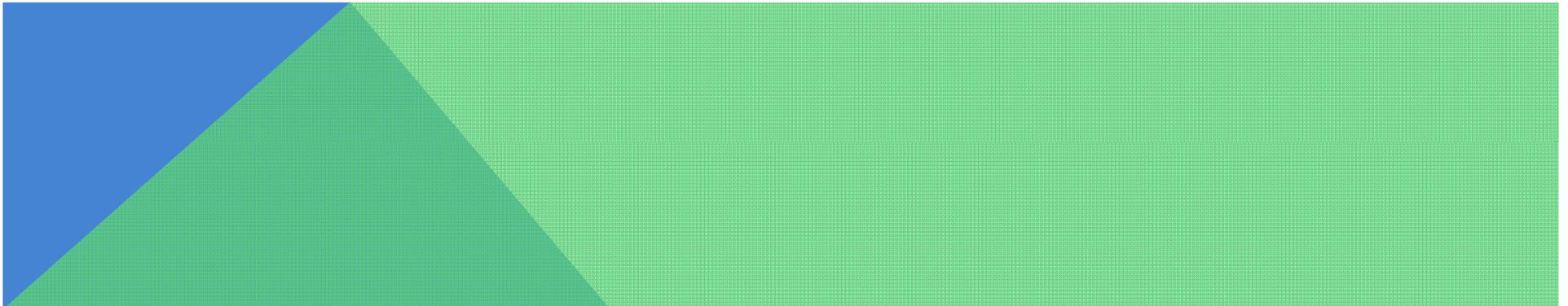
OTHER QUESTIONS

- May a lawyer advise a client to change her privacy settings on her Facebook page in light of anticipated or ongoing litigation?
- What other advice may/should a lawyer give a client about social media communications in relation to litigation?

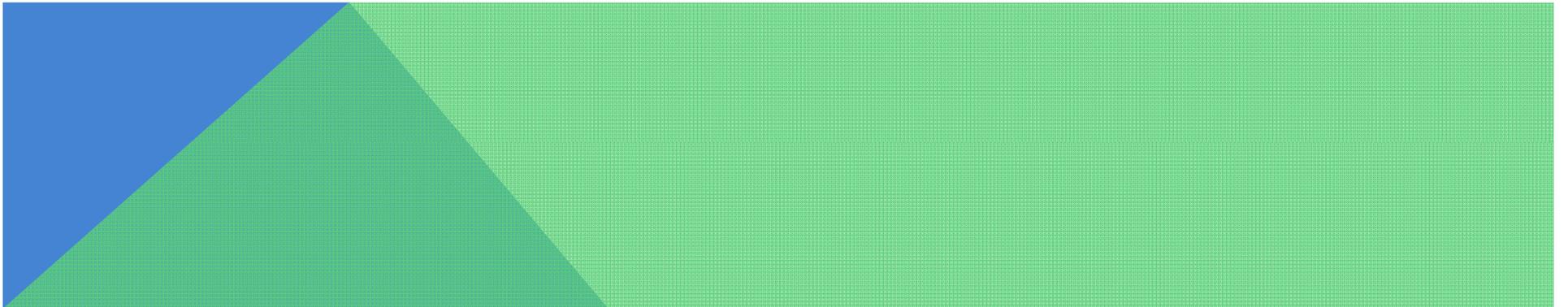


OTHER QUESTIONS

- May a lawyer advise a client to change her privacy settings on her Facebook page in light of anticipated or ongoing litigation?
- **YES – see Phila. Bar Assoc. Op. 2014-5**
- What other advice may/should a lawyer give a client about social media communications in relation to litigation?
 - **Do not discuss legal advice or confidential facts**
 - **Do not discuss involvement in a legal case**
 - **Do not disclose terms of confidential settlements**
 - **Etc.**



LAWYER BLOGGING



KINDS OF BLOGS

PERSONAL BLOGS

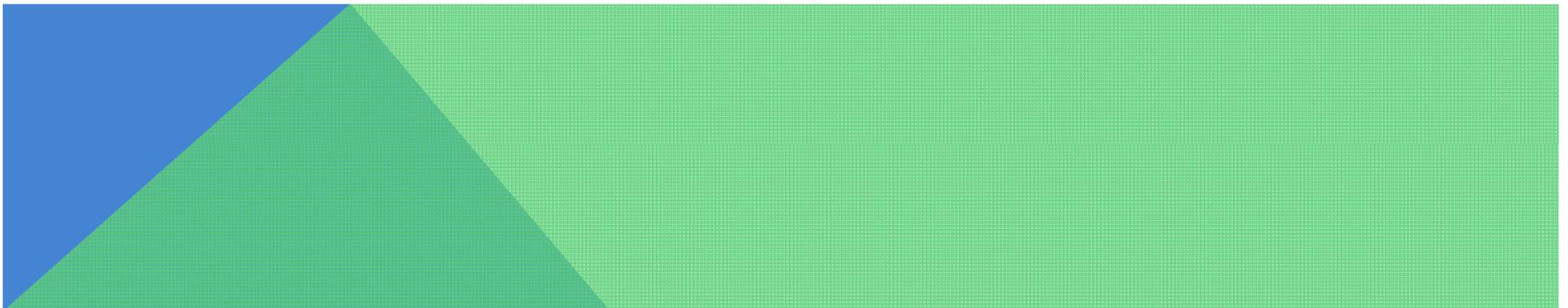
ISSUE BLOGS

LEGAL REPORTING BLOGS

SELF-ADVERTISING BLOGS

MIX OF THESE

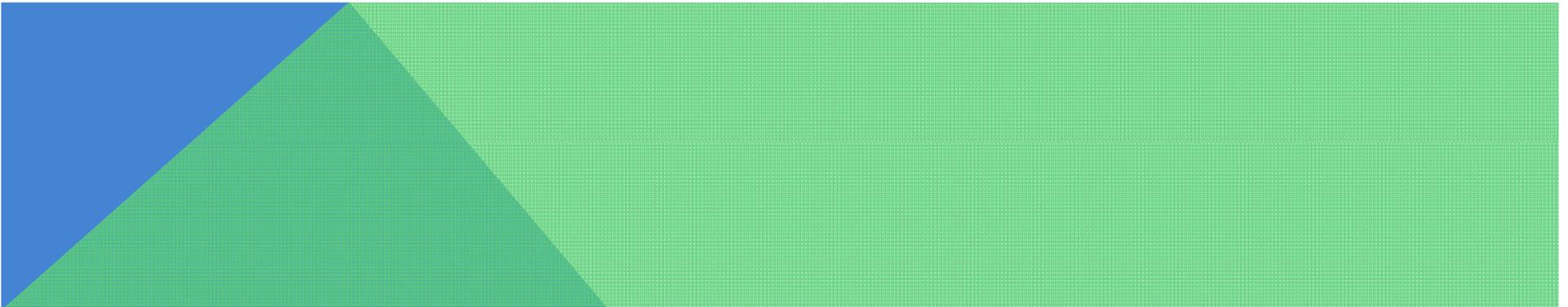
AND OTHERS



ETHICS ISSUES: HYPO FIVE

Lawyer Joe, a staunch advocate of civil liberties issues and also a criminal defense attorney, blogs in his free time on current cases and political developments related to civil liberties matters. He loses an important motion in a pending case that is relevant to his blog themes, and drafts an excoriating critique of the judge's opinion in his pending case, along with attaching the opinion to his blog.

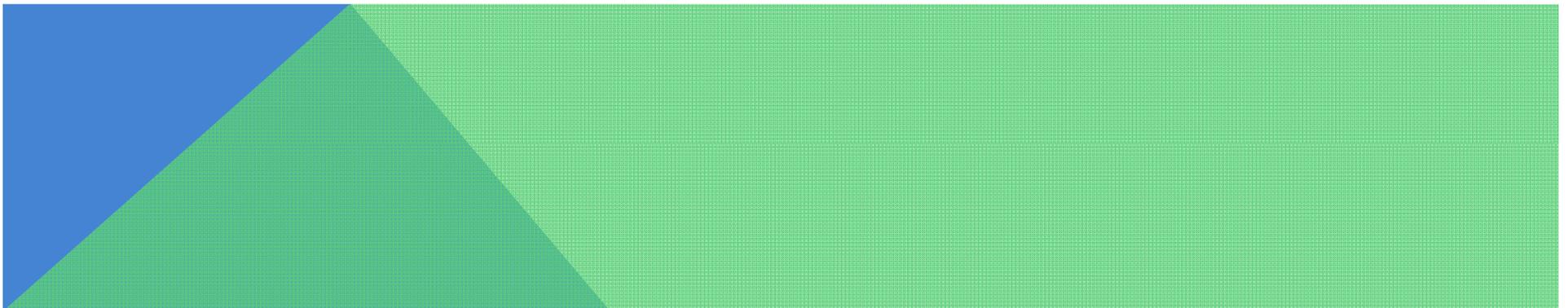
Has Joe committed any legal ethics breaches?



LAWYER BLOGGING: HYPO SIX

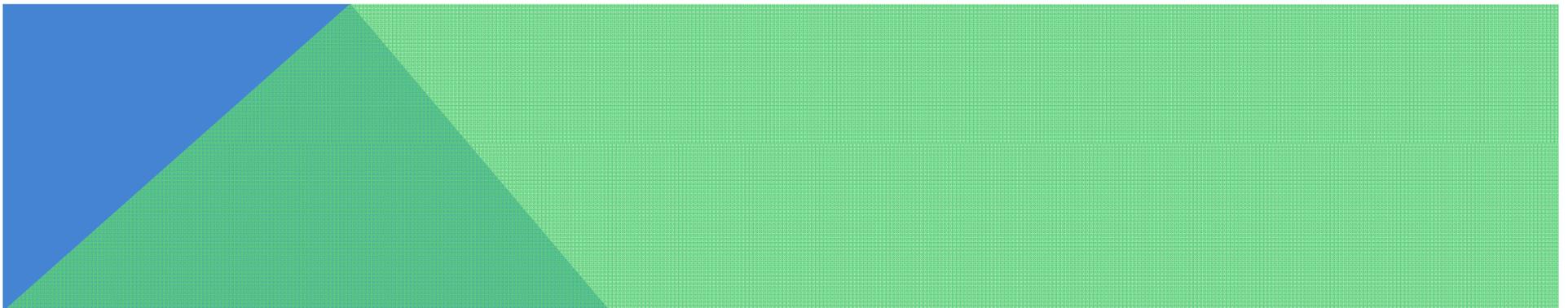
Joe also blogs about a case another lawyer recently lost, presenting a post-mortem of where the law is weak and what strategies might produce better results in future cases.

Has Joe committed any ethics breaches?



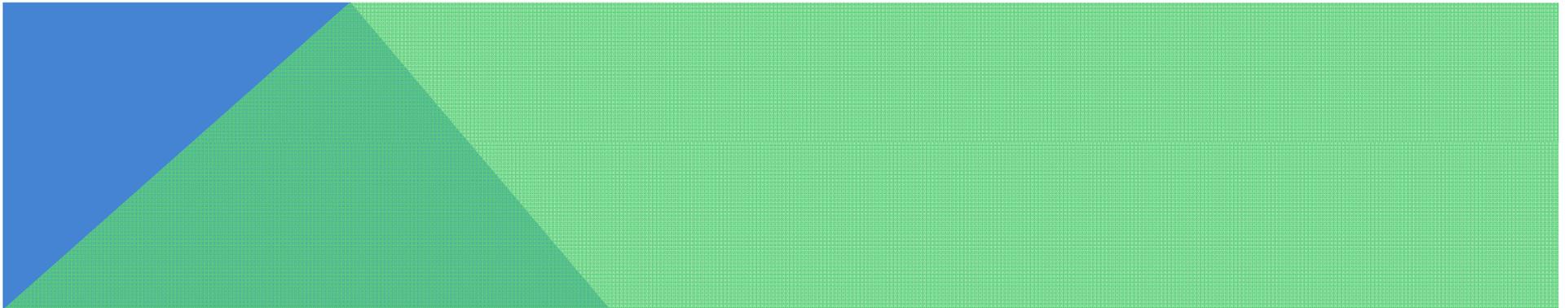
LAWYER BLOGGING: HYPO SEVEN

Joe decides to dedicate a blog to a humorous satire of leading lawyers and judges in his field.



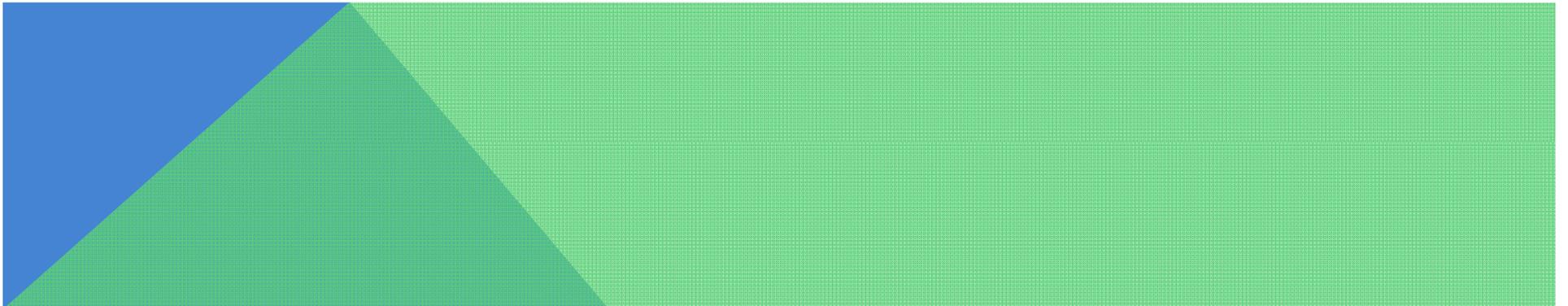
HYP0 EIGHT

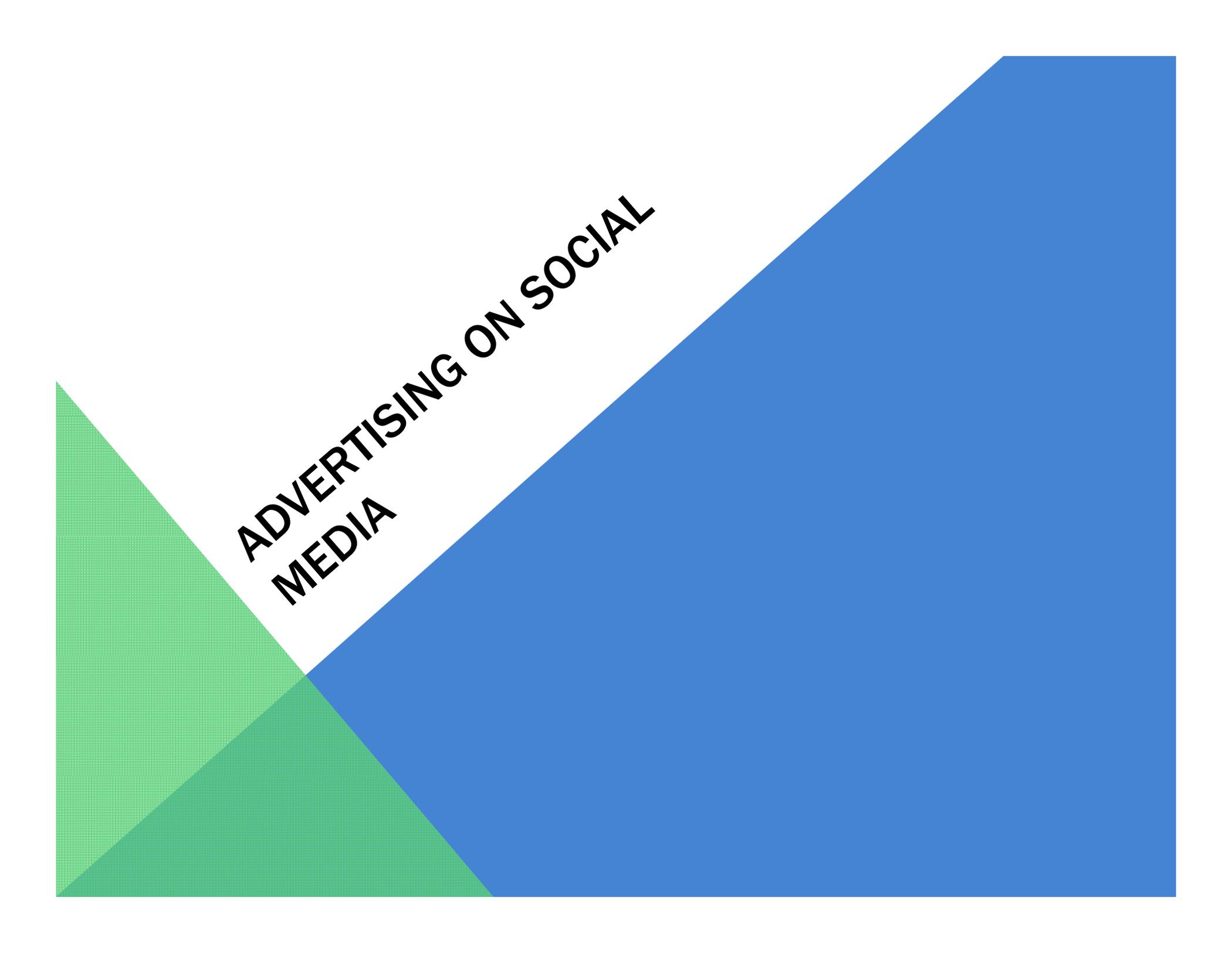
Joe decides to blog about his past cases and what he has learned from mistakes, failings, victories, and successes.



HYPO NINE

Joe includes his contact information in his blog and gains many clients this way.

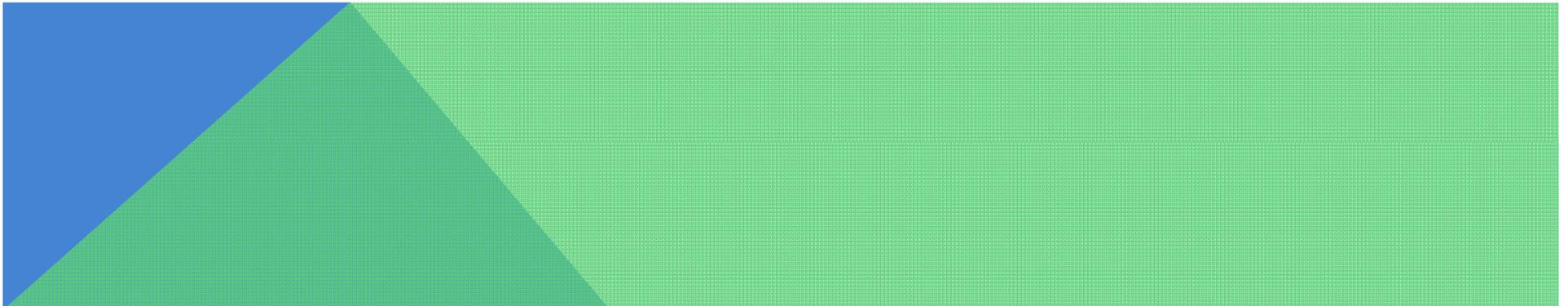




**ADVERTISING ON SOCIAL
MEDIA**

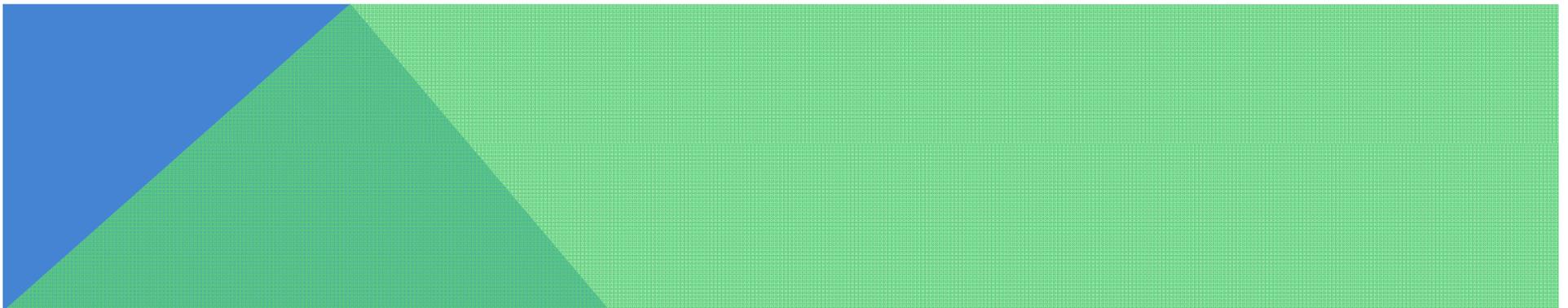
HYPOTHETICAL TEN

Newly moved into
your legal
community, you
consider asking
your professional
contacts to
endorse your
expertise on
LinkedIn



ISSUES

Regulations on Communications about specializations , MR 7.4

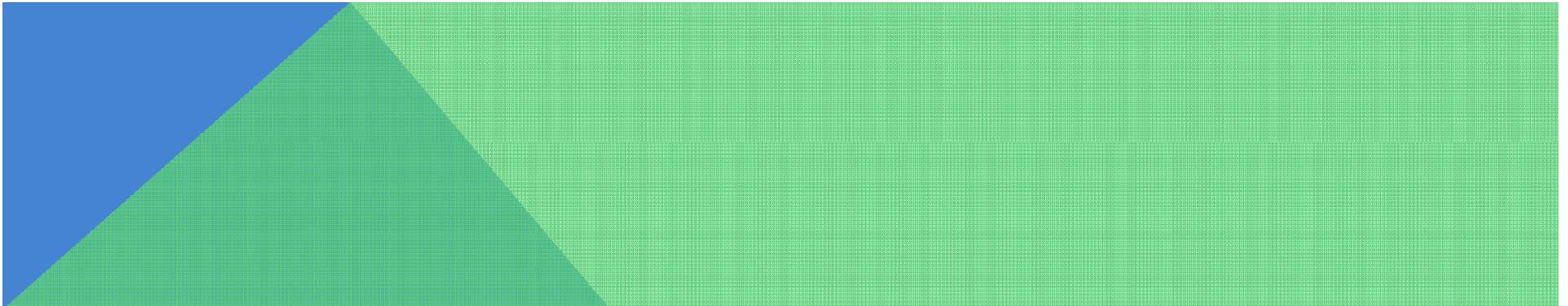


INFORMATION ABOUT LEGAL SERVICES

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. . . .

- (d) **A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:**
 - (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
 - (2) the name of the certifying organization is clearly identified in the communication



HYPOTHETICAL ELEVEN

You have been invited to offer legal services to clients through a “Group On”-type solicitation. What legal ethics issues should you consider?



The screenshot shows a Groupon deal for legal services. The deal is titled "Receive \$500 dollars of Legal Services for \$99 from the law firm of Fuller & Respono, Esq." and is currently "No Longer Available" for \$99. The deal is from the Law Firm of Fuller & Respono, Esq., Miami. The deal value is \$500, with an 81% discount, saving \$401. The deal is limited to 53 bought and is tipped at 1:32AM with 5 bought. The deal expires on August 13, 2011. The fine print states: "Expires Aug 13, 2011. Limit 1 per person, may buy multiple as gifts. By appointment only." The highlights include: "Experienced, talented attorney", "Protect your estate and wealth", and "Plan for the future".

Value	Discount You Save	Saved
\$500	81%	\$401

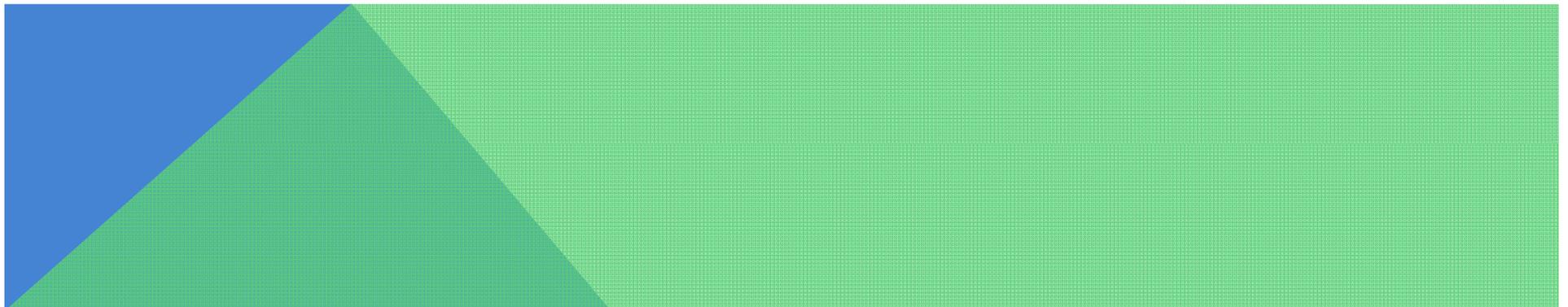
53 bought
Limited quantity available

The deal is on!
Tipped at 1:32AM with 5 bought

The Fine Print
Expires Aug 13, 2011
Limit 1 per person, may buy multiple as gifts. By appointment only.

Highlights

- Experienced, talented attorney
- Protect your estate and wealth
- Plan for the future



ISSUES

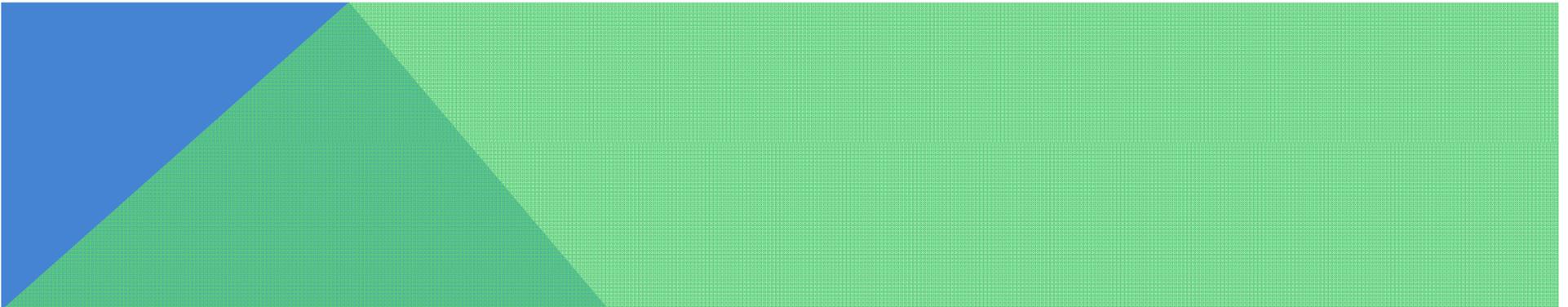
Reasonableness of Fees (MR 1.5)

Explaining the Basis of the Fee and what is included (MR 1.5)

Defining Reasonable Scope of Representation (MR 1.2)

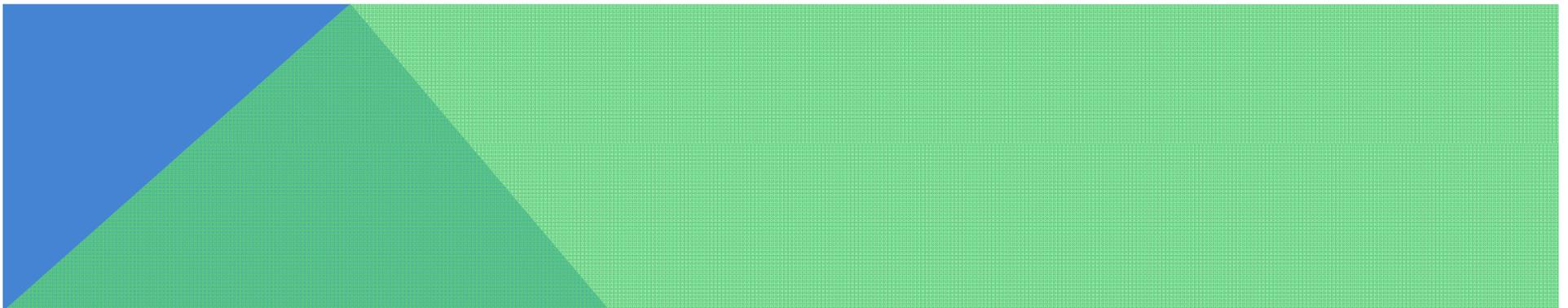
Must be effective for Meeting Client's Goals

All usual duties attach, must check for conflicts etc.



MR 1.5, FEES

- (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client



RULE 1.5 FEES - COMMENT

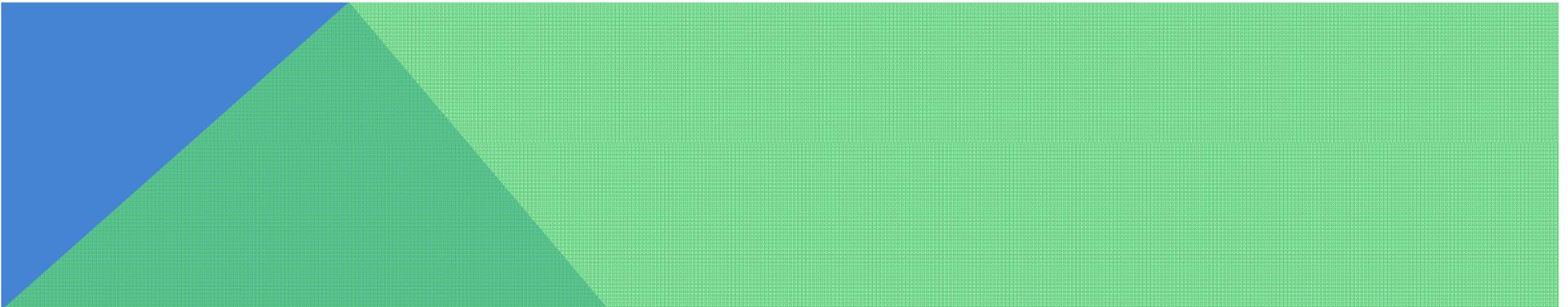
Basis or Rate of Fee

[2] . . . In a new client-lawyer relationship . . . an understanding as to fees and expenses must be promptly established. **Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation.** A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

MR 1.5, COMMENT 5

Terms of Payment

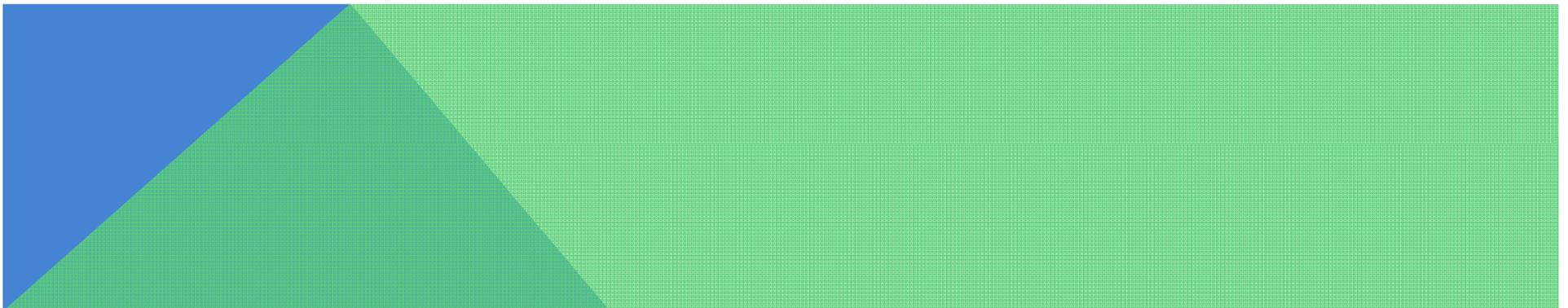
An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.



CLIENT-LAWYER RELATIONSHIP

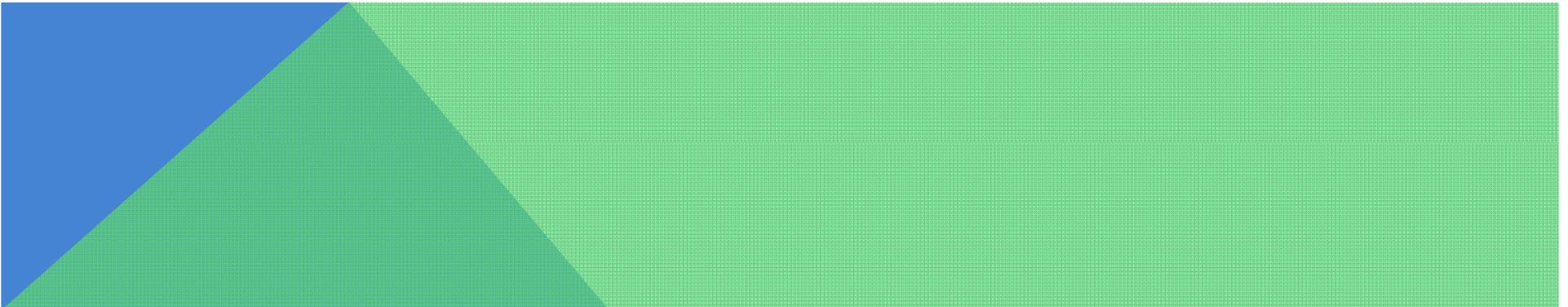
RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.



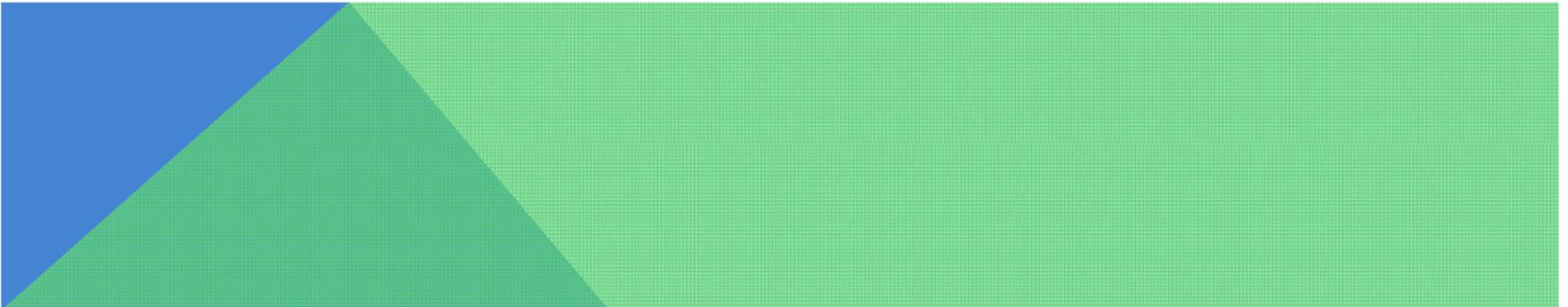
MR 1.2, COMMENT 7

[7] **Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.** If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.



RELATED ISSUES

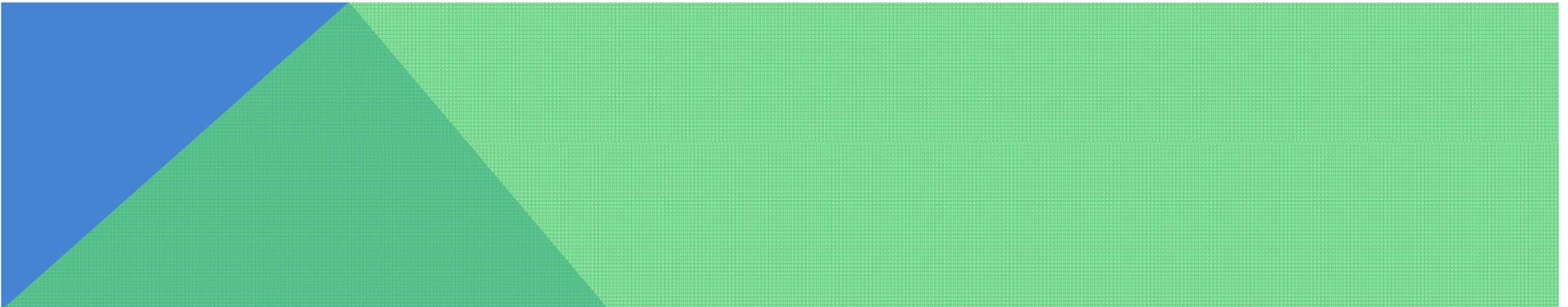
- What about third-party generated web sites that rate and advertise lawyers and encourage clients and others to add comments and assessments?



RELATED ISSUES

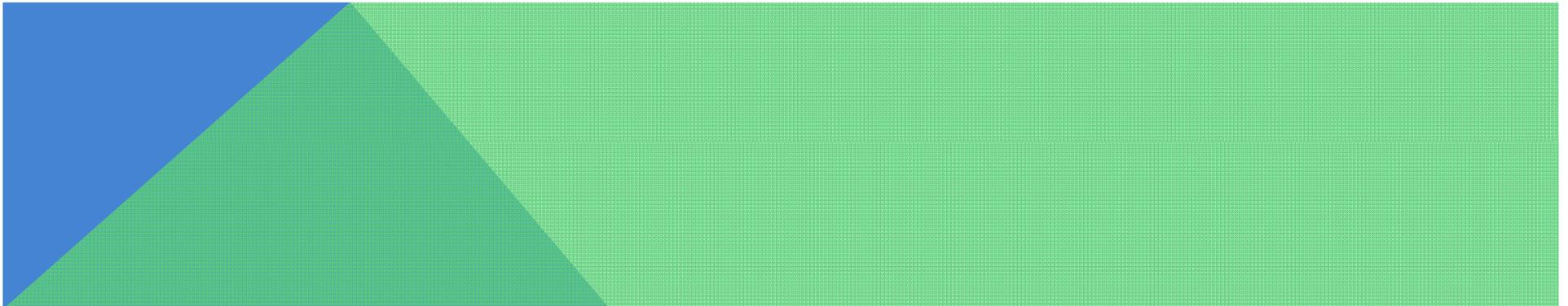
What about third-party generated web sites that rate and advertise lawyers and encourage clients and others to add comments and assessments ?

South Carolina Ethics Op. 09-10 – If you “claim” these sites you must ensure their information is accurate



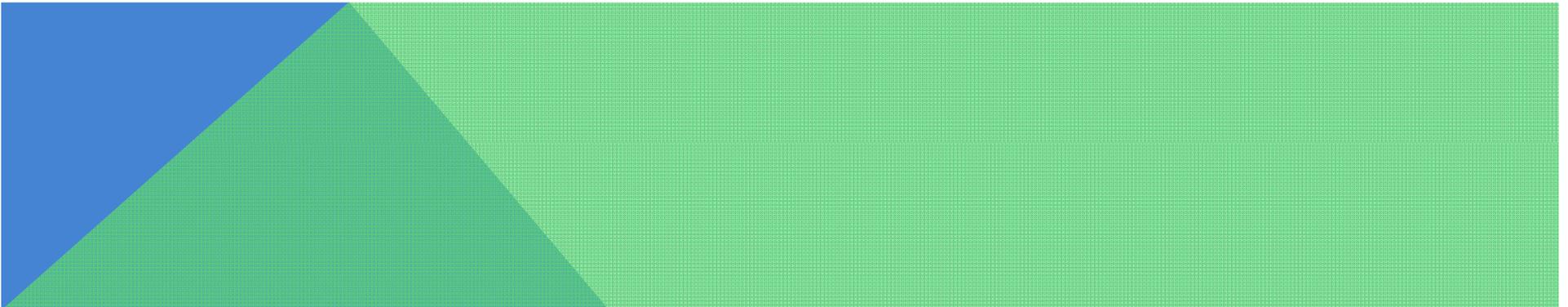
HYPOTHETICAL TWELVE

An attorney is asked to take part in a chat room that advertises itself as providing legal information from experts on a particular subject



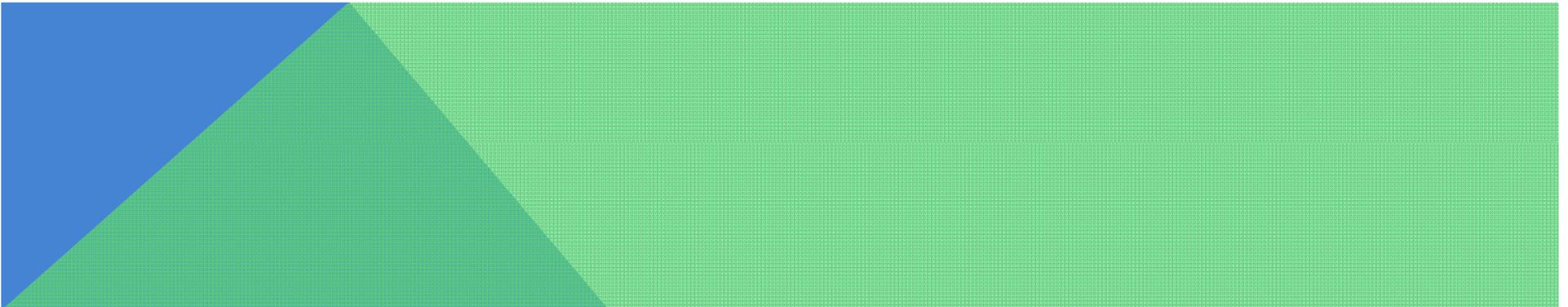
ISSUES

- Disclaim establishment of attorney-client relationship
- Courts adopt the perspective of a reasonable client
- Attorney beware: attorney must be clear that there is no attorney client relationship
- But attorneys may engage in public speaking and general legal education activities
- Good analogy for analyzing lawyer participation in chat rooms might be to a lawyer's public address at the local library



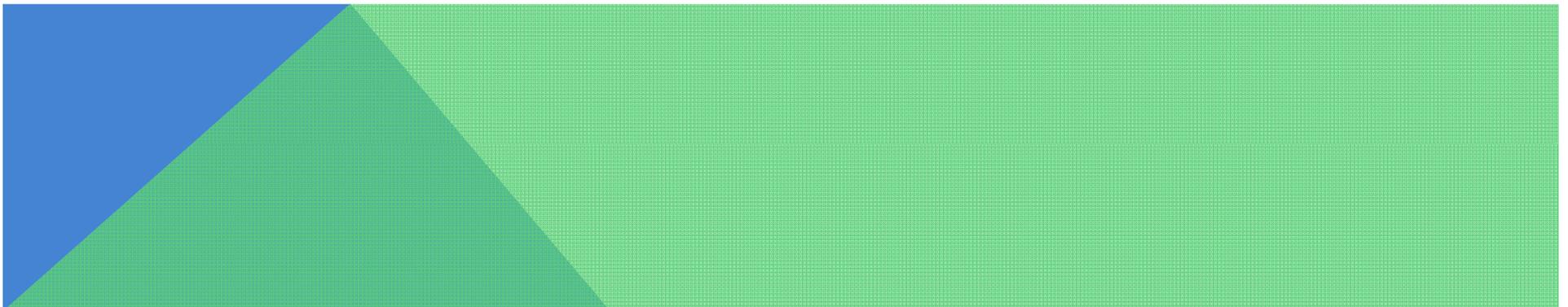
BEST PRACTICES

- Include disclaimers, but be aware that they may not be enough
- Do not give legal advice, *i.e.*,
- Avoid soliciting specific facts from individuals and/or giving answers tailored to specific facts
- If lawyer and information seeker want to explore formation of an attorney-client relationship, lawyer should invite the information seeker to meet separately in a traditional, private consultation
- If attorney **DOES** wish to and/or **DOES** form an attorney-client relationship with an individual through online communications, all the traditional duties attach
 - e.g., conflicts, adequate representation, restrictions on right to withdraw, etc.



HYPOTHETICAL THIRTEEN

A juror in a trial in which you are appearing as counsel sends you an invitation to connect on Facebook/LinkedIn.



HYPOTHETICAL FOURTEEN: THE BASIC CAVEATS

Your friend asks you to take part in a pro bono lawyer chat room on the subject of your legal expertise. The chat room advertises all of its participant lawyers with bios, pictures, and contact information. The lawyers give their time for free but are permitted to invite participants to follow up with them later by scheduling an office appointment.

May you take part in this pro bono activity, and, if so, what precautions, if any, should you take?

